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A DIGEST
OF THE
DECISIONS OF THE COURTS
OF THE
STATE OF PENNSYLVANIA,
BROUGHT DOWN TO NOVEMBER, 1895.

AND INCLUDING
NOT ONLY THE CASES CONTAINED IN THE REGULAR SERIES OF REPORTS, BUT
ALSO THOSE IN THE LEGAL REPORTERS AND PERIODICALS OF THE
DAY, WITH MANY MANUSCRIPT CASES;

TOGETHER WITH
TABLES OF OVERRULED AND REVERSED AND AFFIRMED CASES,
AND A
LIST OF CASES DIGESTED, ARRANGED ALPHABETICALLY WITH THE
NAMES OF BOTH PLAINTIFFS AND DEFENDANTS,
WITH A GENERAL INDEX TO THE WHOLE WORK AND A CHRONOLOGICAL
TABLE OF STATUTES REFERRED TO.

BY
FRANK F. BRIGHTLY, ESQ.,
OF THE PHILADELPHIA BAR;
AUTHOR OF "BRIGHTLY'S PURDON'S DIGEST," "BRIGHTLY'S NEW YORK DIGEST,"
"BRIGHTLY'S PHILADELPHIA DIGEST," ETC., ETC.

VOL. IV. PART I.

A TO K

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TO THE

HON. CRAIG BIDDLE,

JUDGE OF THE COURT OF COMMON PLEAS NO. 1, FOR THE FIRST JUDICIAL
DISTRICT OF PENNSYLVANIA,

WHOSE

HONORABLE AND DISTINGUISHED CAREER UPON THE COMMON PLEAS BENCH

FOR THE PAST TWENTY YEARS

HAS WON FOR HIM THE RESPECT AND ADMIRATION OF

THE BAR AND THE PEOPLE,

This Volume

IS MOST RESPECTFULLY DEDICATED

BY THE AUTHOR.

PREFACE.

THIS volume originally appeared in the year 1891, as a digest of the decisions of the courts of the State of Pennsylvania, during the period covered by volumes 124 to 136 of the Pennsylvania State Reports, including certain other cases, which had previously been reported in outside reports, and had not been digested, and bringing the digest down to March, 1891.

In the preparation of the present edition, the author has incorporated all the matter contained in the earlier edition of this volume, after having revised the same, and has added all the decisions of the courts of the State of Pennsylvania down to Nov. 1st, 1895, including all the cases in the Pennsylvania State Reports down to volume 170, page 240, together with all the cases decided in the lower courts and reported down to that time. This, with the first three volumes of the work, can, therefore, be said to be a complete digest of all the reported decisions of the courts of Pennsylvania down to Nov. 1st, 1895.

This volume has been arranged practically upon the same lines as the previous volumes, with such changes, however, as the author deemed would make it more useful and handy as a ready reference, and yet would not render its use in connection with the use of the other volumes confusing. The cross references have been largely increased; the points decided have, in many instances, been duplicated under the several titles; the main titles have been much more largely subdivided, and many new sub-titles have been added; the general index to the whole four volumes, which has been added to this volume, has been greatly amplified; a chronological list of statutes has been inserted at the end of the work, and, in order to facilitate the reference to statutes in the body of the work, the author has in every instance given the page of the 12th edition of Brightly's Purdon's Digest on which the acts referred to may be found. The author, in the preparation of this volume, in addition to giving the point of each case, has also endeavored to give a short statement of the facts, and to thus make the book more useful to such members of the profession as have not a complete law library ready at hand.

The labor attending the preparation of a work of this magnitude is simply stupendous, and can only be fully appreciated by persons who have had experience in such work; and especially is this so when the work is the product of but one hand, as this is, and as are all the other works of the same author. It has been the aim of the author to avoid error, and, if he has not in all cases done so, he claims the indulgence of the profession, and will always be glad to correct such errors as may be found, when pointed out to him.

F. F. BRIGHTLY.

PHILADELPHIA, NOV. 1, 1895.

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Lanc.	Lancaster Law Review, vols. 6 to 12, page 384.
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P. S.	Pennsylvania State Reports, vols. 124 to 170, page 240.
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Hartranft's Estate, 8 Montg. 81; affirmed in **Hartranft's Estate**, 153 P. S. 530.

Hawley v. Hampton, 9 Montg. 150; affirmed in **Hawley v. Hampton**, 160 P. S. 18.

Haws v. St. Paul Fire & Marine Ins. Co., 22 W. N. C. 552; reaffirmed in **Haws v. St. Paul Fire & Marine Ins. Co.**, 130 P. S. 113.

Hayes v. Coatesville Opera House Co., 8 C. C. 537; affirmed in **Hayes v. Coatesville Opera House Co.**, 139 P. S. 636.

Hays's Estate, 41 P. L. J. 792; affirmed in **Hays's Estate**, 159 P. S. 381.

Hays v. Leonard, 10 C. C. 648; affirmed in **Hays v. Leonard**, 155 P. S. 474.

Heany v. Schwartz, 8 Montg. 113; affirmed in **Heany v. Schwartz**, 155 P. S. 154.

Heffron v. Kittanning Ins. Co., 1 Lack. Jur. 235; affirmed in **Heffron v. Kittanning Ins. Co.**, 132 P. S. 580.

Heidenwag v. Philadelphia, 3 Dist. Rep. 292; affirmed in **Heidenwag v. Philadelphia**, 168 P. S. 72.

Heilman v. Lebanon & Annville Street Ry. Co., 10 C. C. 241; affirmed in **Heilman v. Lebanon & Annville Street Ry. Co.**, 145 P. S. 23.

Heilman v. Leibert, 1 Northam. 9; affirmed in **Leibert's Appeal**, 119 P. S. 617.

Hick's Estate, 8 C. C. 30; affirmed in **Hick's Estate**, 134 P. S. 507.

Hiester v. Yerger, 10 Montg. 166; affirmed in **Hiester v. Yerger**, 166 P. S. 445.

Hinchman v. Phila. & West Chester Turnpike Road, 5 Del. 414; affirmed in *Hinchman v. Phila. & West Chester Turnpike Road*, 160 P. S. 150.

Hirst's Estate, 28 W. N. C. 212; affirmed in *Hirst's Estate*, 147 P. S. 319.

Hodge's Estate, 45 L. I. 282; affirmed in *Luffberry's Appeal*, 125 P. S. 513.

Holland v. Kindregan, 8 Montg. 118; affirmed in *Holland v. Kindregan*, 155 P. S. 156.

Holton v. Newcastle Northern Ry. Co., 8 C. C. 430; affirmed in *Holton v. Newcastle Northern Ry. Co.*, 138 P. S. 111.

Hoopes's Estate, 12 C. C. 331; affirmed in *Hoopes's Estate*, 152 P. S. 105.

Howard Street, 24 W. N. C. 491; affirmed in *Howard Street*, 142 P. S. 601.

Howell's Estate, 10 C. C. 232; affirmed in *Howell's Estate*, 147 P. S. 164.

Hughes v. Jones, 4 Montg. 215; affirmed in *Jones v. Hughes*, 16 Atl. 849.

Huston v. Clark, 3 Dist. Rep. 2; affirmed in *Huston v. Clark*, 162 P. S. 435.

I.

Ihrle's Estate, 4 Northam. 325; affirmed in *Ihrle's Estate*, 162 P. S. 369.

Ingersoll's Estate, 15 C. C. 19; affirmed in *Ingersoll's Estate*, 167 P. S. 536.

Inquirer Printing Co. v. Wehrly, 9 Lanc. 209; affirmed in *Inquirer Printing Co. v. Wehrly*, 167 P. S. 415.

Irwin's Estate, 6 C. C. 582; affirmed in *Irwin's Estate*, 133 P. S. 1.

Irwin's Estate, 1 Dist. Rep. 265; affirmed in *Irwin's Estate*, 160 P. S. 82.

J.

Jackson v. Fozer, 3 Northam. 333; affirmed in *Jackson v. Fozer*, 154 P. S. 223.

Jacobs's Estate, 9 C. C. 40; affirmed in *Jacobs's Estate*, 140 P. S. 268.

Jacoby's Case, 2 York 25; affirmed in *Jacoby's Appeal*, 1 Walk. 346.

Jinks v. Lodge, 37 P. L. J. 446; affirmed in *Jinks v. Lodge*, 139 P. S. 414.

Johnson's License, 13 C. C. 584; affirmed in *Johnson's License*, 165 P. S. 315.

Johnson v. Philadelphia & Reading R. R. Co., 2 Dist. Rep. 229; affirmed in *Johnson v. Philadelphia & Reading R. R. Co.*, 163 P. S. 127.

Johnson v. Watson, 10 Lanc. 11; affirmed in *Johnson v. Watson*, 157 P. S. 454.

Jordan's Estate, 13 C. C. 506; affirmed in *Jordan's Estate*, 161 P. S. 393.

K.

Kane v. Moore, 9 Montg. 165; affirmed in *Kane v. Moore*, 167 P. S. 275.

Kates's Estate, 9 C. C. 569; affirmed in *Kates's Estate*, 148 P. S. 471.

Keil v. Harris, 1 C. C. 171; affirmed in *Keil v. Harris*, 5 Cent. 865.

Keller v. Hestonville, Mantua & Fairmount Pass. Ry. Co., 1 Dist. Rep. 197; affirmed in *Keller v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 149 P. S. 65.

Kelsey v. Church, 4 C. P. 105; affirmed in *Church's Appeal*, 13 Atl. 756.

Kemble v. Philadelphia, G. & N. R. R. Co., 46 L. I. 444; affirmed in *Kemble v. Philadelphia, G. & N. R. R. Co.*, 140 P. S. 14.

Kendig v. Landis, 7 Lanc. 217; affirmed in *Kendig v. Landis*, 135 P. S. 612.

Kennedy's Estate, 8 C. C. 376; affirmed in *Kennedy's Estate*, 141 P. S. 479.

Kerr's Estate, 13 C. C. 431; affirmed in *Kerr's Estate*, 159 P. S. 512.

Kille v. Reading Iron Works, 47 L. I. 464; affirmed in *Kille v. Reading Iron Works*, 141 P. S. 440.

King's Estate, 47 L. I. 454; affirmed in *King's Estate*, 147 P. S. 410.

King's Estate, 9 Lanc. 99; affirmed in *King's Estate*, 150 P. S. 143.

Kinike's Estate, 11 C. C. 232; affirmed in *Kinike's Estate*, 155 P. S. 101.

Knauss's Estate, 3 C. C. 584; affirmed in *Leibert's Appeal*, 119 P. S. 525.

Knight's Estate, 2 Dist. Rep. 523; affirmed in *Knight's Estate*, 159 P. S. 500.

Knight's Estate, 14 C. C. 457; affirmed in *Knight's Estate*, 167 P. S. 453.

Knox's Estate, 37 P. L. J. 43; affirmed in *Knox's Estate*, 131 P. S. 220.

Koons v. Koons, 6 Kulp 317; affirmed in *Koons v. Koons*, 148 P. S. 585.

Kulp v. Brant, 9 Montg. 161; affirmed in *Kulp v. Brant*, 162 P. S. 222.

Kulp v. McGreevy, 5 Kulp 134; affirmed in *McGreevy v. Kulp*, 126 P. S. 97.

L.

Lafferty's Estate, 2 Dist. Rep. 215; affirmed in *Lafferty's Estate*, 154 P. S. 430.

Lancaster County v. Lancaster City, 10 Lanc. 65; affirmed in *Lancaster County v. Lancaster City*, 160 P. S. 411.

Landmesser's Estate, 6 Lanc. 173; affirmed in *Landmesser's Appeal*, 126 P. S. 115.

Lane v. Nelson, 7 Kulp 286; affirmed in *Lane v. Nelson*, 167 P. S. 602.

Lane v. White, 24 W. N. C. 380; affirmed in *Lane v. White*, 140 P. S. 99.

Lang v. Penna. R. R. Co., 12 C. C. 432; affirmed in *Lang v. Penna. R. R. Co.*, 154 P. S. 342.

La Plume Borough v. Gardner, 2 Lack. Jur. 28; affirmed in *La Plume Borough v. Gardner*, 148 P. S. 192.

Larkin's Estate, 4 Del. 133; affirmed in *Larkin's Estate*, 132 P. S. 554.

Laughlin's Estate, 36 P. L. J. 189; affirmed in *Laughlin's Estate*, 131 P. S. 333.

Law's Estate, 47 L. I. 212; affirmed in *Law's Estate*, 140 P. S. 444.

Lawall v. Lawall, 1 Northam. 350; affirmed in *Lawall v. Lawall*, 150 P. S. 626.

Lazarus's Estate, 6 Kulp 53; affirmed in *Lazarus's Estate*, 142 P. S. 104.

Leake v. Philadelphia, 10 C. C. 263; affirmed in *Leake v. Philadelphia*, 150 P. S. 643.

Lee's Estate, 22 W. N. C. 45; affirmed in *Lee's Appeal*, 124 P. S. 74.

Lennig's Estate, 31 W. N. C. 234; affirmed in *Lennig's Estate*, 154 P. S. 209.

Levis's Estate, 6 Montg. 178; affirmed in *Levis's Estate*, 140 P. S. 179.

Levy's Estate, 11 C. C. 266; affirmed in *Levy's Estate*, 153 P. S. 174.

Levy's Estate, 14 C. C. 129; affirmed in *Levy's Estate*, 161 P. S. 189.

Lewis's Estate, 11 C. C. 561; affirmed in *Lewis's Estate*, 152 P. S. 477.

Line's Estate, 3 Northam. 337; affirmed in *Line's Estate*, 155 P. S. 378.

Lines v. Lines, 2 Northam. 349; affirmed in *Lines v. Lines*, 142 P. S. 149.

Lititz Bank v. Siple, 10 C. C. 391; affirmed in *Lititz Bank v. Siple*, 145 P. S. 49.

Lockhart v. Craig Street Ry. Co., 8 C. C. 470; affirmed in *Lockhart v. Craig Street Ry. Co.*, 139 P. S. 419.

Loeser's Estate, 16 C. C. 49; affirmed in *Loeser's Estate*, 167 P. S. 498.

Loftas v. Farmers' & Mechanics' Nat. Bank, 46 L. I. 46; affirmed in *Loftus v. Farmers' & Mechanics' Nat. Bank*, 133 P. S. 97.

Long v. Girdwood, 28 W. N. C. 299; affirmed in *Long v. Girdwood*, 150 P. S. 413.

Lucas v. Hunter, 11 C. C. 343; affirmed in *Lucas v. Hunter*, 153 P. S. 293.

Luzerne Building Ass'n v. People's Bank, 6 Kulp 92; affirmed in *Luzerne Building Ass'n v. People's Bank*, 142 P. S. 121.

Luzerne Water Co. v. Toby Creek Water Co., 6 Kulp 237; affirmed in *Luzerne Water Co. v. Toby Creek Water Co.*, 148 P. S. 568.

M.

McCandless v. Allegheny Bessemer Steel Co., 39 P. L. J. 299; affirmed in *McCandless v. Allegheny Bessemer Steel Co.*, 152 P. S. 139.

McCloskey v. Powell, 8 C. C. 22; affirmed in *McCloskey v. Powell*, 138 P. S. 383.

McConomy v. Reed, 9 Lanc. 65; affirmed in *McConomy v. Reed*, 152 P. S. 42.

McCracken v. Hamburger, 8 C. C. 167; affirmed in *McCracken v. Hamburger*, 139 P. S. 326.

McCullough's Will, 35 P. L. J. 169; affirmed in *Keating's Appeal*, 36 P. L. J. 283.

McDonald's Estate, 36 P. L. J. 324; affirmed in *McDonald's Estate*, 130 P. S. 480.

McElligott v. McCormick, 6 Lanc. 75; affirmed in *McCormick v. McElligott*, 127 P. S. 230.

McGeary's Estate, 33 P. L. J. 404; affirmed in *McGeary's Appeal*, 5 Cent. 852.

McGeorge v. Harrison Chemical Co., 25 W. N. C. 327; affirmed in *McGeorge v. Harrison Chemical Co.*, 141 P. S. 575.

McHale v. Easton & Bethlehem Transit Co., 4 Northam. 360; affirmed in *McHale v. Easton & Bethlehem Transit Co.*, 169 P. S. 416.

McMaster v. Westchester Normal School, 13 C. C. 481; affirmed in *McMaster v. Westchester Normal School*, 162 P. S. 260.

McMullen v. Stone, 2 York 21; affirmed in *Stone & McMullen*, 10 W. N. C. 541.

McNaughton v. Halderman, 5 Del. 278; affirmed in *McNaughton v. Halderman*, 160 P. S. 144.

McNeilan's Estate, 15 C. C. 46; affirmed in *McNeilan's Estate*, 167 P. S. 473.

M.

Major's Estate, 5 Kulp 163; affirmed in *Major's Appeal*, 126 P. S. 109.

Malone v. Philadelphia, 7 C. C. 613; affirmed in *Malone v. Philadelphia*, 132 P. S. 209.

Maneval v. Jackson Township, 9 C. C. 28; affirmed in *Maneval v. Jackson Township*, 141 P. S. 436.

Mangan's Estate, 4 Kulp 149; affirmed in *Mangan's Appeal*, 11 Atlan. 805.

Markley's Estate, 5 Montg. 93; affirmed in *Markley's Estate*, 132 P. S. 352.

Markley's Estate, 10 C. C. 549; affirmed in *Markley's Estate*, 148 P. S. 538.

Marlor v. Philadelphia, Wilmington & Baltimore R. R. Co., 34 W. N. C. 148; affirmed in *Marlor v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 166 P. S. 524.

Marsden's Estate, 14 C. C. 602; affirmed in *Marsden's Estate*, 166 P. S. 213.

Marshall's Estate, 37 P. L. J. 128; affirmed in *Marshall's Estate*, 138 P. S. 285.

Martin's Estate, 45 L. I. 196; affirmed in *Martin's Estate*, 131 P. S. 638.

Martin's Estate, 2 Dist. Rep. 232; affirmed in *Martin's Estate*, 160 P. S. 32.

Martins v. Stevens, 1 Northam. 191; affirmed in *Stephens v. Martins*, 23 W. N. C. 475.
Maset v. Pittsburgh, 6 C. C. 599; affirmed in *Mazet v. Pittsburgh*, 137 P. S. 548.
Mazurie's Estate, 46 L. I. 128; affirmed in *Mazurie's Estate*, 132 P. S. 157.
Meadville Nat. Gas Co. v. Meadville Fuel Gas Co., 1 C. C. 448; affirmed in *Meadville Fuel Gas Co.'s Appeal*, 4 Atlan. 733.
Medary v. Cathers, 8 Montg. 123; affirmed in *Medary v. Cathers*, 161 P. S. 87.
Mercantile Library Co. v. Philadelphia, 14 C. C. 204; affirmed in *Mercantile Library Co. v. Philadelphia*, 161 P. S. 155.
Mercer Home, 3 Lack. Jur. 367; affirmed in *Mercer Home*, 162 P. S. 232.
Meener's Estate, 1 Northam. 301; affirmed in *Geisinger's Appeal*, 1 Mona. 600.
Miller v. Preston, 30 W. N. C. 240; affirmed in *Miller v. Preston*, 154 P. S. 63.
Miller v. Snyder, 6 Lanc. 92; affirmed in *Miller v. Snyder*, 133 P. S. 23.
Millvale Borough, 14 C. C. 79, 82; affirmed in *Millvale Borough*, 162 P. S. 374.
Mintzer's Estate, 43 L. I. 292; affirmed in *Guarantee Tr. & S. D. Co.'s Appeal*, 9 Atlan. 66.
Moore v. Dunn, 10 C. C. 79; affirmed in *Moore v. Dunn*, 147 P. S. 359.
Morris v. Barnard, 15 W. N. C. 79; affirmed in *Barnard's Appeal*, 3 Atlan. 764.
Morrison's Estate, 37 P. L. J. 295; affirmed in *Morrison's Estate*, 139 P. S. 306.
Moul v. Hunter, 1 York 157; affirmed in *Hunter v. Moul*, 98 P. S. 13.
Mullen v. Doyle, 47 L. I. 48; affirmed in *Mullen v. Doyle*, 147 P. S. 512.
Murphy v. Ellis, 11 C. C. 301; affirmed in *Murphy v. Ellis*, 153 P. S. 133.
Myers v. Esery, 46 L. I. 506; affirmed in *Myers v. Esery*, 134 P. S. 177.

N.

Naphe's Estate, 46 L. I. 57; affirmed in *Naphe's Estate*, 134 P. S. 492.
Neely v. Bair, 5 York 179; affirmed in *Neely v. Bair*, 157 P. S. 417.
Nelson's Estate, 9 C. C. 552; affirmed in *Nelson's Estate*, 147 P. S. 160.
Nesbitt v. Turner, 7 Kulp 41; affirmed in *Nesbitt v. Turner*, 155 P. S. 429.
Nester v. Continental Brewing Co., 12 C. C. 417; affirmed in *Nester v. Continental Brewing Co.*, 161 P. S. 473.
Newcastle Northern Ry. Co. v. Newcastle & Shenango Valley R. R. Co., 12 C. C. 71; affirmed in *Newcastle Northern Ry. Co. v. Newcastle & Shenango Valley R. R. Co.*, 152 P. S. 96.

Newhard v. Penna. R. R. Co., 8 Montg. 101; affirmed in *Newhard v. Penna. R. R. Co.*, 153 P. S. 417.
Nolde v. Madlem, 4 Lanc. 347; affirmed in *Nolde's Appeal*, 15 Atlan. 777.
Norristown v. Norristown Pass. Ry. Co., 9 C. C. 98; affirmed in *Norristown v. Norristown Pass. Ry. Co.*, 148 P. S. 87.
Norristown Title, Trust & Safe Dep. Co. v. John Hancock Life Ins. Co., 5 Montg. 83, 6 Ibid. 17; affirmed in *Norristown Title, Trust & Safe Dep. Co. v. John Hancock Life Ins. Co.*, 132 P. S. 385.
Northampton County v. Easton Pass. Ry. Co., 8 C. C. 442; affirmed in *Northampton County v. Easton Pass. Ry. Co.*, 148 P. S. 282.

O.

Oberholtzer v. Hunsberger, 4 Montg. 129; affirmed in *Oberholtzer v. Hunsberger*, 1 Mona. 543.
O'Hara v. United Brethren Mut. Aid Soc., 5 Kulp 454; affirmed in *O'Hara v. United Brethren Mut. Aid Soc.*, 134 P. S. 417.
Old's Estate, 8 Lanc. 329; affirmed in *Old's Estate*, 150 P. S. 529.
Oliver's Estate, 24 W. N. C. 139; affirmed in *Oliver's Estate*, 136 P. S. 43.
Ott v. Sweatman, 15 C. C. 97; affirmed in *Ott v. Sweatman*, 166 P. S. 217.
Overseers of Cascade v. Overseers of Lewis, 11 C. C. 282; affirmed in *Overseers of Cascade v. Overseers of Lewis*, 148 P. S. 333.
Owen's Case, 8 C. C. 458; affirmed in *Owen's Case*, 140 P. S. 565.

P.

Palo Alto Road, 13 C. C. 537; affirmed in *Palo Alto Road*, 160 P. S. 104.
Patrick's Estate, 40 P. L. J. 261; affirmed in *Patrick's Estate*, 162 P. S. 175.
Patton v. Philadelphia Traction Co., 25 W. N. C. 542; affirmed in *Patton v. Philadelphia Traction Co.*, 132 P. S. 76.
Paul v. Long, 1 Northam. 195; affirmed in *Long v. Paul*, 127 P. S. 456.
Paxson v. Nields, 48 L. I. 59; affirmed in *Paxson v. Nields*, 137 P. S. 385.
Peirce v. Hubbard, 10 C. C. 63; affirmed in *Peirce v. Hubbard*, 152 P. S. 18.
Pennsburg Borough, 3 Montg. 187; affirmed in *Pennsburg Borough*, 11 Cent. 842.
Penna. Co. for Ins. on L. & G. A. v. Phila., G't'n & Norristown R. R. Co., 11 C. C. 482; affirmed in *Penna. Co. for Ins. on L. &*

G. A. v. Phila., G't'n, & Norristown R. R. Co., 153 P. S. 160.

Pennsylvania R. R. Co. v. Duncan, 111 P. S. 352; affirmed in *Pennsylvania R. R. Co. v. Duncan*, 129 P. S. 181.

Pennsylvania R. R. Co. v. Philadelphia Belt Line R. R. Co., 10 C. C. 625; affirmed in *Pennsylvania R. R. Co. v. Philadelphia Belt Line R. R. Co.*, 149 P. S. 218.

People's Mut. Fire Ins. Co. v. Groff, 11 C. C. 585; affirmed in *People's Mut. Fire Ins. Co. v. Groff*, 154 P. S. 200.

Pepper's Estate, 11 C. C. 257; affirmed in *Pepper's Estate*, 154 P. S. 331.

Pepper's Estate, 2 Dist. Rep. 611; affirmed in *Pepper's Estate*, 159 P. S. 508.

Perth Amboy Terra-cotta Co. v. Ardmore Woodworking Co., 3 Montg. 115; affirmed in *Perth Amboy Terra-cotta Co.'s Appeal*, 124 P. S. 367.

Perry v. Pennsylvania Schuylkill Valley R. R. Co., 3 Montg. 43; affirmed in *Perry's Appeal*, 13 Atl. 66.

Perry County v. Troutman, 8 C. C. 427; affirmed in *Perry County v. Troutman*, 144 P. S. 361.

Philadelphia v. Ball, 48 L. I. 34; affirmed in *Philadelphia v. Ball*, 147 P. S. 243.

Philadelphia v. Citizens' Pass. Ry. Co., 10 C. C. 16; affirmed in *Philadelphia v. Citizens' Pass. Ry. Co.*, 151 P. S. 128.

Philadelphia v. Hiester, 48 L. I. 4; affirmed in *Philadelphia v. Hiester*, 142 P. S. 39.

Philadelphia v. Ladies' United Aid Society, 1 Dist. Rep. 249; affirmed in *Philadelphia v. Ladies' United Aid Society*, 154 P. S. 12.

Philadelphia v. Martin, 45 L. I. 64; affirmed in *Philadelphia v. Martin*, 125 P. S. 583.

Philadelphia v. Odd Fellows' Ass'n, 15 C. C. 609; affirmed in *Philadelphia v. Odd Fellows' Hall Ass'n*, 168 P. S. 105.

Philadelphia v. Pennsylvania Hospital, 8 C. C. 72; affirmed in *Philadelphia v. Pennsylvania Hospital*, 134 P. S. 171.

Philadelphia v. Spring Garden Farmers' Market Co., 30 W. N. C. 21; affirmed in *Philadelphia v. Spring Garden Farmers' Market Co.*, 154 P. S. 93.

Philadelphia v. Thirteenth & Fifteenth Streets Pass. Ry. Co., 15 C. C. 29; affirmed in *Philadelphia v. Thirteenth and Fifteenth Streets Pass. Ry. Co.*, 36 W. N. C. 428.

Philadelphia v. Westminster Cemetery Co., 34 W. N. C. 17; affirmed in *Philadelphia v. Westminster Cemetery Co.*, 162 P. S. 105.

Phillips v. Henry, 10 Montg. 9; affirmed in *Phillips v. Henry*, 160 P. S. 24.

Pierce v. Cleland, 1 Lack. Jur. 185; affirmed in *Pierce v. Cleland*, 133 P. S. 189.

Pierie v. Philadelphia, 47 L. I. 154; affirmed in *Pierie v. Philadelphia*, 139 P. S. 573.

Pine Street, 2 York 6; affirmed in *Pine Street*, 2 York 49.

Pitcher v. People's Street Ry. Co., 2 Lack. Jur. 87; affirmed in *Pitcher v. People's Street Ry. Co.*, 154 P. S. 560.

Pittsburgh v. Coyle, 41 P. L. J. 352; affirmed in *Pittsburgh v. Coyle*, 165 P. S. 61.

Pittsburgh v. Logan, 14 C. C. 458; affirmed in *Pittsburgh v. Logan*, 165 P. S. 516.

Pittsburgh & West End Pass. Ry. Co. v. Point Bridge Co., 39 P. L. J. 367; affirmed in *Pittsburgh & West End Pass. Ry. Co., v. Point Bridge Co.*, 165 P. S. 37.

Platt v. Johnson, 15 C. C. 587; affirmed in *Platt v. Johnson*, 168 P. S. 47.

Potter's Field, In re, 8 York 145; affirmed in *York School District's Appeal*, 169 P. S. 70.

Potts v. Quaker City Elevated R. R. Co., 12 C. C. 593; affirmed in *Potts v. Quaker City Elevated R. R. Co.*, 161 P. S. 396.

Pottstown Borough Extension, 1 Montg. 189; affirmed in *Pottstown Borough Extension*, 117 P. S. 538.

Powell v. Blair, 7 C. C. 492; affirmed in *Powell v. Blair*, 133 P. S. 550.

Provident Life and Trust Co. v. Fiss, 48 L. I. 44; affirming *Provident Life & Trust Co. v. Fiss*, 147 P. S. 232.

Purvis v. Ross, 12 C. C. 193; affirmed in *Purvis v. Ross*, 158 P. S. 20.

Putnam Nail Co. v. Dulaney, 8 C. C. 595; affirmed in *Putnam Nail Co. v. Dulaney*, 140 P. S. 205.

R.

Raeder's Lunacy, 7 Kulp 275; affirmed in *Raeder's Lunacy*, 167 P. S. 597.

Rahn Township v. Tamaqua & Lansford St. Ry. Co., 4 Dist. Rep. 29; affirmed in *Rahn Township v. Tamaqua & Lansford St. Ry. Co.*, 167 P. S. 84.

Randall v. Frankford, S. & P. Pass. Ry. Co., 47 L. I. 154; affirmed in *Randall v. Frankford, S. & P. R. R. Co.*, 139 P. S. 464.

Raub v. Van Horn, 7 C. C. 102; affirmed in *Raub v. Van Horn*, 133 P. S. 573.

Read v. St. Ambrose Church, 6 C. C. 76; affirmed in *Read v. St. Ambrose Church*, 137 P. S. 320.

Reap v. Battle, 6 Kulp 423; affirmed in *Reap v. Battle*, 155 P. S. 265.

Reece v. Haymaker, 42 P. L. J. 74; affirmed in *Reece v. Haymaker*, 204 P. S. 575.

Rehfuß v. Moore, 47 L. I. 36; affirmed in *Rehfuß v. Moore*, 134 P. S. 462.

Reiff's Estate, 22 W. N. C. 62; affirmed in Reiff's Appeal, 124 P. S. 145.
Reinhart v. South Easton, 1 Northam. 226; affirmed in Reinhart v. South Easton, 4 Atlan. 532.
Rhodes's Estate, 43 L. I. 58; affirmed in Thompson's Appeal, 13 Atlan. 952.
Rhodes's Estate, 26 W. N. C. 233; affirmed in Rhodes's Estate, 147 P. S. 227.
Richardson's Estate, 6 C. C. 653; affirmed in Richardson's Estate, 132 P. S. 292.
Rickert v. Stephens, 2 Northam. 117; affirmed in Rickert v. Stephens, 133 P. S. 537.
Road in Bethlehem, 2 L. I. 265; affirmed in Schweitzer's Appeal, 7 Cent. 631.
Roberts v. Sharp, 33 W. N. C. 524; affirmed in Roberts v. Sharp, 161 P. S. 185.
Rogers's Estate, 3 Northam. 217; affirmed in Rogers's Estate, 154 P. S. 217.
Rothschild v. Pittsburgh & State Line R. R. Co., 1 C. C. 620; affirmed in Pittsburgh & State Line R. R. Co.'s Appeal, 4 Cent. 107.
Rowan's Estate, 6 C. C. 461; affirmed in Rowan's Estate, 132 P. S. 299.

S.

Saake v. Dorner, 3 Dist. Rep. 170; affirmed in Saake v. Dorner, 167 P. S. 301.
Saeger v. Runk, 3 Northam. 13; affirmed in Saeger v. Runk, 148 P. S. 77.
Schofield's Estate, 15 C. C. 70; affirmed in Schofield's Estate, 167 P. S. 479.
Scranton v. Thomas, 2 Lack. Jur. 1; affirmed in Scranton v. Thomas, 141 P. S. 1.
Scranton School Dist. v. Simpson, 1 Lack. Jur. 165; affirmed in Scranton School Dist. v. Simpson, 133 P. S. 202.
Seagrove Building & Loan Ass'n v. Stockton, 9 C. C. 593; affirmed in Seagrove Building & Loan Ass'n v. Stockton, 148 P. S. 146.
Selser's Estate, 7 C. C. 417; affirmed in Selser's Estate, 141 P. S. 529.
Shaaber v. Reading, 7 C. C. 230; affirmed in Shaaber v. Reading, 133 P. S. 643.
Shafer's Estate, 1 Northam. 153; affirmed in Shafer's Appeal, 106 P. S. 49.
Shafer v. McIlhaney, 12 C. C. 27; affirmed in Shafer v. McIlhaney, 154 P. S. 58.
Shafer v. Senseman, 1 Northam. 389; affirmed in Shafer v. Senseman, 125 P. S. 310.
Shalters v. Ladd, 8 C. C. 528; affirmed in Shalters v. Ladd, 141 P. S. 349.
Sharon Hill Borough, 4 Del. 252; affirmed in Sharon Hill Borough, 140 P. S. 250.
Shaub v. Lancaster, 10 Lanc. 225; affirmed in Shaub v. Lancaster, 156 P. S. 362.
Sheehan v. Philadelphia & Reading R. R. Co., 15 C. C. 209; affirmed in Sheehan v.

Philadelphia & Reading R. R. Co., 166 P. S. 354.
Shehan's Estate, 37 P. L. J. 397; affirmed in Shehan's Estate, 139 P. S. 168.
Sherry v. Sheppard, 12 C. C. 168; affirmed in Comm'th v. Jenks, 154 P. S. 368.
Siegfried's Estate, 1 Northam. 49; affirmed in Halsey's Appeal, 120 P. S. 209.
Silverthorn's Estate, 2 C. C. 393; affirmed in Thompson's Appeal, 11 Atlan. 455.
Simes's Estate, 44 L. I. 36; affirmed in Simes's Appeal, 12 Atlan. 87.
Simon's Estate, 12 C. C. 617; affirmed in Simon's Estate, 155 P. S. 215.
Singer Sewing Machine Co. v. Cope, 5 Lanc. 286; affirmed in Cope v. Singer Sewing Machine Co., 1 Mona. 650.
Siegel v. Herbine, 10 C. C. 347; affirmed in Siegel v. Lauer, 148 P. S. 236.
Sloan's Estate, 14 C. C. 359; affirmed in Sloan's Estate, 161 P. S. 237.
Smith's Estate, 8 C. C. 323; affirmed in Smith's Estate, 140 P. S. 344.
Smith v. Cohn, 11 Lanc. 103; affirmed in Smith v. Cohn, 170 P. S. 132.
Smith v. Ervin, 15 C. C. 32; affirmed in Smith v. Ervin, 168 P. S. 271.
Smith v. Reading City Pass. Ry. Co., 13 C. C. 49; affirmed in Smith v. Reading City Pass. Ry. Co., 156 P. S. 5.
Souder's Estate, 15 C. C. 285; affirmed in Souder's Estate, 169 P. S. 239.
Souder v. Columbia Nat. Bank, 10 Lanc. 217; affirmed in Souder v. Columbia Nat. Bank, 156 P. S. 374.
South Chester Borough v. Garland, 5 Del. 305; affirmed in South Chester Borough v. Garland, 162 P. S. 91.
Stahl v. Penna. R. R. Co., 12 C. C. 375; affirmed in Stahl v. Penna. R. R. Co., 155 P. S. 309.
Steele v. Northampton County, 1 Northam. 407; affirmed in Northampton County v. Steele, 1 Mona. 582.
Steinmetz's Estate, 15 C. C. 259; affirmed in Steinmetz's Estate, 168 P. S. 171, 175.
Stevens's Estate, 11 Lanc. 129, 137; affirmed in Stevens's Estate, 164 P. S. 209, 216.
Stevenson v. Fox, 45 L. I. 379; affirmed in Stevenson v. Fox, 125 P. S. 568.
Stewart's Estate, 45 L. I. 184; affirmed in Seagrave's Appeal, 125 P. S. 362.
Stewart's Estate, 1 Lack. Jur. 225; affirmed in Stewart's Estate, 137 P. S. 587.
St. Mary's Gas Co. v. Elk County, 15 C. C. 411; affirmed in St. Mary's Gas Co. v. Elk County, 168 P. S. 401.
Stocker v. Hutter, 2 Northam. 53; affirmed in Stocker v. Hutter, 134 P. S. 19.

Stong's Estate, 9 Montg. 185; affirmed in Stong's Estate, 160 P. S. 13.
Strange v. Austin, 7 C. C. 128; affirmed in Strange v. Austin, 134 P. S. 96.
Straub v. Pittsburgh, 38 P. L. J. 89; affirmed in 138 P. S. 356.
Strauss's Estate, 14 C. C. 593; affirmed in Strauss's Estate, 36 W. N. C. 374.
Striewig's Estate, 8 York 98; affirmed in Striewig's Estate, 169 P. S. 61.
Sutherland v. Ross, 6 Montg. 203; affirmed in Sutherland v. Ross, 140 P. S. 379.
Sutton v. Morgan, 41 P. L. J. 47; affirmed in Sutton v. Morgan, 158 P. S. 204.
Sweitzer's Estate, 9 C. C. 49; affirmed in Sweitzer's Estate, 142 P. S. 541.

T.

Tallman's Will, 9 C. C. 357; affirmed in Tallman's Estate, 148 P. S. 286.
Tamaqua & Lansford St. Ry. Co. v. Inter-County St. Ry. Co., 4 Dist. Rep. 20; affirmed in Tamaqua & Lansford St. Ry. Co. v. Inter-County St. Ry. Co., 167 P. S. 91.
Tanney v. Tanney, 41 P. L. J. 43; affirmed in Tanney v. Tanney, 169 P. S. 277.
Teacle's Estate, 6 C. C. 553; affirmed in Teacle's Estate, 132 P. S. 533.
Thropp v. Richardson, 6 Montg. 20; affirmed in Thropp v. Richardson, 132 P. S. 399.
Tift v. Quaker City Bank, 8 C. C. 606; affirmed in Tift v. Quaker City Bank, 141 P. S. 550.
Titlow's Estate, 11 C. C. 625; affirmed in Titlow's Estate, 163 P. S. 35.
Tompkins v. Merriman, 6 Kulp 543; affirmed in Tompkins v. Merriman, 155 P. S. 440.
Transue's Estate, 7 Montg. 359; affirmed in Transue's Estate, 141 P. S. 170.
Tubbs's Estate, 7 Kulp 223; affirmed in Tubbs's Estate, 161 P. S. 252.
Tunis v. Hestonville, Mantua & Fairmount Pass. Ry. Co., 11 C. C. 450, 452; affirmed in Tunis v. Hestonville, Mantua & Fairmount Pass. Ry. Co., 149 P. S. 70.
Turner v. Warren, 5 Del. 249, 297; affirmed in Turner v. Warren, 160 P. S. 336.
Twelfth Street Market Co. v. Phila. & Reading Terminal R. R. Co., 10 C. C. 25; affirmed in Twelfth Street Market Co. v. Philadelphia & Reading Terminal R. R. Co., 142 P. S. 580.

U.

Ulmer v. Ryan, 46 L. I. 158; affirmed in Ulmer v. Ryan, 27 W. N. C. 26.

Unangst v. Goodyear Mfg. Co., 2 Northam. 90; affirmed in Unangst v. Goodyear Mfg. Co., 141 P. S. 127.

V.

Van Haagen Soap Co.'s Estate, 8 C. C. 84; affirmed in Van Haagen Soap Co.'s Estate, 141 P. S. 214.
Volkenand v. Drum, 6 Kulp 519; affirmed in Volkenand v. Drum, 154 P. S. 616.

W.

Wachter v. Phoenix Assur. Co., 46 L. I. 448; affirmed in Wachter v. Phoenix Assur. Co., 132 P. S. 428.
Waesoh's Estate, 14 C. C. 387; affirmed in Waesoh's Estate, 166 P. S. 204.
Waln's Estate, 12 C. C. 385; affirmed in Waln's Estate, 156 P. S. 194.
Walton v. Bryn Mawr Hotel Co., 8 Montg. 205; affirmed in Walton v. Bryn Mawr Hotel Co., 160 P. S. 3.
Warren Gas Light Co. v. Pennsylvania Gas Co., 13 C. C. 310; affirmed in Warren Gas Light Co. v. Pennsylvania Gas Co., 161 P. S. 510.
Warwick Iron Co. v. Morton, 7 Montg. 87; affirmed in Warwick Iron Co. v. Morton, 148 P. S. 72.
Washington Street, 6 C. C. 315; affirmed in Washington Street, 132 P. S. 257.
Watts's Estate, 14 C. C. 635; affirmed in Watts's Estate, 36 W. N. C. 369.
Weikel v. Lower Providence Live Stock Ins. Co., 3 Montg. 207, 211; affirmed in Lower Providence Live Stock Ins. Co. v. Weikel, 13 Atlan. 82.
Weiler's Estate, 12 Lanc. 123; affirmed in Weiler's Estate, 169 P. S. 66.
Wells's Estate, 45 L. I. 44; affirmed in Neilson's Appeal, 13 Atlan. 943.
West Branch Lumberman's Exchange v. Fisher, 11 C. C. 328; affirmed in West Branch Lumberman's Exchange v. Fisher, 150 P. S. 475.
Wheelen v. Phillips, 47 L. I. 415; affirmed in Wheelen v. Phillips, 140 P. S. 33.
Whitby v. Duffy, 7 Lanc. 201; affirmed in Whitby v. Duffy, 135 P. S. 620.
White's Estate, 23 W. N. C. 315; affirmed in White's Estate, 132 P. S. 17.
White's Estate, 2 Dist. Rep. 207; affirmed in White's Estate, 163 P. S. 388.
Whitecar's Estate, 10 C. C. 448; affirmed in Whitecar's Estate, 147 P. S. 368.

Whitmore v. Dwelling House Ins. Co., 2 Lack. Jur. 45; affirmed in *Whitmore v. Dwelling House Ins. Co.*, 148 P. S. 405.
Wilhelm v. Fayette County, 15 C. C. 559; affirmed in *Wilhelm v. Fayette County*, 168 P. S. 462.
Wilkes-Barre v. Ricketts, 5 Kulp 429; affirmed in *Wilkes-Barre v. Felts*, 134 P. S. 529.
Wilkinsburg Bor. v. Home for Aged Women, 7 C. C. 75; affirmed in *Wilkinsburg Bor. v. Home for Aged Women*, 131 P. S. 109.
Williamson v. Hiestand, 1 Northam. 148; affirmed in *Hiestand v. Williamson*, 128 P. S. 122.
Willock's Estate, 41 P. L. J. 446; affirmed in *Willock's Estate*, 165 P. S. 522.
Wilson v. Cox, 10 Montg. 43; reversed in *Wilson v. Cox*, 37 W. N. C. 142.
Wind Gap & Delaware R. R. Co. v. Pennsylvania S. & N. S. R. R. Co., 1 Northam. 179, 181; affirmed by the Supreme Court, MSS.
Wodock v. Robinson, 9 C. C. 503; affirmed in *Wodock v. Robinson*, 148 P. S. 503.
Wood v. Bridgeport, 6 Montg. 101; affirmed in *Wood v. Bridgeport*, 143 P. S. 167

Woods v. Irwin, 13 C. C. 276; affirmed in *Woods v. Irwin*, 163 P. S. 413.
Wright's Estate, 11 C. C. 492; affirmed in *Wright's Estate*, 155 P. S. 64.

Y.

Yard's Case, 10 C. C. 41; affirmed in *Eckstein's Petition*, 148 P. S. 509.
Yonkin's Contested Election, 2 C. C. 550; affirmed in *Yonkin's Appeal*, 12 Cent. 371.
Yost v. Brown, 5 C. C. 526; affirmed in *Yost v. Brown*, 126 P. S. 92.
Youghioheny River Coal Co. v. Pierce, 39 P. L. J. 348; affirmed in *Youghioheny River Coal Co. v. Pierce*, 153 P. S. 74.
Young's Estate, 15 C. C. 296; affirmed in *Young's Estate*, 166 P. S. 645.

Z.

Zane v. Rosenberry, 12 C. C. 382; affirmed in *Zane v. Rosenberry*, 153 P. S. 38.

CASES IN VOLUME III.

SINCE REPORTED IN THE REGULAR STATE REPORTS.

A.

Accident Association v. Smith, 24 W. N. C. 33; since reported in 126 P. S. 317.

B.

Bailey v. Comm'th, 20 W. N. C. 221; since reported as *Comm'th v. Bailey*, in 129 P. S. 480.
Baker v. Leibert, 23 W. N. C. 466; since reported in 125 P. S. 106.
Bank's Appeal, 23 W. N. C. 359; since reported in 124 P. S. 337.
Bank v. Piolet, 24 W. N. C. 83; since reported in 126 P. S. 194.
Barhite's Appeal, 24 W. N. C. 64; since reported in 126 P. S. 404.
Battles v. Sliney, 24 W. N. C. 71; since reported in 126 P. S. 460.
Blackman v. Comm'th, 23 W. N. C. 464; since reported in 124 P. S. 578.
Blumenthal's Petition, 23 W. N. C. 493; since reported in 125 P. S. 412.
Borough v. Water Co., 23 W. N. C. 413; since reported in 124 P. S. 610.
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Breckenridge's Appeal, 24 W. N. C. 105; since reported in 127 P. S. 81.
Brewing Co.'s Petition, 24 W. N. C. 177; since reported in 127 P. S. 523.
Brinser v. Anderson, 20 W. N. C. 505; since reported as *Anderson v. Brinser*, in 129 P. S. 376.
Brooke v. Bordner, 24 W. N. C. 53; since reported in 125 P. S. 470.
Brooks v. Bank, 23 W. N. C. 502; since reported in 125 P. S. 394.
Brown's Appeal, 24 W. N. C. 77; since reported in 125 P. S. 303.
Byrne v. Hayden, 23 W. N. C. 306; since reported in 124 P. S. 170.
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C.

Callahan's Appeal, 23 W. N. C. 233; since reported in 124 P. S. 138.
Campbell v. County, 24 W. N. C. 107; since reported in 127 P. S. 86.
Canal Co. v. Goldstein, 23 W. N. C. 496; since reported in 125 P. S. 246.
Carlson's License, 24 W. N. C. 184; since reported in 127 P. S. 330.
City v. Christian Association, 23 W. N. C. 563; since reported in 125 P. S. 572.
City v. Dungan, 23 W. N. C. 248; since reported in 124 P. S. 52.
City v. Gore, 23 W. N. C. 419; since reported in 124 P. S. 595.
City v. Richards, 23 W. N. C. 339; since reported in 124 P. S. 303.
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Coggin's Appeal, 23 W. N. C. 206; since reported in 124 P. S. 10.
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County v. Boyer, 24 W. N. C. 29; since reported in 125 P. S. 226.
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County v. Wells, 24 W. N. C. 117; since reported in 125 P. S. 319.
Cox v. Comm'th, 23 W. N. C. 477; since reported in 225 P. S. 94.
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Cox v. Sims, 23 W. N. C. 535; since reported in 125 P. S. 522.

Craige's Appeal, 24 W. N. C. 35; since reported in 126 P. S. 223.
Crew v. McCafferty, 23 W. N. C. 278; since reported in 124 P. S. 200.

D.

Davenport v. Jones, 24 W. N. C. 43; since reported in 126 P. S. 271.
Dengler's Appeal, 23 W. N. C. 428; since reported in 125 P. S. 12.
Ditman v. Raule, 23 W. N. C. 302; since reported in 124 P. S. 225.
Dreisback v. Serfass, 24 W. N. C. 23; since reported in 126 P. S. 32.

E.

Emerick v. Moir, 23 W. N. C. 388; since reported in 124 P. S. 498.
Evans v. Cleary, 23 W. N. C. 509; since reported in 125 P. S. 204.
Ewing's Appeal, 24 W. N. C. 106; since reported in 197 P. S. 81.

F.

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Fischer v. Ferry Co., 23 W. N. C. 224; since reported in 124 P. S. 154.
Ford's Appeal, 24 W. N. C. 106; since reported in 127 P. S. 81.
Forepaugh v. Railroad Co., 24 W. N. C. 385; since reported in 128 P. S. 217.
Fowler's Appeal, 23 W. N. C. 500; since reported in 125 P. S. 388.
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G.

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Gorman v. Comm'th, 23 W. N. C. 405; since reported in 124 P. S. 536.
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Griswold v. Gebbie, 24 W. N. C. 72; since reported in 126 P. S. 353.

H.

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Hoch's Appeal, 24 W. N. C. 27; since reported in 126 P. S. 13.
Hoffman v. Clough, 23 W. N. C. 399; since reported in 124 P. S. 505.
Holmes v. Tallada, 23 W. N. C. 463; since reported in 125 P. S. 133.
Howe's Appeal, 24 W. N. C. 133; since reported in 126 P. S. 233.
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I.

Insurance Co. v. Elkins, 23 W. N. C. 396; since reported in 124 P. S. 484.
Insurance Co. v. Stauffer, 23 W. N. C. 522; since reported in 125 P. S. 416.
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J.

Jensen v. Perry, 24 W. N. C. 90; since reported in 126 P. S. 495.
Jones v. Gordon, 24 W. N. C. 302; since reported in 124 P. S. 263.

K.

Kelm's Appeal, 24 W. N. C. 135; since reported in 125 P. S. 480.
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L.

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Lee v. McMullan, 23 W. N. C. 483 ; since reported in 125 P. S. 74.

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Mc.

McCurdy's Appeal, 23 W. N. C. 226 ; since reported in 124 P. S. 99.

M.

Marlin v. Waters, 24 W. N. C. 129 ; since reported in 127 P. S. 177.

Melloy v. Burtis, 23 W. N. C. 289 ; since reported in 124 P. S. 261.

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Morgan's Appeal, 23 W. N. C. 522 ; since reported in 125 P. S. 561.

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N.

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Neely's Appeal, 23 W. N. C. 336 ; since reported in 124 P. S. 406.

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O.

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P.

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R.

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Ryman's Appeal, 23 W. N. C. 552; since reported in 124 P. S. 635.

Ryon's Appeal, 23 W. N. C. 394; since reported in 124 P. S. 528.

S.

Saunders v. Gould, 23 W. N. C. 443; since reported in 124 P. S. 237.

Schepper's Appeal, 23 W. N. C. 570; since reported in 125 P. S. 598.

Shiffer v. Broadhead, 24 W. N. C. 44; since reported in 126 P. S. 260.

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T.

Temple v. Baker, 24 W. N. C. 1; since reported in 125 P. S. 634.

Thomas's Appeal, 23 W. N. C. 409; since reported in 124 P. S. 640.

Thomas v. Hinkle, 24 W. N. C. 119; since reported in 126 P. S. 478.

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U.

Usher v. Railroad Co., 24 W. N. C. 57; since reported in 126 P. S. 206.

V.

Volkmar Street, 23 W. N. C. 364; since reported in 124 P. S. 320.

W.

Walls v. Campbell, 23 W. N. C. 506; since reported in 125 P. S. 346.

Watson's Appeal, 24 W. N. C. 86; since reported in 125 P. S. 340.

Wayne Avenue, 23 W. N. C. 232; since reported in 124 P. S. 135.

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Wegley v. Teal, 23 W. N. C. 521; since reported in 125 P. S. 498.

Wheatland's Appeal, 23 W. N. C. 437; since reported in 125 P. S. 38.

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Wistar's Appeal, 23 W. N. C. 532; since reported in 125 P. S. 526.

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Y.

Yost v. Navigation Co., 23 W. N. C. 489; since reported in 125 P. S. 152.

Z.

Zell's Appeal, 24 W. N. C. 68; since reported in 126 P. S. 329.

A DIGEST

OF

PENNSYLVANIA DECISIONS.

ABANDONMENT.

See DEBTOR AND CREDITOR, VI.: EJECTMENT, II.: JURY, VII.: LANDLORD AND TENANT, II.: TIMBER: TURNPIKES.

1. Where no step was taken in the cause until fourteen years after the service of the summons, when a declaration was filed, it was *held*, that the cause must be regarded as abandoned, and upon motion of defendant the declaration was quashed and a judgment of *nolle prosequi* was entered against the plaintiff; and this, notwithstanding the omission of the defendant to enter such a judgment upon *præcipe*. *Waring v. Pennsylvania R. R. Co.*, 16 C. C. 56; s. c. 42 P. L. J. 269.

2. Where a bill in equity has been ordered by the court to be dismissed, but no formal decree has been entered, after the lapse of twelve years, the plaintiff will be regarded as having abandoned the suit, and there being no suit pending a bill of revivor will be set aside on motion. *Hubbell v. Lankenau*, 3 Dist. Rep. 743.

3. Where a submission of partnership disputes has been regularly revoked by one of the parties before the award is made or filed, the fact that the revoking party subsequently deposited certain moneys collected by him in a bank designated in the agreement for arbitration, does not show that he has abandoned his revocation of the submission. *McKenna v. Lyle*, 155 P. S. 599.

4. The public may abandon a street or alley dedicated to public use, and the acceptance of another in place of the original is conclusive proof of such abandonment; adverse possession for twenty-one years by an adjoining owner of half a road or alley abandoned by the public will give title as against the original owner or grantor of said road or alley. *Flick's Estate*, 6 Kulp 329.

5. Upon the abandonment of proceedings to condemn lands for a lateral railroad, under the act 6 April 1869 (Brightly's Purdon 1821), the plaintiff will be ordered to pay the counsel fees of the defendant. *Marshall v. Grove*, 10 C. C. 532.

6. That a constable who had made a levy, on learning of a subsequent execution in the hands of the sheriff, handed his writ to the sheriff and permitted the latter to sell, does not constitute an abandonment of the first levy, and will not postpone it on distribution. *Miller v. Getz*, 135 P. S. 558.

7. Where a sheriff's interpleader is awarded and a bond is filed by the claimant, the latter is entitled to the possession, but such possession is subject to the lien of the execution, and where the levy is subsequently abandoned, all proceedings founded thereon fall with it, and the claimant, if he desires to obtain possession, must bring replevin; in such an action he cannot recover until he has given proof of his title, and the fact that

he gave bond in the interpleader proceedings is not of itself sufficient to entitle him to recover. *Passavant v. Gummey*, 32 W. N. C. 217.

8. If a person with a right under contract with the owner, to remove timber at so much per foot, abandons the job, a subsequent purchaser from the owner is not liable if he removes and converts the timber. *Short v. Messenger*, 126 P. S. 637.

9. Where a building contract provided that retained percentages should not be paid until the contract should be completed according to the specifications, and before the contract was completed the contractors abandoned the work, and the owners paid all the subsequent wages and supply bills under the supervision of one of the contractors; it was *held*, that an attachment execution would not lie on the part of a judgment creditor of the contractors to recover from the owners the retained percentages. *American Fertilizer Powder Mfg. Co. v. Malone*, 166 P. S. 289.

10. Where the defendant agreed in writing to pay to the plaintiff five dollars per month for five years, if the plaintiff's son failed to make such payment, and on the same day the plaintiff agreed in writing, in consideration of her son promising to pay defendant a balance of liquor bill owing by plaintiff, to relinquish all claims which she had against defendant, and the first contract remained in the plaintiff's possession, and there was evidence that payments were made upon it; it was *held*, to be for the jury to determine whether it was the intention of the parties to abandon the first agreement. *Richardson v. Moyer*, 155 P. S. 174.

11. Where the plaintiff brought suit against the promotor of a corporation and sought to rescind a contract for subscription, and it appeared that the plaintiff had directed the defendant to sell the stock at a certain price, and that the plaintiff had also given a proxy to vote his stock, and that he had attended and participated in the business of a stockholders'

meeting; it was *held*, that such acts were *prima facie* acts of ownership inconsistent with the demand for rescission, and that the jury might infer from them an acquiescence in the defendant's refusal and an abandonment or waiver of such demand. *Jessop v. Ivory*, 158 P. S. 71.

12. Where a decedent died in 1872 and a codicil which bequeathed a legacy to the petitioner was finally established in 1890; and upon a petition for an order on the executors and devisees of real estate to pay the legacy, the defendants answered that there were no assets, and that the devisees held the real estate since 1864 under articles of agreement then executed with the decedent, but it was not shown that any payments had been made under the agreement or that the same had been enforced; the court *held*, that the agreement should be considered as having been abandoned by the parties, and that the statute of limitations would not bar a recovery of the legacy. *Wilson's Estate*, 10 Lanc. 105.

13. Where a township has acquired an easement to flow water over certain land, whether by grant or prescription, more than a mere non-user for three years is required to destroy it; so, it is not within the power of one supervisor to grant a surrender of it. *Eshleman v. Martic Township*, 152 P. S. 68.

14. A defendant in an attachment execution who has claimed his three hundred dollars exemption but afterwards assigned it for the benefit of creditors, cannot reclaim it on the ground that his assignment was illegal; such an assignment will be considered as an abandonment of his claim even though the assignees withdraw their claim to it. *Good's Estate*, 8 Lanc. 345.

15. The defendant agreed to accept the lease of an ore mine. The plaintiff agreed to give him possession as soon as he obtained it, and to tender him a good and sufficient marketable title; *held*, that performance by the plaintiff should be tendered in a reasonable time. That a delay by plaintiff of four years and eight months

to take steps to obtain possession (the value becoming deteriorated in the meantime) was unreasonable and evidence of abandonment, and that the defendant was not bound to accept the lease. *Kille v. Reading Iron Works*, 141 P. S. 440; affirming s. c. 47 L. I. 464.

16. Where lessees under a lease dated March 1, 1876, agreed to go upon the premises and operate for oil within forty days, but they did not take possession or carry out their agreement; and afterwards they sunk a test well near the demised premises which they abandoned, and no further development was made until December 1889; it was held, that the action of the lessees amounted in law to an abandonment of any right under the lease. *Barnhart v. Lockwood*, 152 P. S. 82.

17. A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon; where, however, an oil lease contains a grant of a right to mine for and remove oil, for twenty years at a certain royalty, the right of the lessee is to explore for and determine the existence of oil upon the land, and if none is found, such right ceases when the explorations are finished and the lot abandoned. *Venture Oil Co. v. Fretts*, 152 P. S. 451; *McNish v. Stone*, 152 P. S. 457, note. See *May v. Hazlewood Oil Co.*, 152 P. S. 518.

18. In ejectment to recover possession of land, brought by the lessee of an oil lease against other parties claiming under the same lessor, where the defendants claimed that the plaintiffs had abandoned their rights under their lease, but this was denied by the plaintiff in their abstract of title; it was held, that the question of abandonment was for the jury, and it was further held, that, as against any but the grantor, an abandonment could not be complete until the statutory period of limitation or the end of the term granted and possession might be resumed by the grantee at any time

previous. *Bartley v. Phillips*, 165 P. S. 325.

19. Where a railroad company condemns land, it has a right to make provision for its future as well as its present needs, and non-user of a portion of the land for certain purposes cannot be held to be an abandonment; adverse possession against the company cannot be established by proof of mere detached occupation of the property by different people, none of whom held under the paper title under which the property was claimed. *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Peet*, 152 P. S. 488.

20. One railroad company has no power to raise a question as to the abandonment of forfeiture of another railroad company's location; such a question is for the commonwealth alone. *Pittsburgh, Virginia & Charleston Ry. Co. v. Pittsburgh, Cannonsburgh & State Line Ry. Co.*, 159 P. S. 331.

21. A delay of five years and two months in building a branch railroad after its location is not evidence of its abandonment by mere lapse of time. The act 22 March 1871 (Brightly's Purdon 412), does not apply to railroad companies. *Pittsburgh, Virginia & Charleston Ry. Co. v. Pittsburgh, Cannonsburgh & State Line Ry. Co.*, 159 P. S. 331.

22. Where a turnpike company is authorized by an act of assembly to purchase the road and franchises of a passenger railway company and is invested with the like powers, privileges, and immunities as the railroad company, but with authority to remove the tracks, the turnpike company may after the expiration of twenty-seven years rebuild and operate the railroad; a removal of the rails and a sale of the cars and property in pursuance of an express legislative authority raises no implication of abandonment, or other disability as to the future exercise of the franchises. *Hinchman v. Philadelphia & West Chester Turnpike Road*, 160 P. S. 150; affirming s. c. 5 Del. 414.

23. In a proceeding under the act 10 June 1893 (Brightly's Purdon 426), for-

the termination of an easement which has been abandoned by a corporation possessing the right of eminent domain where it appears that there are no facts in dispute, the court will not frame an issue requiring the intervention of a jury. *Delaware & Hudson Canal Co. v. Genet*, 169 P. S. 343; affirming s. c. 15 C. C. 215.

ABATEMENT.

- II. Plea to the jurisdiction.
- III. Disability of parties.
- IV. Misnomer.
- V. Non-joinder.
- VI. Death of parties.
- VII. Former action pending.
 - (a) When pleadable.
 - (b) When not pleadable.
 - (c) Of the plea of *lis pendens*.
 - (d) In criminal proceedings.
- VIII. Pleading.
- IX. Practice.

II. Plea to the jurisdiction.

1. Upon a rule to open a judgment where it appears that there was no service of the writ, the court will not set aside the return of service, but will open the judgment, and permit the defendant to file a plea in abatement to the jurisdiction. *Keyes v. Moorhead*, 11 C. C. 43.

2. Where a defendant seeks to object to the jurisdiction of the court over its person, the proper practice is to file an appearance *de bene esse* and a plea in abatement to the jurisdiction. *McConkey v. Peach Bottom Slate Co.*, 14 C. C. 514.

3. Where a plea in abatement for want of jurisdiction and a plea in bar are filed together, expressly reserving all benefit and advantage of the plea in abatement, the filing of the plea in bar will not be held to be a waiver of the plea in abatement. *McConkey v. Peach Bottom Slate Co.*, 14 C. C. 514.

III. Disability of parties.

4. The holder of a check cannot maintain an action in his own name against the drawee; and this, though the check was for the entire balance due the drawer. *Maginn v. Dollar Savings Bank*, 131 P. S. 362.

5. Where the sureties on a bond given by a railroad company to secure land damages, intervened in the condemnation proceedings, they will not be permitted to defend on the ground that the dissolution of the railroad company prior to the condemnation proceedings abated the action against the principal and discharged the surety. *Keller v. Harrisburg & Potomac R. R. Co.*, 161 P. S. 504.

IV. Misnomer.

6. The misnaming of the township in the *præcipe* and writ in ejectment may be taken advantage of by plea of not guilty; a plea in abatement is not necessary. Doubt was expressed whether a plea in abatement is admissible at all in ejectment. *Stimmel v. Miller*, 8 C. C. 128.

V. Non-joinder.

7. Where an unincorporated association was sued before a magistrate and only one member thereof was served with the summons, it was held, that the magistrate should have admitted a plea in abatement setting forth the names and residences of the members not served, and issue should have been joined thereon if the plea was disputed. *Rivers v. Fame Lodge*, 11 C. C. 241.

VI. Death of parties.

8. Where an action is brought for personal injuries and the plaintiff dies before the case is called for trial, the executors or administrators of the deceased may, under the act 15 April 1851 (Brightly's Purdon 55) be substituted as plaintiffs and prosecute the suit to final judgment. That act is not repealed by

the act 26 April 1855 (Brightly's Purdon 1603), the purpose of which was simply to designate the persons who, in connection with the widow, should be entitled to a right of action where no suit had already been brought by the decedent. *Birch v. Pitts. Cin. Chicago & St. L. Ry. Co.*, 165 P. S. 339.

9. Upon the death of a plaintiff in ejectment, his heirs may either adopt the pending action or ignore it and institute a suit in their own name. *Reitz v. Thomas*, 13 C. C. 315.

10. In an action of trespass *vi et armis* against several defendants where one of them dies, his executor cannot be brought upon the record by *scire facias* and substituted in place of the decedent, but the plaintiff may pursue the executor in an independent action. *Cowell v. Pitcher*, 13 C. C. 583.

11. An action of trespass to recover damages for the killing of plaintiff's husband in a fight will abate upon the death of the defendant prior to judgment. *Weiss v. Hunsicker*, 14 C. C. 398.

VII. Former action pending.

(a) When pleadable.

12. A plea of *lis pendens* is a good plea in abatement to a bill in equity. *Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Philadelphia National Bank*, 14 C. C. 193; s. c. 33 W. N. C. 525.

13. Where a foreign attachment was dissolved because the plaintiff failed to file an affidavit showing his cause of action, and the suit was then discontinued and the costs other than the counsel fees of the garnishee were paid, it was *held*, that a second attachment against the same property would be stayed until the garnishee's fees in the first attachment were paid. *Jackson v. Thomson*, 9 Montg. 28.

14. Where the costs of a previous non-suit had not been paid, it was *held*, that the plea of the non-suit to a second

action was a good plea of *lis pendens*. *Fitzpatrick v. Riley*, 163 P. S. 65.

15. A claimant against a decedent's estate may withdraw his claim before the auditor and bring his action at law, but where the fact of such withdrawal is not established, his action at law will be non-suited. *Kreckel v. McCullagh*, 12 Lanc. 179.

16. It is a good affidavit of defence that the claim for which suit is brought had been used by the plaintiff as a set-off in another action between the same parties in which the plaintiff was defendant. *Pennsylvania R. R. Co. v. Davenport*, 154 P. S. 111. See *Baugh v. Mitchell*, 166 P. S. 577.

(b) When not pleadable.

17. The pendency of a common law action does not oust the jurisdiction of the orphans' court as to a claim made before it against a decedent's estate. *Guth's Appeal*, 2 Cent. 767.

18. A bill to enjoin the collection of a judgment is barred by the pendency of proceedings to open the judgment in the courts of another county. *Smith v. Kammerer*, 152 P. S. 98.

19. A writ of account render in the usual form will not be quashed on the ground of the pendency of a previous action in another court, in which previous action the writ had been quashed because not in the usual form. *Clarke v. Ballou*, 12 C. C. 369; s. c. 1 Dist. Rep. 430.

20. In an action brought by a defendant in an attachment against the garnishee, the pending attachment cannot be pleaded in abatement or in bar of the action; but the court will mould the judgment and control the execution so that the garnishee's rights shall be protected. *Datz v. Chambers*, 14 C. C. 643.

21. A replevin may be maintained notwithstanding the pendency of a previous replevin for the same property brought by the defendant against a third person. *Conner v. Riehl*, 11 Lanc. 338.

(c) Of the plea of lis pendens.

22. A plea of former suit pending must allege that the case is the same, the parties the same, and the rights asserted and the relief prayed for are the same; and where the truth of the plea can be ascertained by an inspection of the record, the court will determine the question without a reference. *Harrisburg v. Harrisburg City Pass. Ry. Co.*, 1 Dist. Rep. 192.

23. Whether another action is pending either at law or in equity is pleadable only in bar or abatement of the suit; the merits of such a plea cannot be determined upon a motion to dissolve an attachment under the act 17 March 1869, in advance of trial. *Meyers v. Rauch*, 4 Northam. 350.

24. Where a defendant in foreign attachment has entered an appearance to the attachment and he wishes to raise the question that the writ was issued for the same cause of action for which a former suit is pending, he should rule the plaintiff to file a declaration and then plead in abatement that the former action was for the same indebtedness. *Schall v. Rutledge*, 1 York 33.

25. A plea that a prior suit still pending was brought against the plaintiff before a justice in which the plaintiff's claim might have been set off, is not a plea of abatement, but is essentially a plea in bar. *Felpel v. Hershour*, 128 P. S. 587.

26. A judgment will be opened where it appears that an appeal from a justice's judgment on the same instrument is pending, and that the defendant has complied with the conditions of the bond. *Rosso v. Maresco*, 1 Lack. Jur. 414.

27. Where a guardian loaned his ward's money in good faith to a solvent manufacturing company of which the guardian was a member, and solely with the intent to obtain a good rate of interest for the benefit of the ward's estate; it was held, that the ward was not entitled to claim a share of the profits without submitting to

a like share of the losses, and where the guardian was charged with a share of the profits earned by his ward's money each year, it was not error to allow him a credit of one-third of such profits as a compensation for his services. *Small's Estate*, 144 P. S. 293. Where, pending proceedings in the orphans' court, the ward filed a bill in equity against the company for discovery and an account of profits; it was held, that the bill against the members of the company other than the guardian was demurrable for want of equity, and the orphans' court having exclusive jurisdiction of the guardian's accounts, the proceeding pending thereon was a bar to the bill against the guardian. *Rau v. Small*, 144 P. S. 304.

28. It was not decided whether the act 15 June 1871 (Brightly's Purdon 1843) makes the indexing of a bill in equity, record notice from the commencement of the action. *Duff v. McDonough*, 155 P. S. 10.

(d) In criminal proceedings.

29. A defendant can be held on two or more indictments at the same time for the same offence, and a pendency of one will not bar proceedings on the other; he has a right, however, to have the bill first found disposed of before pleading to the second, but if he contents himself with a motion to quash the second bill and is then tried and convicted thereunder, the pendency of the first bill is no ground for a new trial. *Commonwealth v. Norris*, 9 Montg. 143.

VIII. Pleading.

30. A plea in abatement must be put in not later than the term next succeeding that to which the writ was issued or the declaration filed. *Stimmel v. Miller*, 8 C. C. 128.

31. A participation in the choice of arbitrators is a waiver of a right to a plea in abatement. *Ibid.*

32. Where a former recovery is pleaded in abatement and there is also a plea of

the general issue, the case should not be put on the trial list until the special plea has been either replied to or stricken off. *Amheim v. Dye Works*, 36 W. N. C. 32.

33. A plea in abatement will be stricken off only when irregular in form or out of time; if regular in form but not good in substance, it will not be stricken off but will be disallowed. *Harrisburg v. Harrisburg City Pass. Ry. Co.*, 1 Dist. Rep. 192.

IX. Practice.

34. A plaintiff cannot take judgment for want of an affidavit of defence, pending a plea in abatement. *Hummel v. Myers*, 26 W. N. C. 279.

ABDUCTION.

See CRIMINAL LAW, XXXVII.

ABORTION.

See CRIMINAL LAW, XXVII.

ABSCONDING DEBTORS.

See ATTACHMENT.

ACCEPTANCE.

See BILLS OF EXCHANGE.

ACCESSION.

See CHATTELS, III.

ACCESSORIES.

See CRIMINAL LAW, LXI.

ACCIDENT INSURANCE.

See INSURANCE, IV.

ACCOMPLICES.

See CRIMINAL LAW, XVII. (g): EVIDENCE, XXIX. (h).

ACCORD AND SATISFACTION.

See DEBTOR AND CREDITOR, V.

ACCOUNT.

See PARTNERSHIP.

1. On the taking of an account as to the value of a partnership interest, sold to plaintiffs at a sheriff's sale, an inventory of stock taken just before the sale, proved only by the testimony of a witness who found it in the partnership, safe two years after the sale, is inadmissible. *Crawford v. Shriver*, 139 P. S. 239.

2. Where two agricultural societies agreed to hold a joint fair, and the treasurer of one society sued the treasurer of the other to recover half the net proceeds of the same; it was held to be a good affidavit of defence that there had never been a settlement of accounts between the two societies, that the defendant was not a party to the contract, and that he had received the moneys as treasurer of his own society and had paid them out in accordance with the rules of, and as directed by, that society. *Pennsylvania State Agricultural Society v. Jermyn*, 167 P. S. 359.

ACCOUNT RENDER.

1. A writ of foreign attachment may issue in an action of account render. *Philadelphia & Reading R. R. Co. v. Snowden*, 166 P. S. 236.

2. Where a proceeding in account render was begun by foreign attachment, the court made absolute a rule permitting an amendment of the form of action, and allowing the plaintiff to file a bill in equity with the same effect as if the original proceeding had been begun in equity. *Crowe v. Davis*, 33 W. N. C. 552.

3. Upon an agreement between two firms that one should take a contract, and each should do portions of the work and to share the profits equally; it was held, that upon its breach, the plaintiff might maintain assumpsit for damages,

and was not compelled to resort to account render or to a bill in equity for an accounting under a partnership relation. *Canfield v. Johnson*, 144 P. S. 61.

4. In account render by the principal against the executor of an attorney, a statement of the attorney's accounts relating to his client's business in his own handwriting is admissible for the plaintiff, and it need not be shown to have been communicated by the attorney to the plaintiff or his agent. *Johnston v. McCain*, 145 P. S. 531.

5. A partnership having been dissolved by the death of a partner for six years, the statute of limitations is a bar to an action of account render by the representatives of the deceased partner. *Guldin v. Lorah*, 141 P. S. 109; affirming s. c. 8 C. C. 503.

6. Assumpsit lies for the balance of an account where the only work for the jury is to add the debit and credit sides of the account and strike the balance; in such a case it is not necessary to bring account render or to file a bill in equity. *Richey v. Hathaway*, 149 P. S. 207.

7. Where the defendant was the son-in-law of the testatrix, and was employed by her as an agent, and it appeared that he made statements at regular intervals to her and paid the balances due, and that she was entirely satisfied with them; it was held, that no action would lie by her executor for an account. *Bitterling v. Keipler*, 160 P. S. 1.

8. Each tenant in common has an equal right to the possession of the whole, and one can only maintain an action of account at common law against his companion, in the case where he has expressly constituted him his bailiff. *Kennedy's Estate*, 1 Lack. L. N. 135.

9. A writ of account render will not be quashed upon motion on the ground that the defendant is thereby summoned to answer two individuals without any community of interest appearing between them. *Clarke v. Ballou*, 12 C. C. 369; s. c. 1 Dist. Rep. 430.

10. A writ of account render in the

usual form will not be quashed on the ground of the pendency of a previous action in another court, in which previous action the writ had been quashed because not in the usual form. *Clarke v. Ballou*, 12 C. C. 349; s. c. 1 Dist. Rep. 430.

ACCOUNT STATED.

1. In a suit upon an account stated signed by the defendant, it is sufficient to allege that an investigation showed an indebtedness to the defendant, setting forth the items from which the error in the account arose. *Teller v. Sommer*, 132 P. S. 33.

2. If an alleged settlement be attacked, it is admissible to prove the several items claimed to have been included in it. *Mead v. White*, 8 Atlan. 913.

3. An account stated, though not admissible in evidence as a set-off, because barred by the statute of limitations, was held to be admissible as evidence from which a presumption of payment of the plaintiff's claim might be inferred. *Morrison v. Collins*, 127 P. S. 28.

4. In a suit for a balance found in favor of the plaintiff by the settlement of a partnership account, such settlement acquiesced in for years is conclusive unless it clearly be shown, and this within a reasonable time, that a mistake was committed. *Varner's Appeal*, 16 Atlan. 98.

5. Laches may be imputed to an executor or a trustee: where an executor received an account of the settlement of a partnership transaction in which his testator was interested and he made no objection thereto for more than five years; it was held, that he was estopped by his own laches from afterwards disputing the correctness of the account; and this, though the period of limitation had not expired. *Seybert v. Robinson*, 13 C. C. 198 s. c. 32 W. N. C. 200.

6. Where a collecting bank received a check for collection through the clearing house upon a Friday and the check would have been paid if it had been sent to the clearing house on Saturday, but it was

not so sent until Monday, when it was returned dishonored, when the assistant cashier of the collecting bank sent the check back to the plaintiff with a full statement of what had been done, and the accounts between the plaintiff and defendant were then adjusted and the defendant continued to act as plaintiff's clearing house agent for four years more; it was *held*, in an action for the loss, brought nearly six years after the original transaction by plaintiff's assignee for creditors, that the defendant was entitled to go to the jury on a question of the authority of the assistant cashier and a subsequent ratification of his act and of the binding effect of a settlement made and acquiesced in for such a length of time. *Farmers' and Mechanics' Bank v. Third National Bank*, 165 P. S. 500.

7. In an action to recover a balance alleged to be due under a settlement of mutual accounts between the plaintiff's assignor and the defendant, where the defendant denied the alleged settlement and offered evidence that after the assignment he had made a settlement with the assignee and that a balance was found due to the defendant; it was *held*, that the case was for the jury. *Felty v. Deaven*, 166 P. S. 640.

ACCRETION.

See RIVERS AND WATER-COURSES.

ACCUMULATION.

See USES AND TRUSTS, II. (b).

ACKNOWLEDGMENT.

See DEED, IV.: LIMITATION VI. (c):
MORTGAGE, IV.

ACQUIESCENCE.

See ESTOPPEL.

ACTION.

No right of action upon a contract lies by a stranger to it; where one railroad

company leased another for a certain number of years and covenanted to run the road and apply the surplus to the payment of coupons of certain mortgage bonds previously issued by the lessor, and if such surplus was not sufficient, then to advance money to buy the said coupons and hold them as security for such advances; it was *held*, that this did not constitute a contract of guaranty and that the holder of such bonds or coupons had no right of action thereon. *Freeman v. Pennsylvania R. R. Co.*, 3 Dist. Rep. 733.

ADJOURNMENT.

See JUSTICE'S COURTS, V.: PRACTICE,
XVII.

ADMINISTRATION.

See CONFLICT OF LAWS: EXECUTORS
AND ADMINISTRATORS.

ADMISSIONS, DECLARATIONS AND CONFESSIONS.

See EVIDENCE, XXIX.

ADMISSIONS IN PLEADING.

See EVIDENCE, XXVIII.

ADOPTION.

See DECEDENTS' ESTATES: INFANT, I. (d).

ADULTERATION.

See MARKETS: MILK.

ADULTERY.

See CRIMINAL LAW, XXXIII.: HUSBAND
AND WIFE, XI.

ADVANCEMENTS.

See DECEDENTS' ESTATES, VIII.

ADVANCES.

See MORTGAGE.

ADVERSE POSSESSION.

See EASEMENTS: LIMITATION, V.

ADVICE OF COUNSEL.

See ATTORNEYS: MALICIOUS PROSECUTION.

AFFIDAVIT OF DEFENCE.

See PRACTICE, V.

AGE.

See EVIDENCE, XXX. (d).

AGENCY.

See BAILMENT, VIII.: EVIDENCE, XX., XXX.: INSURANCE: FACTORS.

- I. Proof of agency.
- II. Authority of agents.
 - (a) General principles.
 - (b) Brokers.
 - (c) Insurance agents.
 - (d) Revocation of authority.
- III. Ratification.
- IV. Rights of agents.
- V. Responsibilities of agents.
- VI. Rights of principals.
- VII. Rights of principal against agent.
- VIII. Liabilities of principals.
- IX. Compensation of agents.

I. Proof of agency.

1. The authority of an agent cannot be proved by his declarations. *McInnes v. Rittenhouse*, 1 Mona. 657; s. c. 16 Atlan. 818; *Kaufman v. National Transit Co.*, 2 Mona. 36.

2. Upon the trial of a *scire facias sur mortgage*, statements of a conveyancer who negotiated the loan and embezzled the fund that he was acting as agent for the mortgagee, are not admissible to establish such agency. *Pepper v. Cairns*, 133 P. S. 114; s. c. 25 W. N. C. 562.

3. Where an agreement is signed by one party and accepted by the agent of the other party, who acted in the transac-

tion, it binds the latter though not signed by him. *Cowan v. Watkins*, 1 Lack. Jur. 129.

4. Where a lease executed by the lessor's agent, and acquiesced in by the principal, provided that the buildings erected by the lessee should be paid for by the lessor at a price to be determined by arbitrators, it was not necessary that the agent's authority should be in writing. *Dietz v. Lamb*, 5 Kulp 264.

5. Continuous acts performed by an alleged agent in and about the business of his alleged principals, and their recognition of such acts, are evidence from which an agency may be inferred. *The Odorilla v. Baizley*, 128 P. S. 283.

6. A company who accepts the benefit of a contract cannot repudiate the authority of the agent who made it. *Siemens Regenerative Gas-Lamp Co. v. Horstmann*, 24 W. N. C. 396; s. c. 16 Atlan. 490.

7. The real owner of a property and business who permits another to hold himself out as the ostensible owner, is estopped from denying the authority of such agent. *McCracken v. Hamburger*, 8 C. C. 167; affirmed in 139 P. S. 326.

8. One who told his son that if a petition for macadamizing a street was presented, to sign it, who was told by his son that he had signed it, and who failed to disavow his son's act, is estopped from afterwards setting up his son's want of authority to sign. *Brown v. Philadelphia*, 5 Cent. 699.

9. Authority by a son to execute for his father a release of liens will not be inferred from the execution of other releases upon payment in cash. *Corr v. Greenfield*, 134 P. S. 503. See *Deacon v. Greenfield*, 141 P. S. 467.

10. The question of the authority of the maker's business manager to sign his name to the note in suit, or whether it was subsequently ratified, was properly submitted to the jury. *Watson v. Lukins*, 126 P. S. 630.

11. Upon the trial of a *scire facias sur mortgage* the question whether an embezzling conveyancer was acting as agent for

the mortgagee or mortgagor was, under the evidence, properly submitted to the jury. *Sergeant v. Martin*, 133 P. S. 122; s. c. 25 W. N. C. 565; *Sergeant v. Aberle*, 134 P. S. 613; s. c. 26 W. N. C. 87.

12. Where the plaintiffs were manufacturers in Chicago, and shipped oleomargarine to the defendant at factory prices in the city of Chicago less five per cent, defendant paying freight at Pittsburgh, the point of delivery, and to receive for his services whatever price he could obtain above the bill price and freight; it was *held*, that the contract was one of sale and not of agency, and the price was recoverable from the defendant in this state, notwithstanding the prohibitory provisions of the act 21 May 1885 (Brightly's Purdon 1621). *Braunn v. Keally*, 146 P. S. 519.

13. Where the defendants agreed to consign all lumber which they manufactured to the plaintiffs as their sole agents for sale thereof, the said agreement to continue so long as the defendants trading as the — Lumber Company or under any other name should make, work, or manufacture lumber in the southern states, and in the first part of the agreement the defendants were described as trading as the Tar River Lumber Company, whilst in other parts there was a blank before the words "Lumber Company"; it was *held*, in an action for the breach of a contract, that parol evidence was admissible to prove that the defendants organized the Southern Lumber Company, and under its name manufactured lumber and shipped it to other parties from the south. *Hagy v. McGuire*, 147 P. S. 187.

14. Where an owner of patents gave the defendant an option to purchase within sixty days, and subsequently the defendant agreed to furnish the necessary funds to construct certain motors and one dynamo, and the owner of the patents gave the plaintiff an order for the construction of the motors, and the plaintiff charged them to his account; it was *held*, that the agreement between the owner of the patents and the defendant

did not create a relation of principal and agent between them, and plaintiff could not recover. *Morgan Engineering Co. v. McKee*, 155 P. S. 51.

15. In a suit against an alleged principal by the son of an alleged agent, it was *held*, that the declarations of the plaintiff's mother, made before her death, denying her agency, but not made at the time she made the contract with plaintiff, and not made to plaintiff at any time nor in his presence, were not admissible against him. *Harrington v. Bronson*, 161 P. S. 296.

16. Where a brick manufacturer agreed with a paving contractor to furnish bricks of a kind stipulated by the borough, and, after a dispute, the manufacturer entered into an agreement with the authorities that an inspector should be appointed; it was *held*, that the inspector thereby became his agent and he could not complain that the inspector threw out bricks as bad, which were, in fact, good. *Park Fire Clay Co. v. Ott*, 165 P. S. 563.

17. The fact that a person was employed by another as the manager of a stone quarry, does not of itself raise a presumption that he acted as agent in making a contract for laying a flag sidewalk. *Morgan v. Wilson*, 6 Kulp 358.

II. Authority of agents.

(a) General principles.

18. A power of attorney to sign, endorse, and accept all notes, bills, and drafts in connection with a certain business, and to do such other matters and things as belong and pertain to or are connected therewith, does not authorize the attorney to confess judgment against his principal. *Rigg v. Burgauer*, 5 Montg. 69.

19. The business of real estate agents is simply to bring the parties together; they have no implied authority to bind their principals as to the terms of sale, or the damages which may arise from their breach. *Fairmount Cab Company's Estate*, 47 L. I. 524.

20. An agent for the sale of property is not thereby authorized to vary the agreements contained in the deed as executed. Evidence of his parol agreement at the execution of the deed will not be admitted. *Rice v. Lewis*, 4 Atlan. 810.

21. An agent authorized to purchase and sell goods in the cigar manufacturing business in one locality, cannot bind his principal in the purchase of a retail business in another locality. *Rigg v. Burgauer*, 5 Montg. 69.

22. Money voluntarily paid by an agent acting in the scope of his authority, to a creditor claiming it as due from the principal, cannot be recovered back. *Mattes v. Jemison*, 1 Northam. 280.

23. Notice to plaintiff's father in charge of the work, was held to be admissible in evidence as notice to the plaintiff himself. *Short v. Messenger*, 126 P. S. 637.

24. An affidavit of defence by the maker of a note setting up a want of authority of an agent to sign the defendant's name, must specifically state such want of authority. *Canfield v. Ditman*, 16 Atlan. 739.

25. Evidence of authority of agent to extend the time for the performance of a contract. *Locust Mountain Water Co. v. Yorgey*, 13 Atlan. 956.

26. For a treatise on the subject of "scope of employment," see note to *Brooke v. New York, L. E. & W. Railroad Co.*, 1 Atlan. 210.

27. A dwelling-house being erected on a wife's land by the direction of her husband and with her knowledge and concurrence, his agency and her promise to pay will be implied. *Muckel's Estate*, 8 Lanc. 89; s. c. 4 Del. 386.

28. An agent to diligently manage real estate has *prima facie* no authority to execute an exclusive grant to quarry for a term of fifteen years; such a grant, however, may be validated by showing a previous course of dealing which gave a construction by the parties themselves to the agent's authority under his written employment, or that the owners knowingly received rents with-

out objections. The burden of showing such a course of dealing being on the grantee, it is for the jury to determine whether he has met this burden to their satisfaction. *Duncan v. Hartman*, 143 P. S. 595; s. c. 149 P. S. 114.

29. Where a tenant abandons the premises with notice to the agent who had collected the rent, he will not be relieved from liability under the lease unless it be shown that the agent had authority to accept the surrender; where the agent had been appointed by parol, the scope of his authority was to be determined by the jury. *Murphy v. Losch*, 148 P. S. 171.

30. Where the note in suit was signed by a firm name with the addition of a name as manager, and there was evidence that the manager used the name of the firm in making notes, borrowing money and drawing checks, and it also appeared from the copartnership agreement, that he was authorized to sign all notes, checks, drafts, and obligations, and to execute all papers under seal or otherwise necessary for conducting the business; it was held, that there was sufficient evidence to carry to the jury the question of his authority to make the note in suit. *Lerch v. Bard*, 153 P. S. 573.

31. An agent to solicit orders for goods and to collect outstanding accounts has no authority to release one of his employer's customers and to accept in his place the latter's successor in business. *Ludwig v. Gorsuch*, 154 P. S. 413.

32. In an action for the price of melons sold to defendant's agent on the authority of a telegram directing the agent to buy two cars if the stock were of good size and cheap, it was not a good affidavit of defence that the agent was not authorized to buy other melons than those mentioned in the telegram, that those forwarded were small and of inferior quality, and that the defendants had refused to receive them, and upon plaintiff's refusal to order a return, the defendants sold them for sixty dollars less than the sum

claimed by plaintiffs. *Williams v. Sawyers*, 155 P. S. 129.

33. In an action on a promissory note executed by the general manager of a firm, who was also an attorney at law, where it appeared that he was also the attorney of the payee for whom he had been authorized to make the investment, and it also appeared that after his death, the note was found in an envelope endorsed with the name of the payee, and it further appeared that two days after he received plaintiff's check, he had deposited it to his individual account as attorney, and that he paid the interest on the note quarterly; it was held, that the questions of the delivery of the note and whether or not the money was borrowed in good faith for the firm, were for the jury. *Lerch v. Bard*, 162 P. S. 307.

34. A person employed and designated as a general agent with authority to make collections both of cash and notes, has authority to direct an attorney to bring suit and to indemnify a constable by giving a bond in the name of his principal. *Swartz v. Morgan*, 163 P. S. 195.

35. An attorney in fact with power to sell land has no authority to receive payment otherwise than in money, and if he accept payment in the bonds of a corporation which he holds until they become worthless, he is liable to his principal for the price of the land in an action of assumpsit. *Paul v. Grimm*, 165 P. S. 139.

36. A general agent substituted in the place of another to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts and the like, has authority to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction not known to the party dealing with the agent. *Rice v. Jackson*, 16 C. C. 15.

(b) Brokers.

37. In a suit by a broker against his principal for loss occasioned by a transaction on margins, the defendant's testimony that his means were inadequate to carry the contract into effect is admissible upon the question, whether his intention was to buy. *Myers v. Tobias*, 2 Mona. 32.

38. Where stock has been deposited with a broker to secure advancements which have all been paid, the broker has no right to pledge the stock with another person for his own indebtedness in such a way as to irrevocably pass the title, and if he does so, he is liable to the owner for its value. *Van Voorhis v. Rea*, 153 P. S. 19.

39. Where stock is deposited with a broker as collateral for purchases, and it is pledged by the broker and sold by the pledgees, the measure of damages for the conversion of the stock is its market value at the date of the conversion. *Jamison's Estate*, 163 P. S. 143; reversing s. c. 3 Dist. Rep. 217.

(c) Insurance agents.

40. In a suit against an insurance company upon an alleged settlement, the agency of the party, who made the settlement, may be proved by his affidavit, as the general agent of the company, to obtain a continuance. *Parker v. Citizens' Insurance Co.*, 129 P. S. 583.

41. The acceptance of overdue premiums on three previous occasions does not continue the policy in force after a subsequent default; though the agent agreed to continue it for a definite period. *Lantz v. Vermont Life Insurance Co.*, 139 P. S. 546; 27 W. N. C. 276; reversing s. c. 25 Ibid. 356.

42. A clause in a fire policy that any broker procuring the insurance shall be considered the agent of the insured, does not include an agent authorized by the company to take the policy. *Kister v. Lebanon Mutual Insurance Co.*, 128 P. S. 553.

43. If an insurance company by its usual course of dealing, treats its agent as its debtor for premiums on policies delivered to him, payment to the agent is payment to the company. *Pennsylvania Insurance Co. v. Carter*, 11 Atlan. 102.

44. A sub-agent whose appointment was made by its agent but without its knowledge cannot recover compensation for his services. *Powell v. Prudential Insurance Co.*, 4 Montg. 166. See *McGonigle v. Susquehanna M. F. Ins. Co.*, 168 P. S. 1.

45. An insurance agent who fails to obey instructions of his principal to cancel a policy of fire insurance, is liable to his principal in damages for loss occasioned by a subsequent fire. *Knaber v. Union Insurance Co.*, 129 P. S. 8.

46. A policy of fire insurance being the renewal of another policy, the company is bound by the promise of its agent to make it like the first one, and the insured is not bound by a covenant therein, not contained in the first policy. *Burson v. Fire Association*, 136 P. S. 267; s. c. 26 W. N. C. 408.

47. The subjects of fire insurance; authority of agent to vary terms in policy; and proofs of loss; are considered in notes to *Universal Insurance Co. v. Block*, 1 Atlan. 527, and *Lebanon Mutual Insurance Co. v. Erb*, 4 Ibid. 13.

48. An insurance broker who places an insurance in a company which does not exist, is liable for any loss which may occur. *Vann v. Downing*, 10 C. C. 59; s. c. 28 W. N. C. 259.

49. Where an insurance agent is instructed to cancel a policy, it is his duty to notify the insured and not the insurance broker who negotiated the insurance. *Sun Fire Office v. Ermentrout*, 11 C. C. 21.

50. An agent of a fire insurance company who violates his instructions not to insure a certain class of risks, is liable to the company for any loss occasioned by his violation; so, where he receives orders to cancel a policy, and he delays doing so until the property is destroyed by fire, he is liable to the company. *Sun Fire Office v. Ermentrout*, 11 C. C. 21.

51. Where an insurance company dis-sents from the action of their agent in placing a policy in violation of express instructions, its failure to signify its dissent to its agent is not tantamount to an approval unless such failure continues for more than a reasonable length of time; where the company in such a case defends against the policy and notifies the agent that they will hold him liable for loss in case of the failure of the suit, the agent will be held liable for the costs but not for counsel fees nor for the costs of an appeal where no appeal is necessary. *Sun Fire Office v. Ermentrout*, 11 C. C. 21.

(d) Revocation of authority.

52. Where the defendant purchased ice from plaintiff's agent, and plaintiff's husband notified the defendant not to pay the balance of money due to said agent; it was held, that the revocation of authority to collect the money was sufficient, and defendants having paid the money to the agent, could be compelled to pay it again to the plaintiff. *Lancaster v. Knickerbocker Ice Co.*, 153 P. S. 427.

53. Where several tenants in common appoint one of their number to collect the rents, one of the joint owners has a right, at any time, to revoke the agency so far as his own interest is concerned, and after notice of such revocation, it is the duty of the tenant to pay over to the revoking owner his proportionate share of the rent. *Barrett v. Bemelmans*, 163 P. S. 122.

54. Where a dealer has been in the habit of selling goods to an agent, notice of the revocation of the agency may be shown by written or oral communication from the principal or agent or by circumstances, and a course of dealing incompatible with the absence of notice. *Perrine v. Jermyn*, 163 P. S. 497; *Grauley v. Jermyn*, 163 P. S. 501.

55. A general power of attorney for the sale of land is revocable at will, and is revoked by the death of the principal;

it is not rendered a power coupled with an interest by a stipulation that the agent shall receive a certain proportion of the proceeds obtained by the sale. *Shisler's Estate*, 13 C. C. 513.

56. Where a contract of employment as agent contains no stipulation as to its duration, the employer has the right to terminate it at any time, and to discharge the agent without notice. *Rice v. Fidelity and Casualty Co.*, 1 Lack. L. N. 111.

III. Ratification.

57. A partner having knowledge of the act of his co-partner, and who participates in the enjoyment of the money received, thereby ratifies his co-partner's act. *Levick's Appeal*, 2 Atlan. 532.

58. There can be no binding ratification, unless the principal be fully informed of what his agent has done. *Zoebisch v. Rauch*, 133 P. S. 532.

59. In an action against two upon an alleged joint contract, a letter by one defendant to the other is admissible on the question of ratification. *Ibid.*

60. Where plaintiff's agent without authority from defendant ordered coffee of the plaintiff to be delivered to the defendant, and the latter after its arrival, instead of repudiating the transaction, permitted the same agent to take it away and sell it, and subsequently received money from him and forwarded it to the plaintiff; it was held, that the defendant had ratified the transaction. *Haworth v. Truby*, 138 P. S. 222; s. c. 27 W. N. C. 99; 38 P. L. J. 138.

61. The subject of the ratification of the act of an agent is considered in a note to *Vermont State Baptist Convention v. Ladd*, 4 Atlan. 638.

62. Where the contract sued on was made with the agent of the plaintiff firm and such agent testified as to its terms; it was held error to exclude an offer to prove by the agent that the agreement was submitted to his firm and ratified by them. *Canfield v. Johnson*, 144 P. S. 61.

63. Where an agent has procured the note of a third person drawn to the order of his principal, upon the condition that it was to be used for a particular purpose, the principal on accepting the note will be held to be bound by the agent's stipulation; and this, though it was unauthorized. *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 P. S. 398.

64. Where the agent of a vendor of land without written authority, signs for the vendor a contract for the sale of land, such contract under the statute of frauds, when ratified in writing by the vendor, will have the same effect as though signed by the agent in pursuance of lawful authority by writing; provided the vendee has not repudiated the contract before such ratification. *McClintock v. South Penn. Oil Co.*, 146 P. S. 144.

65. The acceptance by a corporation of the contract of its officer, and action under it, is a ratification of the authority of the officer in making the contract. *Goldbeck v. Kensington National Bank*, 147 P. S. 267; affirming s. c. 10 C. C. 97; 48 L. I. 76.

66. Where a vendee of goods from a travelling salesman made a claim for defects, and the principal authorized his salesman to make an allowance of fifty dollars, but the salesman agreed to take back the goods on receiving another order and this agreement was repudiated by the purchaser; it was held, that the agent's authority was a question for the jury. *Louchhiem v. Davies*, 148 P. S. 499.

67. Where the attorney for a judgment debtor contracted with the plaintiff as to the application of funds to be derived from the private sale of defendant's lands, and such agreement showed no authority to said attorney to receive the money on the plaintiff's behalf; it was held, that the fact that the plaintiff knew that the attorney was to receive the proceeds of such sale, did not make the latter the plaintiff's attorney or operate as a ratification of his acts. *Kephart v. Zeek*, 151 P. S. 423.

68. Under the act 21 March 1772

(Brightly's Purdon 941), a lease under seal for a term of ten years, executed by an agent without written authority, creates a tenancy at will, or at most, a tenancy from year to year, terminable at the end of any year at the will of either party; and, after the death of the tenant and notice by his executors of his intention to surrender, the liability of the tenant's estate cannot be changed by a ratification of the lease in writing by the principal. *Loran's Estate*, 10 C. C. 554; s. c. 29 W. N. C. 115.

IV. Rights of agents.

69. Where a real estate broker has leased the premises in his own name for a long term, he is not entitled to retain from the rents collected by him for a short time, commissions upon the aggregate amount of the rentals for the entire term of the lease. *Lucas v. Jackson*, 140 P. S. 122.

70. Where the defendant employed the plaintiff as his agent to sell proprietary tablets under a written contract for several years, and the defendant agreed to furnish the plaintiff sufficient samples and printed matter relating thereto, as the same might be called for, and the plaintiff was made the sole agent on the condition that he should use his reasonable endeavors to introduce and sell the tablets, and should devote his entire time and attention to that purpose; it was held, in an action for the breach of the contract which was defended on the ground that the plaintiff's demands were unreasonable and his methods of distribution inefficient, that the plaintiff had a right to demand samples in quantity fairly and reasonably sufficient, and what was a reasonable quantity was a question of fact for the jury. *Jensen v. Perry*, 126 P. S. 495. Upon the questions of reasonableness and efficiency, the opinions of experts were admissible. It was also competent for the defendant to prove by a witness that he had made an investigation but could find no samples, but that the

plaintiff was ignorant or unskilful in the business would not entitle the defendant to a verdict. *Perry v. Jensen*, 142 P. S. 125.

71. Where the plaintiff procured an oil lease to be executed to the defendant, and was to receive for his services either an interest in the lease or the sum of two hundred dollars, and the defendant forfeited the lease by non-development; it was held, that the defendant having failed to exercise his option, the plaintiff was entitled to compensation fairly determinable by the amount fixed by the defendant himself in his agreement. *McDonald v. Liggett*, 146 P. S. 460.

72. An agent is not estopped by his acts from showing the truth as to the condition of his account with his principal, where the position of the principal was in no way prejudiced by the agent's conduct. *Stewart v. Parnell*, 147 P. S. 523.

73. An agent is not prohibited from making profit out of the sale of his principal's property if it appear that the agent's interest or profit was acquired by him after making known all material facts to, and by the consent of the plaintiff prior to the sale. *Kramer v. Winslow*, 154 P. S. 637.

74. Where an agent or consignee has his principal's property in his possession and is responsible for it and has a special interest in it to the amount of his commission, he may insure it in his own name, and in case of loss he may recover the full amount of his policy, holding all beyond his own interest in trust for his principal. *Roberts v. Firemen's Ins. Co.*, 165 P. S. 55.

V. Responsibilities of agents.

75. An agent for care and custody only and not to sell, is not liable to his principal for a share of the profits received by such agent from the purchaser upon a sale made directly by the principal to the purchaser in the absence of the agent. *Philadelphia Nat. Bank v. Pennsylvania Warehousing Co.*, 141 P. S. 517.

76. Where a person assumes to act in this state as an agent for a foreign corporation which has not registered itself in the office of the secretary of the commonwealth under the provisions of the act 22 April 1874 (Brightly's Purdon 937), he must be held cognizant of the incapacity of his company to do business, and assuming to act for the company in this state, he is personally liable for the price of goods furnished to him in this state upon his order as such agent; and his liability is not limited to the penalty prescribed by that act. *Lasher v. Stimson*, 145 P. S. 30.

77. Where an attorney is employed to take possession of a number of properties and to rent them until sold, to make sale of them and to collect all rents and purchase money, and to pay all taxes and expenses out of the moneys so received, and he dies before completing his engagement, the statute of limitations runs against his liability to account only from his death. *Johnston v. McCain*, 145 P. S. 531.

78. In an account render by the principal against the executor of an attorney, a statement of the attorney's accounts relating to his client's business in his own handwriting is admissible for the plaintiff, and it need not be shown to have been communicated by the attorney to the plaintiff or his agent. *Johnston v. McCain*, 145 P. S. 531.

79. An agent who makes a contract in excess of his authority, and by which his principal refuses to be bound, is personally liable to the other party to the contract, but a subsequent ratification of the agreement by the principal will release the agent. *Hopkins v. Everly*, 150 P. S. 117.

80. A real estate broker is not liable for failure to have a proper transfer made of a fire policy where it does not appear that he was ever employed by the plaintiff to render such service; he could not be held liable by reason of his receipt of a fee for services in attending to the fire loss, where such fee was paid after

the fire had occurred. *Herbert v. Lukens*, 153 P. S. 180.

81. A lessee cannot, in the face of the terms of a written lease and an assignment thereof, relieve himself of personal liability by showing by parol evidence that he was acting as agent of a proposed corporation, at least without showing that the execution of the lease was induced by fraud or misrepresentation. *Sanders v. Sharp*, 153 P. S. 555.

82. A collector who undertakes the collection of a claim is responsible for the negligence of the attorney employed by him by which the claim is lost. *Siner v. Stearne*, 155 P. S. 62.

83. A person who signs a release of liens falsely representing that he has authority to do so from the owner of the lien, is liable in damages to a person purchasing the property on the faith of the release. *Lane v. Corr*, 156 P. S. 250.

84. A firm of real estate brokers who agree to sell land for another, cannot sell it to one of their employees; if they do so they are bound to account for all the profits which the employee may have made out of the transaction; and this, although they themselves may not have participated in the profits. *Powers v. Black*, 159 P. S. 153.

85. Agents who put themselves in a position of hostility and litigate in equity with their former principals, will be charged with costs. *Burke v. Teller*, 11 C. C. 59.

86. Where certain stock of a corporation was in the name of an agent who offered to assign the same as collateral for certain bonds that were to be issued in accordance with a contract of sale for the stock of another corporation; it was held, in a proceeding to compel the consummation of the alleged sale, that the agent would be compelled to disclose his agency as to the ownership of the stock, or that the shares so held would be excluded in making up a sufficient number of shares to comply with the agreement. *Norristown Traction Co. v. Stingluff*, 7 Montg. 126.

87. Where an assignee of certain book accounts was authorized to collect the same and apply the proceeds to the indebtedness of the assignors, and the assignee appointed the defendant his agent to collect said accounts, and subsequently an agreement in writing was made between the assignee and certain other creditors of the assignor, by which all the parties appointed the defendant to collect the accounts and agreed that after the assignee's claim was paid the balance should be paid to the other creditors; it was *held*, that the defendant was not invested with judicial power in the distribution of the proceeds; it was his duty to apply them to the claims of the assignee until such claims were paid, and, having paid them to the other creditors, he was liable to repay them to the plaintiff, the assignee. *Johns v. Ehrehart*, 7 York 125.

VI. Rights of principals.

88. Goods purchased by an agent upon the order of his principal become the property of the latter at the moment of purchase. *Brownfield v. Johnson*, 128 P. S. 254.

89. Where the property of the principal is in the possession of his buying agent and it is levied upon and sold as the property of the agent on a debt of the latter subsisting prior to the creation of the agency, the principal may maintain trespass against the sheriff notwithstanding the fact that the agency was undisclosed to the execution creditor. *Sweigert v. Finley*, 144 P. S. 266.

90. Where a simple contract other than a bill or note is made by an agent in his own name, his undisclosed principal may maintain an action upon it and an unauthorized and unnecessary addition of a seal to such a contract may be treated as surplusage. *Lancaster v. Knickerbocker Ice Co.*, 153 P. S. 427.

91. In a suit by a principal for the price of goods sold by his agent, where

the defendant does not deny that he knew that the vendor was the plaintiff's agent, he cannot set off a claim due to him by the vendor. *Catasauqua Mfg. Co. v. Roberts*, 2 Dist. Rep. 392.

VII. Rights of principal against agent.

92. An agent to collect moneys for an estate is not responsible for the defalcations of an assistant agent also appointed by the trustees of the estate; and this, though the assistant agent's collections be entered in the same book as those made by the defendant. *Sergeant v. Emlen*, 47 L. I. 464.

93. An agent with authority to sell land at a specified price is liable to his principal for a greater price received by him and concealed from his principal. *Kramer v. Winslow*, 130 P. S. 484.

94. An agent who sells land of his principal and agrees to pay the purchase money to the latter, as payments are made to him, the agent, and who subsequently accepts a mortgage in his own name for the purchase money *eo instanti*, becomes liable to his principal for the amount. *Long v. Rhoads*, 126 P. S. 378.

95. A commission merchant who sells a consignment on credit and takes a note therefor in his own name, including sales for other parties, is liable to his consignor for the amount due on the consignment. *Brown v. Delk*, 132 P. S. 152.

96. An agreement was made to allow an agent \$100 per month, the same to be charged against his stipulated commissions; *held*, that at the termination of his agency his advancements having exceeded his commissions, his principal had no right of action for the excess. *Mixsell's Estate*, 7 C. C. 443; s. c. 46 L. I. 476.

97. Where a real estate broker was employed by the vendor to effect a sale and acted as the agent of the purchaser; it was *held*, that the vendor could recover back from the broker a commission paid to him in ignorance of that fact. *Cannell v. Smith*, 142 P. S. 25.

VIII. Liabilities of principals.

98. A principal is not liable for a fraudulent representation made by an agent beyond the scope of his real or apparent authority. *Megargel v. Protheroe*, 1 Lack. Jur. 125.

99. A mortgagee is not affected by the act of the agent of the mortgagor, in not paying over to the latter the whole of the amount borrowed. *Barnard's Appeal*, 3 Atlan. 764; affirming *Morris v. Barnard*, 15 W. N. C. 79.

100. The owner of a mortgage bond is not bound by the unauthorized act of his agent to collect rents, pay taxes, etc., in transferring the same. *Yard's Appeal*, 12 Atlan. 359.

101. A sewing-machine company was held liable for the contract of its general manager in the employment of a canvasser and agreement to pay him commissions on his sales. *American Buttonhole, Overseaming and Sewing-Machine Co. v. Maurer*, 10 Atlan. 762.

102. The liability of a principal to pay his agent for 400 hectolitres of Brazil-nuts, the purchase of which was ordered, was not affected by the fact that the nuts were shipped with others of the same quality in one hold, that being the usual method of shipping. So the agent was not bound to set apart the exact quantity before offering to deliver. *Brownfield v. Johnson*, 128 P. S. 254.

103. Where the defendant's agent was instructed by him to purchase cows of a certain color, in a suit for the purchase money, the plaintiff is entitled to a verdict, unless it be shown that the condition was made known to him. *Worth v. Ellis*, 4 Del. 336.

104. As to the effect of the payment of usury to an agent, see notes to *Bonus v. Trefz*, 2 Atlan. 375, and *Nichols v. Osborne*, 3 Ibid. 155.

105. A vendor is as much affected by false representations made by a third person acting for him in his presence as if made by himself; and this, whether such representations were honest or

fraudulent. *Blygh v. Samson*, 137 P. S. 368.

106. Where a person purchases at sheriff's sale the personal property on a farm and in a store, and leaves the execution defendant in possession to conduct the farm and run the store as his agent, such purchaser is answerable to all persons dealing with the defendant in the execution, to whom it is not known that the real arrangement was that the defendant in the execution should use the property for his own benefit until, if possible, he could pay for it. *Harrington v. Bronson*, 161 P. S. 296.

107. An action of deceit by a vendee of land against a vendor to recover damages for misrepresentations made by the vendor's agent as to the quantity of the land conveyed, cannot be sustained in the absence of clear evidence of fraud and of some evidence of participation or knowledge on the part of the principal or circumstances which should have put him upon inquiry. *Freyer v. McCord*, 165 P. S. 539.

108. In an action upon a purchase-money mortgage, it is a good defence that the plaintiff's agent, through whom the sale was negotiated, represented the house to be built on solid land, when in fact it was built on made ground and had settled and cracked to the damage of the defendant; a principal is bound by the acts of his agent within the scope of the authority which he is held out to the world to possess; and this, though the agent acted contrary to instructions. *McNeile v. Cridland*, 168 P. S. 16; s. c. 36 W. N. C. 274.

109. To affect a principal with constructive notice of the knowledge of his agent or attorney, it is necessary that such knowledge be gained in the course of the same transaction in which he is employed by his client. *Dunning v. Reese*, 7 Kulp 201.

110. Where an agent makes a written contract in his own name, the fact of such agency may be shown and the contract may be enforced against the prin-

cipal. *Rice v. Fidelity and Casualty Co.* 1 Lack. L. N. 111.

IX. Compensation of agents.

111. If the purchaser made the purchase through the agent's sign upon the house, it is no defence to a suit for commissions that the purchaser never had any dealings with the agent, but made the bargain with the owner himself. *Jackson v. Carrick*, 25 W. N. C. 132.

112. An agent is entitled to his compensation, though the sale be not consummated, the same being caused by the defective title of the principal to some of the property. *Sweeney v. Ten Mile Oil and Gas Co.*, 130 P. S. 193.

113. An agreement was made to allow an agent \$100 per month, the same to be a charge against his stipulated commission; *held*, that at the termination of his agency his advancements having exceeded his commissions, his principal had no right of action for the excess. *Mixsell's Estate*, 7 C. C. 443; s. c. 46 L. I. 476.

114. A real estate broker cannot recover commissions from the vendor, where he had found a purchaser, and subsequently agreed that the property should be sold to another purchaser from whom he received a liberal compensation; and this, though the vendor knew he was to receive such commission from the vendee. *Rice v. Davis*, 136 P. S. 439; s. c. 26 W. N. C. 405.

115. The questions of the nature of the plaintiff's (a real estate broker) services and the amount of compensation were properly, under the evidence, submitted to the jury. *Ringgold v. Rhodes*, 132 P. S. 189.

116. As to when a real estate agent has earned his commission, see authorities cited in note to *Pratt v. Patterson*, 3 Atlan. 860.

117. As to the right of a life insurance agent to commissions on life premiums, see *Van Uxem v. Sellers*, 2. Mona. 63.

118. To entitle a broker to his commissions for obtaining money on mortgage,

he must have procured it within a reasonable time, and before the revocation of his authority. *Cochran v. Duffee*, 4 Del. 342.

119. A broker is not entitled to commissions on sales made without request or employment; and this, notwithstanding a previous sale on which he had been paid a commission. *Mayer v. Rhoads*, 135 P. S. 601.

120. Commissions for selling land are not earned until the parties have entered into a contract for the sale, enforceable between them. *Michener v. Beirn*, 9 C. C. 637; s. c. 48 L. I. 56.

121. An agent cannot recover a stipulated compensation for procuring a purchaser of the real estate of a corporation, in the absence of evidence that his employment was previously authorized or subsequently ratified. *Copeland v. Tannery Co.*, 142 P. S. 446.

122. Under a contract for payment for services in procuring a purchaser for real estate, a recovery cannot be had on the submission of a proposition from a party with whom the owners had been negotiating. *Hartley v. Anderson*, 150 P. S. 391.

123. Where the plaintiff brought about a contract of sale, which was afterwards repudiated by the purchaser, but who notified another party who did purchase; it was *held*, that the plaintiff could not recover for his services, where it did not appear that the actual purchaser assumed the previous contract. *Johnson v. Seidel*, 150 P. S. 396.

124. Where a broker has brought the parties together, and the meeting has resulted in a contract, the broker is entitled to his commissions although the contractor is required to enter into competition with other bidders before the contract is awarded to him. *Holmes v. Neafie*, 151 P. S. 392.

125. The authority of a real estate broker to sell land may be revoked at any time by his principal, but the broker is entitled to recover such expenses as he may have incurred prior to the revocation

of the authority. Where a broker agreed to sell the defendant's building lots upon a certain commission for each lot sold, and plaintiff sold two lots, when it was found that defendant's wife would not join in the deed, and for that reason no further sales were made; it was *held* to be error to allow the plaintiff to recover the whole amount of commissions he would have been entitled to had all the lots been sold. *Hill v. Jones*, 152 P. S. 433.

126. Where a ship-broker has procured a charter party for shippers, he is entitled to his commission even though the vessel and the goods are lost by the perils of the sea. *Hagar v. Donaldson*, 154 P. S. 242; affirming s. c. 11 C. C. 252.

127. Where an agent to sell real estate entered into an agreement with the proposed purchaser by which the latter and the agent were to purchase the property jointly; it was *held*, that the owner was not obliged to carry out his agent's agreement to sell, and that the agent was not entitled to his commissions. *Finch v. Conrade's Executor*, 154 P. S. 326.

128. As to the sufficiency of an affidavit of defence in an action for commissions for selling books, see *Murphy v. Stanley-Bradley Publishing Co.*, 155 P. S. 25.

129. An agent employed to sell land, whose authority has been revoked, may recover from his principal the expenditures he has been encouraged to make in effecting the sale, together with compensation for his labor and time. *Jaekel v. Caldwell*, 156 P. S. 266.

130. Where a real estate broker has commenced negotiations with a purchaser, the owner cannot, while such negotiations are pending, take the matter into his own hands and complete the sale either at or below the price first limited and then refuse to pay the broker's commission. *Gibson's Estate*, 161 P. S. 177; affirming s. c. 14 C. C. 241.

131. A broker who is employed to borrow money on mortgage is entitled to his commission if he brings to his principal

a party ready and willing to lend the money, where the failure of the party produced by him to lend the money occurs through the fault or inability of the proposed borrower; in such a case the employment of the broker is sufficient authority to the latter to make representations and negotiations on the basis that his principal has a marketable title, and it is within the implied authority of the broker to agree on behalf of his principal to submit the title to opinion of counsel. *Middleton v. Thompson*, 163 P. S. 112. See *Vincent v. Woodland Oil Co.*, 165 P. S. 402.

132. Where a broker was employed to negotiate a loan on mortgage and he procured a party who would lend the money, and in the memorandum of agreement between the broker and the proposed lender, was a provision that the borrower should pay the state tax, which was contrary to the borrower's instructions; it was *held*, in an action by the broker to recover his commissions, that he was entitled to show by the lender, that such provision was a mistake through the use of an old printed form, and that it was no part of the actual contract. *Middleton v. Thompson*, 163 P. S. 112. See *Vincent v. Woodland Oil Co.*, 165 P. S. 402.

133. Where a person is employed to sell real estate and it does not appear that his services are to be rendered on a mere contingency, he is entitled upon a revocation of his authority to compensation for his time, labor and expenses before notice of such revocation. *Vincent v. Woodland Oil Co.*, 165 P. S. 402.

134. Where the plaintiff had in charge the sale of a valuable oil property, but finding that he could not give the matter personal attention, he arranged with the defendant to sell the property, who agreed to share the commissions with him; it was *held*, in an action to recover half of the commissions on the sale, that the case was for the jury, and that it was immaterial that at the time the agreement was made, the property had been withdrawn from the market, and that nego-

tiations with the purchaser whom the plaintiff had approached were not resumed until sometime afterwards. *Loan v. Gillmor*, 165 P. S. 643.

135. Where a broker procures a customer for goods and the seller accepts the customer as a purchaser and receives his order and undertakes to execute it, the broker is entitled to his commissions; where the purchaser refuses to receive the goods, alleging that they were not properly made, the seller cannot relieve himself of liability to the broker by saying that the commission was not to be paid until the goods were delivered and paid for. *Reinstein v. McCadden*, 166 P. S. 340.

136. Where a real estate broker has not paid or taken out a license at the time the contract is made between him and the owner, he cannot recover his commission for the sale of the property; and this, though the sale be not made until after the license is taken out. *Tanhauser v. Corbin*, 3 Lack. Jur. 89.

137. Where a real estate broker is authorized to sell and has commenced a negotiation, the owner cannot take it into his own hands and complete it and then refuse to pay the broker's commissions. *Tanhauser v. Corbin*, 3 Lack. Jur. 89.

AGISTMENT.

See BAILMENT.

AGREEMENTS BETWEEN COUNSEL.

See PRACTICE, XXXIX.

AGRICULTURAL SOCIETIES.

1. Where two agricultural societies agreed to hold a joint fair and the treasurer of one society sued the treasurer of the other to recover half the net proceeds of the same; it was held to be a good affidavit of defence that there had never been a settlement of accounts between the two societies, that the defendant was not a party to the contract, and

that he had received the money as treasurer of his own society and had paid it out in accordance with the rules of, and as directed by, that society. *Pennsylvania State Agricultural Society v. Jermyn*, 167 P. S. 359.

ALIBI.

See CRIMINAL LAW, XVII.

ALIENATION.

See DEVISE, VII.

ALIENS.

1. A declaration of intention cannot be made before a deputy clerk of the courts away from the county seat. *Santo Scola's Case*, 8 C. C. 344; contra, *Boso's Application*, 6 Kulp 83.

2. If an alien minor can be naturalized or declare his intentions, he can only do so through a guardian or next friend. *Lawler's Application*, 5 Mont. 77.

3. In a contested election case, a certificate of naturalization, though conclusive of the facts therein contained, is not conclusive evidence of identity. *O'Day's Contest*, 5 Kulp 491.

4. The court will not naturalize an applicant who, within five years, has been convicted of participating in an unlawful assembly; where, however, he is otherwise of good character, such conviction may not debar him from citizenship upon a future application. *Terry's Case*, 1 Dist. Rep. 266.

5. Congress has no power to impose a duty of naturalization upon the state courts; such courts may absolutely refuse to act, but if they assume the powers and duties incident thereto, they must see that the conditions precedent prescribed by Congress are complied with, and they may prescribe other conditions and may reject, unless satisfied as to the proper qualifications of the applicant. *Lab's Petition*, 3 Dist. Rep. 728. See *Bodek's Case*, 3 Dist. Rep. 725.

6. An alien will not be naturalized unless the court be satisfied that he has at least some comprehension of what the constitution is and of the principles it affirms. *Bodek's Case*, 3 Dist. Rep. 725.

7. A decree of naturalization will not be set aside at the instance of a private person upon an allegation of a fraudulent application and the false deposition of a voucher; such a proceeding must be at the instance of the legally qualified officers of the United States, the state or the county. *In re Shaw*, 2 Dist. Rep. 250.

8. Where a Scotchman had followed the calling of a marine engineer since 1879 on board of vessels sailing under the Belgic flag but navigated by a Pennsylvania corporation, and in 1882 while touching at Philadelphia, he took out his first papers, and four years later, on the oath of a voucher that he had resided five years in the country and one year in this state, he was granted a certificate of naturalization; it was *held*, that the certificate was properly issued and that his residence from the exigencies of his calling was sufficiently proved by evidence of his express declaration in 1879, that it was his intention to reside with his family in this country and to become a citizen thereof. *In re Shaw*, 2 Dist. Rep. 250.

9. Under the act 2 April 1868 (Brightly's Purdon 893), the fees to be paid prothonotaries outside of the city of Philadelphia for naturalizing aliens are, for first papers, one dollar and fifteen cents, and for second papers one dollar and twenty-five cents. *Naturalization Fee*, 15 C. C. 225.

10. A citizen of the United States, not a citizen of this State, or a resident alien may become a stockholder in an agricultural or scientific association incorporated by the court. So, he may vote his shares and become a director. *Comm'th v. Detwiller*, 131 P. S. 614; reversing s. c. 1 Northam. 257.

ALIMONY.

See HUSBAND AND WIFE, XIII.

ALTERATION.

See SURETY.

- I. Of bonds and judgment notes.
- II. Contracts.
- III. Deeds.
- IV. Leases.
- V. Mortgages.
- VI. Negotiable instruments.
- VII. Pleadings and process.
- VIII. Releases.
- IX. Wills.

I. Of bonds and judgment notes.

1. A bond, not filled up at the time of signing, but subsequently filled up in the manner contemplated by the parties, is a valid obligation. *Bugger v. Cresswell*, 12 Atlan. 829.

2. The court is not bound to accept a license bond with a material alteration therein which is unexplained. *Nordstrom's Petition*, 127 P. S. 542.

3. Where a bond has erasures and alterations apparent upon its face, the person who offers it in evidence is bound to explain the erasures and alterations for the satisfaction of the jury. *Nesbitt v. Turner*, 155 P. S. 429; affirming s. c. 7 Kulp 41.

4. If an alteration or interlineation of a judgment note is of such a character that it will be presumed to have been made before execution, it is entitled to be read in evidence; it is for the other side to attack it. *Weaver v. Painter*, 3 Cent. 259.

5. The alteration of the individual judgment note of a partner, by the subsequent signature of his co-partner and the words "trading as," etc., is a material alteration, and a judgment entered thereon against the firm will be opened at the instance of the original maker. *Kocher v. Schoener*, 6 Kulp 41.

6. A judgment will not be opened on the affidavit of a defendant that the note was altered after he signed it, he being contradicted by the corroborated testimony of the plaintiff. *Bender v. Gabel*, 4 Del. 192.

7. Upon an issue to determine the validity of a judgment note, where both parties acknowledged that the rate of the attorney's commission was inserted after the delivery of the note, the question as to who made the alteration was for the jury. *Martin v. Kline*, 157 P. S. 473.

8. The interlineation in a judgment note given by a married woman, of the words "for indebtedness incurred in the management of my separate estate and in connection with a separate business in which I am engaged," was held to be a material alteration. *Wiseman v. Fleischer*, 10 C. C. 300.

9. Where the words "waiving all exemption laws" were added to a judgment note after its execution and delivery, and both parties denied having written them, the court opened the judgment and set aside a writ of *fiery facias* issued thereon. *Rutt v. Martin*, 8 Lanc. 274.

10. The filling out of a commission clause in a judgment note is a material alteration sufficient to avoid the note; where, however, such alteration was made after the plaintiff gave the note up for collection; it was held, that full justice was accomplished by striking out that portion of the judgment and allowing the rest to stand. *Rollins v. Evans*, 2 Lack. Jur. 33.

II. Contracts.

11. The interlineation of the word "by" over the word "before" in a contract to complete by a certain time, does not render the contract inadmissible, the legal effect thereof not being changed. *Express Publishing Co. v. Aldine Press*, 126 P. S. 347.

12. Where a simple contract other than a bill or note is made by an agent in his

own name, his undisclosed principal may maintain an action upon it, and an unauthorized and unnecessary addition of a seal to such a contract may be treated as surplusage. *Lancaster v. Knickerbocker Ice Co.*, 153 P. S. 427.

13. Where school directors advertised for bids for the erection of two school-houses, and let the contract to one of several bidders according to drawings and specifications, and when the work was completed, the directors allowed the contractor a bill for "extras"; it was held, upon an appeal from the township auditors who charged the directors with the latter amount, where it was shown that there were many erasures in the specifications, and the unsuccessful bidders testified that the extras allowed were figured on by them and included in the specifications, that it should have been left to the jury whether the erasures were made after the contract was let or before. *Carbondale Township School District v. Tuttle*, 2 Lack. Jur. 333.

14. Where the original contract was fraudulently altered by the contractor; it was held, that such alteration would not defeat the right of a sub-contractor to file a lien for materials furnished under the original contract where it appeared that the sub-contractor had no knowledge of such alteration, and it did not appear that the materials were furnished after the alteration. *Hall v. Brown*, 7 Montg. 182.

III. Deeds.

15. A deed was properly admitted in evidence where alterations in the date were properly noted in the attestation clause; and this, though a similar alteration in the date of the acknowledgment was unexplained. *Bowlby v. Thunder*, 3 Cent. 911. See s. c. 105 P. S. 173.

16. Where an interlineation in a deed appears to be in the same handwriting as the body of the deed, and to have been made with the same ink and probably with the same pen, a judgment will not be reversed because of the admission

of the deed in evidence, where there is nothing to indicate fraud and the interlineation itself is apparently prejudicial to the appellee rather than to the appellant. *Zimmerman v. Camp*, 155 P. S. 152.

17. Where the printed words in a tax deed "said second Monday in June" were erased, and the words "twenty-fourth day of Jan. at an adjourned sale" were interlined over the erasure in the same ink and handwriting as the body of the deed, it seems that it was not such an alteration as required an explanation prior to the admission of the deed in evidence. *Lee v. Newland*, 164 P. S. 360.

IV. Leases.

18. In an action on a lease to recover taxes which the tenant covenanted to pay, where the copy of the lease is filed, an affidavit of defence is not sufficient which does not deny that the copy is a true copy, nor set forth what words were scored out and intended to be eliminated therefrom, but only gives the defendant's understanding of the effect of the erasure of certain words which are not given. *Haynes v. Sinnott*, 160 P. S. 180.

V. Mortgages.

19. Any material alteration of a mortgage renders it absolutely void; where the record showed that the number of days allowed for default in the *scire facias* clause was left blank, and the mortgage when suit was brought upon it showed that the blank had been filled with the words "twenty days"; it was held, that the mortgage was absolutely void. *McIntyre v. Velt*, 153 P. S. 350.

VI. Negotiable instruments.

20. If a check appears on its face that it might have been altered in its amount, and such alteration is alleged, it cannot be received in evidence until the alleged alteration is first explained. *Nagle's Estate*, 134 P. S. 31; s. c. 26 W. N. C. 14; reversing s. c. 2 Northam. 73.

21. If no explanation be given of a material erasure in a note, no recovery can be had thereon. *Hood's Appeal*, 7 Atlan. 137.

22. Where a note in favor of a married woman was altered by an interlineation by her husband, without her knowledge, the court refused to strike off the judgment, but simply opened it to the extent of the amount so added to the note. *Weaver v. Painter*, 3 Cent. 259.

23. The alteration of a promissory note by the addition of a confession of judgment will avoid it. *Hoover v. Diem*, 4 Del. 155.

24. The endorsement of a note with the date left out, in renewal of another note in bank, is an implied authority to the bank to insert the date; the endorser's liability will not be affected by his subsequent unconsciousness from sudden sickness before the note was used, of which the bank had notice. *Bechtel's Estate*, 133 P. S. 367.

25. In an action upon a joint and several promissory note given for the price of a horse by the purchaser and a surety, where it is apparent upon inspection that the date of the note has been altered; if the note was altered before it came into the plaintiff's hands, he is entitled to a verdict against both the maker and the surety; if the alteration was made by plaintiff innocently after it came into his hands, the plaintiff could not recover against the surety, but might recover upon the original consideration against the maker; if the alteration was made by plaintiff with fraudulent intent, he could not recover against either defendant. Where the plaintiff testified that the alteration was made before the note came into his hands, the note was properly admitted in evidence, leaving it to the jury to determine the truth of the allegation. *Miller v. Stark*, 148 P. S. 164.

26. Where a promissory note shows a material alteration on its face, it is not admissible in evidence without an explanation; recovery cannot be had against an endorser where it appears that the

note was changed from four months to ninety days without the endorser's knowledge. *Hartley v. Corboy*, 150 P. S. 23.

27. It is a material alteration to willfully cause the name of a person to be placed on paper as a witness who was in no respect a witness to the transaction; an instrument, however, will not be avoided because a person attempted to endorse a note, but through ignorance, wrote his name as a witness. *Fisher v. King*, 153 P. S. 3.

28. Where a statement in assumpsit avers a debt for money loaned and in the same count set forth a copy of the note given for the debt, the note may be treated at the trial as the real cause of action, and where the defence is an alleged fraudulent alteration of the amount of the note, evidence is admissible that plaintiff, at the time, was borrowing a larger sum from a third party, and that he had declared to defendant's family that nothing was due him, and that he did not mention the debt when the inquiry was made at the inquest of lunacy held over the debtor. *Winters v. Mowrer*, 163 P. S. 235.

29. Where the note sued on plainly showed an alteration and the note was signed by two makers; it was *held* to be competent, upon a claim against the estate of one of the makers, for the claimant to call the other maker to testify when and by whom the alteration was made; and this, although his testimony showed that he was the principal of the note and the decedent was the surety. *Weiser's Estate*, 5 York 5.

30. Where a note was originally made payable to order and the alteration to "bearer" was plainly visible, the burden was *held* to be upon the plaintiff to show that the alteration was made prior to the execution of the note by the makers, or with the consent of the makers. *Weiser's Estate*, 5 York 5.

31. An immaterial alteration will not invalidate a promissory note; the addition at the end of a note of the words "note of J. A. Tooney for his own machine, not

included," was *held* to be an immaterial alteration. *Hadley Falls National Bank v. Loudenslager*, 2 Dist. Rep. 654.

32. The erasure of the place of payment in a promissory note made by a party claiming under it, without the consent of the maker, is such a material alteration as will avoid the note. *Todd v. Lederach*, 11 Montg. 16.

VII. Pleadings and process.

33. A foreign attachment will be dissolved if the affidavit fail to mention the name of the defendant and has a material unnoted interlineation. It cannot be amended. *Jacobs v. Tichenor*, 27 W. N. C. 35.

34. Where, upon *certiorari*, the justice denied under oath that there was a material interlineation in a summons after it was served, and his testimony was corroborated by the constable; it was *held*, that the presumption in favor of the honesty of the justice and the correctness of his record would prevail over the oath of the defendant to the contrary. *Fitzgerald v. Campbell*, 10 C. C. 396.

VIII. Releases.

35. In an action against a carrier, it was *held*, that a release of liability was properly excluded where erasures appeared on the face of the release, and it appeared that such erasures were made by the carrier's agent, and there was no evidence that the paper was shown or read to the shipper after the erasures were made. *Armstrong v. United States Express Co.*, 159 P. S. 640.

IX. Wills.

36. A lead-pencil line run through a legacy by a testator, whose will is written in ink, operates to revoke the legacy. *Tomlinson's Estate*, 133 P. S. 245; s. c. 25 W. N. C. 447; reversing s. c. 6 Lanc. 286.

37. Where a will was altered after its execution, by erasures which were not in it when the will was attested, and such alterations were proven to have been made by the authority of the testatrix, by only one witness; it was held, that the will in its original state, without the erasures, was the valid will of the testatrix. *Simrell's Estate*, 154 P. S. 604; reversing s. c. 2 Lack. Jur. 405.

38. Where a part of a line is cut by a testator from his will, but the signature is left intact, and the balance of the instrument is perfectly intelligible, such mutilation does not amount to a revocation. *Ramsay's Estate*, 13 C. C. 135.

AMBIGUITY.

See CONTRACT: EVIDENCE, XXXII. (i): WILLS.

AMENDMENT.

See CRIMINAL LAW: ELECTION LAW: EQUITY, XXVII.: MECHANICS' LIEN, VII. (b): MUNICIPAL ASSESSMENTS: PRACTICE, I., V.

I. General rules.

- (a) Right of amendment.
- (b) Names.
- (c) Parties.
- (d) Form of action.

II. Of process.

III. Of the declaration.

IV. Of the plea.

V. Of the record.

- (a) When allowed.
- (b) Of the verdict.
- (d) Of the execution.

VI. At what time amendments are allowed.

- (b) After verdict.
- (c) After judgment.
- (d) After appeal.

I. General rules.

(a) Right of amendment.

1. A municipal claim may be amended by adding the averment of notice re-

quired by ordinance. *Philadelphia v. Stevenson*, 132 P. S. 103; s. c. 25 W. N. C. 367; reversing s. c. 6 C. C. 287.

2. An insufficient affidavit in foreign attachment cannot be amended; the attachment must be dissolved. *Shumway v. Webster*, 24 W. N. C. 336.

3. A foreign attachment will be dissolved if the affidavit fail to mention the name of the defendant, and has a material unnoted interlineation. It cannot be amended. *Jacobs v. Tichenor*, 27 W. N. C. 35.

4. If the sole objection to a proposed amendment is that it will deprive the other party of the benefit of the statute of limitations, the amendment should be allowed and the other side left to his prayer for instructions as to its effect. *Seipel v. Baltimore & Cumberland Valley Extension Railroad Co.*, 129 P. S. 425.

5. If the bond for an attachment under the act of 12 July 1842 (Brightly's Purdon 1137) contains but one surety, the proceedings will be quashed on *certiorari* to the common pleas. The bond cannot be amended by adding another surety. *Spettigue v. Hutton*, 9 C. C. 156.

(b) Names.

6. On a motion to quash an indictment for a misnomer of the defendant, the district attorney may amend by the insertion of the proper name. *Comm'th v. Early*, 1 Lack. Jur. 323.

7. The court cannot amend a justice's transcript, filed as a lien, so as to change the defendant's name. *Koehler v. O'Donald*, 2 Northam. 315; *Bachman v. Keiper*, Ibid. 316.

8. Where an agreement is entered into by counsel that a judgment upon a mechanic's lien be amended so as to change the first name of the wife, one of the defendants, and that the judgment be stricken off, and the defendants permitted to file an affidavit of defence, such an agreement cannot afterwards be repudiated by the wife. *Jobe v. Hunter*, 165 P. S. 5.

(c) Parties.

9. An amendment which simply adds the name of a party as legal plaintiff will be allowed under the act 4 May 1852 (Brightly's Purdon 100). *National Bank of Royersford v. Davis*, 6 Montg. 99.

10. An amendment adding a use plaintiff as the proper party to sue, after the latter's right of action is barred, will not be allowed to affect the defendant's right to plead the statute of limitations. *Furst v. Mutual Saving, Loan and Building Association*, 128 P. S. 183.

11. If a widow dies, who has brought an action for the death of her husband by negligence, her personal representatives may be substituted as parties plaintiff. *Brown v. Philadelphia & Reading Railroad Co.*, 46 L. I. 380.

12. Death does not revoke the rule of reference in compulsory arbitration, but the arbitrators, on the death of the plaintiff, cannot make a valid award in his favor until the proper parties are substituted. *Meehan v. Karolin*, 1 Lack. Jur. 305.

13. In proceedings for injuries to land from the construction of a railroad the wife's name may be substituted by amendment as owner, under the act of 4 May 1852 (Brightly's Purdon 100). *Seipel v. Baltimore & Cumberland Valley Extension Railroad Co.*, 129 P. S. 425.

14. A suit for wages brought by a mother to the use of her minor son, may be amended to a suit in her own right. *Harvey v. Quigley*, 4 Montg. 140.

15. A partnership not being registered under the act of 14 April 1851 (Brightly's Purdon 1646), a defendant cannot take advantage of the amendment acts of 4 May 1852 and 12 April 1858 (Brightly's Purdon 100), by adding the name of another party defendant; such a decree of amendment will be stricken off. *McLoney v. Edgar*, 7 C. C. 27.

16. If a suit be brought against two as joint defendants the proceeding cannot be amended after the evidence is closed, so as to make it an action

against a copartnership composed of the same defendants. *Kaiser v. Roberts*, 5 Kulp 459.

17. Where a mechanic's lien was filed against a wife without joining her husband, it was too late to amend at the trial and after the close of the testimony. *Fuller v. Enright*, 37 P. L. J. 431.

18. The act of 10 May 1871 (Brightly's Purdon 100) does not apply to appeals from a justice. The court will not permit the addition of other names as co-defendants. *Foltz v. Singer Manufacturing Co.*, 7 Lanc. 97.

19. Irregularity of process in bringing a new party by service of certified copy of amendment and record is cured by appearance and plea. *Kennedy v. Erdman*, 150 P. S. 427.

20. Where the plaintiff in an action of ejectment dies, his heirs may be substituted in his place as the parties to the action; and this, whether they desire it or not. *Ballentine v. Negley*, 158 P. S. 475.

21. Where a testator in his lifetime enters into an agreement to sell a house and lot, such agreement works an equitable conversion, and the vendor's interest becomes a chose in action which goes to his executors, who are alone the only persons who have the right to use the legal title of the land to enforce the collection of the purchase money. Where such a suit was brought by other devisees, it was held, that the executor was entitled to be substituted as a plaintiff in the suit. *Bender v. Luckenbach*, 162 P. S. 18.

22. In an action to recover a balance alleged to be due under a settlement of mutual accounts, where it appears that after the settlement, but before suit, the plaintiff made an assignment for the benefit of creditors, the record may be amended at any stage of the proceedings so as to add the name of the assignee as party plaintiff. *Felty v. Deaven*, 166 P. S. 640.

23. The record of a judgment cannot be amended by striking off the name of

one of the defendants upon his application; and this, although such defendant's name was written at the bottom of the note by mistake. *Keener v. Miller*, 2 York 180. See *Keener v. Miller*, 3 York 217.

24. A misjoinder of the administrators of a deceased co-partner with surviving partners is amendable on *certiorari*. *Hartman v. Kottcamp*, 2 York 215.

25. Where judgment is entered by confession against a firm in the firm name, the proper way to bring upon the record as defendants, the individual member or members liable therefor, is by a suggestion of the same by affidavit and a rule to amend the parties defendant; the court has full authority to make such an amendment. *Rice v. Summers*, 2 Lack. Jur. 335.

26. Upon the trial of a sheriff's interpleader the issue must correspond with the claim, and the plaintiff can only sustain the issue by proving the claim as made; where the plaintiff claimed the goods by affidavit, and the evidence showed that he held the goods as agent for another; it was *held*, that the verdict must be for the defendant, and the court refused an amendment substituting the name of the principal as plaintiff. *Campbell v. Wasserman*, 9 C. C. 381.

27. In an action on a replevin bond, it is too late after verdict to object that the suit should have been brought in the name of the assignee of the sheriff and not in the name of the sheriff to the use of the avowant; the record may be amended or considered as amended. *Krumbhaar v. Stetler*, 10 C. C. 12.

28. Upon the death of a defendant, an order of court is necessary to bring the name of his executor upon the record as a defendant, and such an order can only be made after notice; before the record is so completed a *scire facias* cannot issue to revive the judgment. *Callahan v. Fahey*, 10 C. C. 488.

29. Where issue has been joined in an action of ejectment and the plaintiff files an affidavit suggesting the death of the

defendant after suit brought, the court will make absolute a rule to amend the record by substituting the tenant for life and residuary legatees under the will of the decedent. *Davis v. Davis*, 13 C. C. 221.

30. Where a suit for damages was brought by a husband and wife, the court refused to permit an amendment striking out the wife's name as a party in the absence of an affidavit of a mistake having been made in the title of the suit, and no mistake appearing in the declaration except that a part of the claim if recoverable would belong to the husband only. *Walter v. Kensinger*, 13 C. C. 222.

(d) Form of action.

31. An action may be amended from case to covenant and then again changed to case. *Collins v. Barnes*, 130 P. S. 356.

32. The court properly refused to permit an amendment, changing the form of action to assumpsit, where the application for the amendment was made after the death of the original plaintiff whose deposition had previously been taken, and thirteen years after the action was commenced. *Purdue v. Taylor*, 146 P. S. 163.

33. Where a proceeding in account render was begun by foreign attachment, the court made absolute a rule permitting an amendment of the form of action, and allowing the plaintiff to file a bill in equity with the same effect as if the original proceeding had been begun in equity. *Crowe v. Davis*, 33 W. N. C. 552.

34. Since the procedure act of 25 May 1887 (Brightly's Purdon 1728) an amendment in the declaration from trespass to case, or *vice versa*, does not change the form of the action and does not require the payment of costs, and a continuance upon the granting of such an amendment is now in the discretion of the court. *Armstrong v. Factoryville*, 10 C. C. 274.

II. Of process.

35. The misnaming of the township in the *præcipe* and writ in ejectment may be

amended under the act of 10 May 1871 (Brightly's Purdon 100). *Stimmel v. Miller*, 8 C. C. 128.

36. A writ of summons is not invalidated by an error in the *præcipe*, but the *præcipe* will be amended and made to conform to the writ. *Davis v. Brode*, 13 C. C. 631.

37. An irregular return of *non est* to a *scire facias sur mortgage* may be amended on motion. *Brundred v. Egbert*, 164 P. S. 615.

III. Of the declaration.

38. A plaintiff may withdraw his original declaration and file an amended one, if the gist of the cause of action remains the same, although the alleged incidents are different. *Pittsburgh Junction Railroad Co. v. McCutcheon*, 7 Atlan. 146.

39. The plaintiff in trespass *quare clausum fregit* cannot, after six years, file an amended narr. for double or treble damages under the act of 29 March 1824 for cutting timber. *Fairchild v. Dunbar Furnace Co.*, 128 P. S. 485.

40. A narr. for personal injuries to a minor son, setting out that the injuries were incurable and permanent, averring damages for loss of services, etc., may be amended by alleging that the child died in consequence of said injuries. *Bradford v. Downs*, 126 P. S. 622.

41. After the entry of a confessed judgment it is doubtful whether the declaration can be amended so as to change the liabilities of joint makers. *McDonald v. McDonald*, 37 P. L. J. 253.

42. If a sufficient affidavit of defence be filed to an original statement, an amendment of the statement, subsequently made without leave of court, which is neither a matter of form nor necessary substance, will be stricken off. *Wigton v. Pennsylvania Railroad Co.*, 25 W. N. C. 357.

43. Whether a narr. for false imprisonment can be amended by adding a count for malicious prosecution, was not decided. *Sloan v. Schomacher*, 136 P. S. 382; s. c. 27 W. N. C. 10.

44. On the trial of an issue in divorce it is in the sound discretion of the court to allow an amendment of the bill of particulars and admit testimony under it. *Melvin v. Melvin*, 130 P. S. 6.

45. Where the libel sets out a statutory cause of divorce in the terms of the statute, but specifies particulars not within the statutory requirements and tending to negative the general averment, the libel may be amended by striking out such particulars as surplusage, and if the evidence sustains the specific cause of action, a divorce may be decreed. *Heilbron v. Heilbron*, 158 P. S. 297.

46. A declaration alleging damage occasioned by the use of splash boards on a dam, may be amended so as to set forth that the overflow was also caused by the closing of a shute in the dam. *Fredericks v. Pennsylvania Canal Co.*, 148 P. S. 317.

47. On the trial of an appeal from a justice where the transcript showed that plaintiff's claim was for money due for timber sold to the defendant, plaintiff was entitled to show that his claim before the justice was upon a promissory note given for the timber, and to amend his declaration by adding a count upon the note. *Boner v. Lukman*, 148 P. S. 591.

48. The court may refuse to permit an amendment to a statement by striking out averments where it is only alleged that they are immaterial and unnecessary, and where they may be advantageous to the defendant as admissions of record. *Heller v. Royal Ins. Co.*, 151 P. S. 101.

49. In ejectment where the abstract of title omits relevant matters of defence, the court should permit an amendment upon equitable terms. *Meade v. Clarke*, 159 P. S. 159.

50. Where the plaintiff owned a corner lot and the grade of both streets was changed in 1887, and in 1888 a common law action was brought to recover damages for the change of grade but only one street was mentioned in the declaration, and in 1892 an amendment was allowed

so as to include the other street; it was *held*, that the act 16 May 1891 (Brightly's Purdon 1399), which provides that the remedy in such a case shall be by a jury of view, did not prevent the amendment or deprive the court of jurisdiction. *Brady v. Wilkes-Barre*, 161 P. S. 246.

51. Where the declaration stated that all the defendants were served but the sheriff's return showed but one defendant served, the plaintiff was permitted to amend upon the argument of the case on exceptions to the report of a referee. *Stickle v. Miley*, 1 York 18.

52. Upon the trial of an action of ejectment, where it was discovered that the plaintiff's abstract made a mistake in referring to a certain deed given to the party through whom both parties claimed title, the court granted the plaintiff leave to amend. *Foust v. Northern Central Ry. Co.*, 5 York 33.

53. Where there is a variance between the evidence and the statement which is technical rather than substantial, an amendment of the statement will be allowed if necessary at any stage of the proceedings. *Buckwalter Stove Co. v. Wood*, 9 Montg. 30.

54. A plaintiff will be permitted to file an amended statement and be granted a continuance upon discovery at the trial of an erroneous statement of fact therein, but upon such an allowance he will be ordered to pay the costs of the term. *Lawrence v. P. N. & N. Y. Railroad Co.*, 27 W. N. C. 572.

55. Where the plaintiff neglected to set off his claim, which was less than three hundred dollars, in a suit before a justice brought by the defendant, and judgment was entered for the defendant on such a plea; it was *held*, that the plaintiff might have leave to amend his affidavit of claim by striking out an erroneous credit and thus making his claim to exceed the sum of three hundred dollars. *Jones v. Linden*, 11 C. C. 51.

IV. Of the plea.

56. Under the act 25 May 1887, sec. 7 (Brightly's Purdon 1729), and the statute of amendments, a defendant who has pleaded non-assumpsit, has a right at the trial, to add the plea of payment, subject to such reasonable terms as the court may impose. *Stillwell v. Rickards*, 152 P. S. 437.

V. Of the record.

(a) When allowed.

57. It is not error to refuse an amendment of a record so as to show notice when, in fact, the notice was not given. *Bennett v. Hayden*, 145 P. S. 586.

58. Where a recognizance was forfeited on August 24, the last day of the term, but was entered on the docket by a clerical error as having been forfeited on August 26, when the court was not in session, the court permitted the record to be amended and refused to strike off the forfeiture; and this, although new bail had been furnished by the defendant. *Comm'th v. Speidel*, 10 Lanc. 390.

59. Upon a trial for murder the record must show the presence of the defendant at every stage of the proceedings, but where he was actually present he is not entitled to a new trial because the clerk neglected to note his presence on the record, but the trial court may direct that the record be so amended as to conform to the actual facts of the case and show the presence of the prisoner. *Comm'th v. Silcox*, 161 P. S. 484.

60. Upon a motion to strike off an appeal the court will allow the justice upon proper application to amend his docket and transcript so as to conform to the facts. *Kearney v. Pennock*, 12 C. C. 37.

61. Where a judgment entered in the common pleas upon a justice's transcript is void on its face for want of jurisdiction, it will be stricken off on motion and the court has no authority to permit the transcript to be amended. *Klinger v. Koons*, 13 C. C. 641.

(b) Of the verdict.

62. In an action on a replevin bond six years after the trial of the action in replevin, it is not error to permit an amendment of a clerical error in recording the verdict. *Clark v. Morss*, 142 P. S. 311.

63. The court has power to amend a verdict so as to make it conform with the intention of the jury, but it cannot substitute a verdict of its own for the purpose of meeting the supposed equities of the case. *Grim v. Reinbold*, 12 C. C. 223. See s. c. 148 P. S. 446.

64. Where on the trial of an issue *devasavit vel non* the case turned upon whether the paper was testamentary in its character, and the jury found that it was the wish of the person who executed the paper that it should take effect at the time it was written, the court properly amended the verdict so as to read, verdict for defendant; but the practice of submitting the construction of such a paper to the jury was not commended. *Jackson v. Tozer*, 154 P. S. 223; affirming s. c. 3 Northam. 333. See *Tozer v. Jackson*, 164 P. S. 373.

(d) Of the execution.

65. Under the act 21 April 1846 (Brightly's Purdon 857) the sheriff has no standing as a petitioner unless he has an interest in having the execution amended, and an amendment will only be allowed when equity and justice require it. *Lowenstein v. Krell*, 162 P. S. 267.

VI. At what time amendments are allowed.**(b) After verdict.**

66. Where a suit was brought in the name of a plaintiff by her attorney in fact and there was doubt as to the validity of the power of attorney, the court after verdict amended the record by striking out the words "by her attorney in fact." *Glackin v. McDermott*, 8 Montg. 144.

67. Where one railroad company, which had leased another, took a bond with sureties from one of its employees, and the two railroads were subsequently consolidated under the act 16 May 1861 (Brightly's Purdon 1801); it was held, that the sureties were liable for the employee's defalcation after the merger of the two companies; it was immaterial that the suit was brought in the name of the new company, as, if the suit should have been brought in the name of the original obligee, the defect could have been cured by amendment; and this after a trial on the merits. *Pennsylvania & Northwestern R. R. Co. v. Harkins*, 149 P. S. 121.

(c) After judgment.

68. Where, upon the opening of several judgments, issues were awarded and the issue in the case at bar had been tried five times, upon the discovery that no issue had actually been allowed in that case, the court permitted an amendment of the record *nunc pro tunc* so as to include it. *Kittanning Insurance Co. v. Adams*, 10 Atlan. 895.

69. An application to amend a statement after an allowance of a judgment of non-suit comes too late. *Henry v. Fisher*, 2 Lack. Jur. 337.

70. A motion to amend by changing the form of action is too late when not made until six months after judgment of non-suit has been entered, and after the statute of limitations has become a bar. *Bitterling v. Keipler*, 160 P. S. 1.

(d) After appeal.

71. The record is within the reach of the court below for the correction of clerical errors until the return day of a writ of error; and this, whether the record is in fact made up and transmitted or only constructively removed. *Gunn v. Bowers*, 126 P. S. 552.

72. In ejectment an amendment adding the plaintiff's wife as a necessary co-plaintiff may be made in the supreme

court. *Shaffer v. Eichert*, 132 P. S. 285.

73. A formal defect in an indictment may be amended either in the court below or in the supreme court. *Davis v. Comm'th*, 4 Cent. 711.

74. In a suit against partners for breach of contract to purchase real estate, the supreme court refused leave to amend by making the partner who made the contract the sole party defendant. *Martin v. Frank*, 26 W. N. C. 361.

75. The supreme court will consider an amendment of the declaration, which could have been made after verdict, as having been made. *Trainor v. Philadelphia & Reading Railroad Co.*, 137 P. S. 148; s. c. 26 W. N. C. 441.

76. Interest should not be included in damages in an action *ex delicto*; but the supreme court will allow the judgment to be amended by remitting the interest. *Emerson v. Schoonmaker*, 135 P. S. 437.

77. Where a married woman is sued before a justice as a single woman, an amendment will be allowed on appeal by adding the name of her husband as co-defendant. *Degnan v. Hutchison*, 2 Northam. 322. See *Foltz v. Singer Manufacturing Co.*, 7 Lanc. 97.

78. Where an action for mesne profits was brought in the name of a husband and wife in right of the wife, but was tried on the merits as though it had been brought in the name of the husband for the use of the wife; it was *held*, that the error, though formal, was material, but was amendable in the supreme court under the act 20 May 1891 (Brightly's Purdon 790). *Thornton v. Britton*, 144 P. S. 126.

79. In replevin for goods distrained for rent a judgment upon a verdict will not support an execution where it is silent as to the sum for which, and the person against whom, it is intended to be entered; the court may mould a verdict into proper form, but the supreme court will not do so where it would be unfair to the appellant in view of the trouble and expense to which he has been put.

Park v. Holmes, 147 P. S. 497; reversing s. c. 28 W. N. C. 288.

80. Under the act 20 May 1891 (Brightly's Purdon 790) the supreme court may modify a judgment without a return of the record. *Terry v. Wenderoth*, 147 P. S. 519.

81. Where a statement claims for the exclusive use of an invention and the evidence fails to show that the use was exclusive, and the defendant does not plead surprise, but defends on the ground that there was no contract at all, he cannot, after a verdict against him, take advantage of the variance, and this, although he had moved for a non-suit on that ground and has presented points covering it. The supreme court will permit him to amend his statement to conform to the evidence. *Kroegher v. McConway*, 149 P. S. 444.

82. In an action of assumpsit where the plea is merely non-assumpsit, a verdict for a sum named in favor of the defendant will not be permitted to stand, and such an error will be corrected in the supreme court. *Neely v. Sensenig*, 150 P. S. 520.

83. Where the supreme court reverses a judgment with a new *venire*, it is immaterial whether the action brought in the name of an agent is in proper form, as the record can be amended in the court below. *Yerkes v. Richards*, 153 P. S. 646; reversing s. c. 8 Montg. 47. See s. c. 11 Lanc. 308.

84. Where an action in assumpsit should have been brought in trespass, the supreme court will amend, if necessary, after a verdict. *Comm'th v. Press Co.*, 156 P. S. 516; affirming s. c. 2 Dist. Rep. 411.

85. Where the *præcipe* in an ejectment included by mistake more land than the plaintiff claimed, and a verdict was rendered for the plaintiff for the land described in the *præcipe*; it was *held*, that the plaintiff might amend his *præcipe* in the supreme court by disclaiming the land included by mistake, and the judgment would then be affirmed;

in such a case the supreme court will impose the costs, up to the time of the application for amendment, upon the plaintiff as a condition of the affirmance of the judgment. *Brothers v. Mitchell*, 157 P. S. 484.

86. Where an assignee of a life policy, who is also a creditor, takes out letters of administration on the debtor's estate and recovers on the policy in a suit brought as administrator, the supreme court upon appeal will permit the record to be amended so that the plaintiff may also appear as assignee. *Clifford v. Prudential Ins. Co.*, 161 P. S. 257.

87. Where an action for the death of a minor son has been brought by the father, the record may be amended in the supreme court by the addition of the name of the mother as a plaintiff. *Weaver v. Iselin*, 161 P. S. 386.

AMOTION.

See **BENEFICIAL SOCIETIES: CORPORATIONS, XVI.**

AMUSEMENTS.

See **THEATRES.**

ANCIENT DEEDS.

See **EVIDENCE, XIII.**

ANCIENT LIGHTS.

See **EASEMENTS.**

ANCILLARY ADMINISTRATION.

See **EXECUTORS AND ADMINISTRATORS.**

ANIMALS.

See **BAILMENT: CRIMINAL LAW, LIX.: STRAYS.**

I. Title.

II. Trespassing animals.

III. Ferocious animals.

IV. Use of animals.

V. Wild animals.

I. Title.

1. The provisions of the sixth section of the act 15 May 1889, entitled "an act for the taxation of dogs and the protection of sheep," that all dogs shall hereafter be personal property and subject of larceny, was held not to be unconstitutional; the provision was germane to the object of the act. *Comm'th v. Depuy*, 148 P. S. 201. See act 25 May 1893, sec. 7 (*Brightly's Purdon* 692).

II. Trespassing animals.

2. Since the repeal of the fence law by the act of 4 April 1889 (P. L. 27) a land owner is not required to fence cattle out, but their owner must fence them in so as to avoid trespassing. *Arthurs v. Chatfield*, 38 P. L. J. 53.

3. Since the repeal of the fence law of 1700 by the act of 4 April 1889 (P. L. 27) every one must keep his cattle within his own close. It is not necessary that the plaintiff's field be enclosed to maintain an action for trespassing cattle. *Thompson v. Kyler*, 9 C. C. 205; s. c. 8 Lanc. 245.

4. Whether an owner of cattle is liable for a trespass committed by them and the question of negligence in permitting them to run at large is one of fact to be decided by the evidence; a justice of the peace has jurisdiction in such a case. *Ziegler v. Hons*, 6 Kulp 374.

5. In an action of trespass on the case for the killing of plaintiff's dog; it was held, to be a good special plea which admitted the killing but alleged that the plaintiff's dog had been in the habit of worrying the defendant's cattle, and that on the night of the killing some dogs were worrying his cattle, and he therefore shot in the dark, and wounded the plaintiff's dog; and further alleged that any damage occasioned to the plaintiff was occasioned by the unlawful trespass and depredations of the said dog. *Sutton v. Coover*, 4 York 22.

6. Mandamus is the proper remedy to enforce a claim upon the public treasury for sheep killed by dogs. *Bundage v.*

Blakely School District, 1 Lack. Jur. 222.

7. A sheep certificate under the local act of 28 March 1873 should show whether the sheep have been destroyed or injured and the number of each. So, one appraisement regularly made, renders any subsequent appraisement void. *Vosburg v. Wyoming County Commissioners*, 7 C. C. 646.

8. Under the local act of 28 March 1873, relating to damages for sheep killed by dogs, the county commissioners cannot review the finding of damages by the appraisers, and though their duty in signing the warrant is but ministerial, if there be indications of fraud they may inquire into such questions and act accordingly. Fraud vitiates everything, "even a sheep certificate." *Ibid.*

9. Where a dog guilty of killing sheep was brought upon the farm of the directors of the poor by the steward's son without authority and afterwards maintained there, the ownership of the dog did not thereby become vested in the poor district. *Sproat v. Directors of Greene*, 145 P. S. 598.

10. Under the act 15 May 1889 (see act 25 May 1893, *Brightly's Purdon* 691), providing for a tax on dogs to pay claims arising from loss or damage to sheep; it was held, that an unpaid balance of a claim in one year might be carried forward and paid out of the taxes collected in the following year. *Nevin v. Dreher School District*, 12 C. C. 449.

11. Where proceedings to recover damages for sheep killed by dogs under the act 25 May 1893 (*Brightly's Purdon* 691) were not begun until nine months after the killing; it was held, that the claimant had been guilty of such laches as was fatal to his right of recovery. *Quemy v. Huntingdon County*, 15 C. C. 163. See *Keener v. Fouch* 16 C. C. 207.

12. An appeal lies from the finding by township auditors under the sheep-dog act 25 May 1893 (*Brightly's Purdon* 692), of the ownership of dogs doing damage to sheep and of the amount of

such damage. *Weakland v. Yahner*, 2 Dist. Rep. 777.

III. Ferocious animals.

13. The owner of a cat, of no known extraordinary mischievous tendencies, is not liable for its coming on the plaintiff's premises and killing the plaintiff's canary bird. *McDonald v. Jodrey*, 8 C. C. 142.

14. An action will not lie under the act of 15 April 1851 (*Brightly's Purdon* 1603) by the widow for the death of her husband by a bull purchased from defendant, on the allegation of known false representations made by defendant in its sale. *Showers v. Yeaney*, 9 C. C. 69.

15. As to the liability of the owner of vicious animals for injuries caused by them, see note to *New Jersey v. Donohue*, 10 Atlan. 152.

16. Where the plaintiff was lawfully on defendant's premises when he was bitten by the defendant's dog, and it appeared that the dog was a ferocious and dangerous animal, and that the defendant knew that such was its nature and character; it was held, that the case was properly submitted to the jury; it was not necessarily contributory negligence to go on premises where a sign of warning was displayed. *Sylvester v. Maag*, 155 P. S. 225.

17. A person, though not the owner of a vicious dog, may make himself liable to others as owner by knowingly keeping or harboring the animal upon his premises after knowledge of its vicious propensities. *Snyder v. Patterson*, 161 P. S. 98.

18. The owner of an alleged vicious dog will not be held responsible for an accident caused by the dog jumping up and frightening the plaintiff's horse on a public road, unless it be made to appear not only that the dog was of a vicious character, but that the owner had knowledge of that character. *Bradley v. Myers*, 10 Lanc. 137.

19. In an action for an injury committed by a dog it must be shown that the dog was vicious, and that the owner

had notice thereof. *Mulherrin v. Henry*, 11 C. C. 49.

20. The owner of a steer is not liable for injuries inflicted upon a person, in the absence of evidence that the animal had a vicious character and that the defendant had previous knowledge thereof; the burden is upon the plaintiff to show negligence on the part of the owner, even when the animal belongs to a class of known dangerous propensities. *Curtis v. Schlosser*, 14 C. C. 600.

IV. Use of animals.

21. Leaving a horse unattended is such negligence as renders the owner liable to the natural consequences of an unattended horse moving inadvertently, being meddled with or taking flight. *Wideman v. Smith*, 1 Lack. Jur. 203.

22. Under the act 10 April 1826, sec. 1 (Brightly's Purdon 285), the taking of cattle to the bank of a canal for the purpose of watering, is an offence punishable by fine and imprisonment. *Philadelphia & Reading R. R. Co. v. Reading & Pottsville R. R. Co.*, 12 C. C. 513; s. c. 2 Dist. Rep. 857.

V. Wild animals.

23. An amending act cannot stand where its title contains no specific reference to the original; the act 25 April 1889 (Brightly's Purdon 2100), amending the first section of the act 15 May 1887, P. L. 116, providing for the destruction of wild animals, is unconstitutional for that reason. *Sanders v. Cambria County*, 16 C. C. 94; s. c. 4 Dist. Rep. 241; 1 Mag. & Con. 65.

ANNUITIES.

See ESTATE FOR LIFE, I.

ANNULMENT OF MARRIAGE.

See HUSBAND AND WIFE, XI.

ANTE-NUPTIAL CONTRACTS.

See HUSBAND AND WIFE, I.

APOTHECARIES.

See EXCISE.

Where the owner of a drug store takes no part in conducting the same, but employs a duly certified pharmacist, he is not indictable under the act 24 May 1887 (since amended by the act 16 June 1891, Brightly's Purdon 108). *Comm'th v. Johnson*, 144 P. S. 377.

APPEAL AND ERROR.

See ARBITRATION: CERTIORARI: EQUITY: JUSTICES' COURTS: POOR, IV.: WAIVER, VI.

- I. Forms of appeal.
- II. Who may appeal.
- III. Time to appeal.
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- VII. Error.
 - (a) Assignable error.
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- VIII. Exceptions.
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- XI. Assignments of error.
- XII. Paper books.
- XIII. Judgment.
- XIV. Reargument.
- XV. Error *coram vobis*.
- XVI. Appeal in criminal cases.

I. Forms of appeal.

1. For forms of taking an appeal under the act of 9 May 1889 (Brightly's Purdon

788, 790), and interesting and valuable remarks thereon by ARNOLD, J., see *In re Forms*, 24 W. N. C. 572. See also *In re Act*, 25 Ibid. 361.

II. Who may appeal.

2. In a proceeding in the quarter sessions under the act of 22 April 1887 (P. L. 61), to compel the collection of a special tax, citizens and taxpayers who have been refused a right to intervene, have no standing to be heard in the supreme court on appeal. *Hower's Appeal*, 127 P. S. 134.

3. Notwithstanding the voluntary payment by a legatee of the collateral inheritance tax upon a bequest, in compliance with a decree of the orphans' court, the commonwealth may afterwards appeal from the decree, for error in not requiring payment of the six per cent additional charge under the act of 4 May, 1885 (P. L. 425). *Comm'th's Appeal*, 128 P. S. 603.

4. Upon a bill for an account as to a partnership interest, the defendants who admit their possession and their liability to account to the real owner have no standing to appeal from a decree confirming the report of a master of an interpleader instituted to determine the question of ownership. *Crawford v. Shriver*, 139 P. S. 239.

5. An assignee for creditors has no standing, either in his own behalf or in behalf of the creditors, to appeal from a decree distributing the fund. *Graff's Estate*, 146 P. S. 415.

6. Where a judgment has been obtained against a county, ten tax-payers may intervene under the act 12 June 1878 (Brightly's Purdon 437), and appeal the case to the supreme court; the court has no discretion to grant or withhold the permission to intervene. *Bell v. Allegheny County*, 149 P. S. 381; reversing a. c. 10 C. C. 597.

7. A judgment upon an appeal taken by one of the parties is no bar to a subsequent appeal by the other party in

which different errors are assigned. *Gates v. Pennsylvania R. R. Co.*, 154 P. S. 566. See s. c. 150 P. S. 50.

8. Where a contestant of a will upon his own application, is granted leave to withdraw from the contest, and is ordered to pay all costs which have accrued to the date of his withdrawal, his connection with the case is at an end and he cannot afterwards take an appeal on the ground that he is still in the case because he has not paid the costs. *Eichert's Estate*, 155 P. S. 59.

III. Time to appeal.

9. A writ of error to reverse a judgment for error therein, must, under the act of 1 April 1874 (Brightly's Purdon 788), issue within two years after the judgment was entered; and this, notwithstanding a subsequent refusal of the court to open or strike off. *Gillespie v. Campbell*, 1 Cent. 558.

10. A writ of error to a refusal to strike off a void judgment lies at any time; if the judgment be but erroneous or voidable, the writ of error must issue within the statutory period. *Clarion, M. & P. Railroad Co. v. Hamilton*, 127 P. S. 1.

11. The statutory period for an appeal from an order authorizing an assessment by the receiver of a mutual fire insurance company having passed, no appeal lies to the refusal to revoke or to grant a rehearing. *Lowenstein v. North Schuylkill Insurance Co.*, 132 P. S. 410.

12. The three years allowed within which an appeal may be taken from a decree of the orphans' court should be computed from the date of the decree and not from a refusal of the court to open it. *Miller's Estate*, 159 P. S. 575. See *Miller's Estate*, 166 P. S. 97.

13. The court has no power to extend the statutory time for an appeal as a matter of indulgence, but where a rule is taken for an appeal *in forma pauperis* before the expiration of the period provided by the statute, the court may stay all pro-

ceedings, including the running of the statute, pending the rule. *Schrenkeisen v. Kishbaugh*, 162 P. S. 45.

IV. When an appeal lies.

14. The act of 9 May 1889 (Brightly's Purdon 788) does not extend the right of review; it simply provides that the dissimilar proceedings of writs of error, appeals, and *certioraris* shall be called by the same name; each retains its own characteristics as before. *Rand v. King*, 134 P. S. 641; s. c. 26 W. N. C. 81.

15. Under the act of 4 May 1889 (Brightly's Purdon 788) an appeal lies only to the final action of the court upon exceptions filed with the referee. That act applies to a report filed after its passage in a litigation begun prior thereto. *Kille v. Reading Iron Works*, 134 P. S. 225; s. c. 26 W. N. C. 1. See s. c. 47 L. I. 464.

16. The refusal to open a judgment can only be reviewed by appeal. Error does not lie. *Gillespie v. Campbell*, 1 Cent. 558.

17. Under the act 20 May 1891 (Brightly's Purdon 789) an appeal will lie from an order made prior to the passage of the act, opening a judgment taken for want of an appearance; on such an appeal, however, the supreme court will only determine whether the discretion of the lower court has been properly exercised. *Kelber v. Pittsburgh Nat. Plow Co.*, 146 P. S. 485.

18. The act 20 May 1891 (Brightly's Purdon 789) does not extend the power of the common pleas to open, vacate or strike off a judgment; it simply extends the right of appeal to certain orders which had been previously regarded as within the discretionary powers of the lower court. *Pennock v. Kennedy*, 153 P. S. 579.

19. A refusal to open a judgment will not be reversed on appeal unless it appear that the discretion of the lower court has been abused. *Walter v. Fees*, 155 P. S. 55; *Philadelphia v. Weaver*, 155 P. S. 74.

20. An order opening a cautionary judgment will not be reversed on the ground of delay in making the motion. *Duane v. Addicks*, 155 P. S. 124.

21. A writ of error lies to an order setting aside an execution. *Feagley v. Norbeck*, 127 P. S. 238.

22. An order refusing to set aside a *levari facias* is a final decree from which an appeal lies to the supreme court, and where a judgment has been confessed on a *scire facias* by the executors of the mortgagor, terre tenants who have paid the mortgage have a right to intervene and take an appeal from an order refusing to set aside a *levari facias*. *Packer v. Owens*, 164 P. S. 185.

23. A writ of error lies to a judgment of non-suit for want of a sufficiently specific statement; a motion to take off, in such case, is not necessary. *Murdock v. Martin*, 132 P. S. 86; s. c. 25 W. N. C. 288.

24. A rule for a more specific statement, although sanctioned by the rules of court, cannot be made a substitute for a demurrer, and where the order making such a rule absolute is practically a judgment for defendant, the supreme court will treat it as a final judgment from which an appeal will lie. *Bradly v. Potts*, 155 P. S. 418. See *Bradly v. Potts*, 33 W. N. C. 570.

25. An appeal lies from an order of the court of common pleas discharging from custody a person arrested under a warrant of arrest. *Morch v. Raubitschek*, 159 P. S. 559.

26. An appeal lies from the judgment of the common pleas on *certiorari* from a justice of the peace in a proceeding by an attachment execution under the act 15 April 1845 (Brightly's Purdon 1147); such a proceeding is not embraced within the provisions of the act 20 March 1810 (Brightly's Purdon 793). *Strouse v. Lawrence*, 160 P. S. 421; reversing s. c. 13 C. C. 131.

27. A decree of partition in the common pleas could only be reviewed on writ of error. An appeal did not lie. *Laird's Appeal*, 1 Mona. 755.

28. A *pro forma* decree of the court below will be given its due effect, if the opinion shows that the court did not decide the case without examination. *Ahl's Appeal*, 129 P. S. 26.

29. As to what is a final judgment from which an appeal lies, see a brief of authorities in notes to *Dodd v. Una*, 5 Atlan. 170; and *Hull v. Caughy*, 6 Ibid. 592.

See WAIVER, VI.

V. When an appeal does not lie.

30. An order discharging a rule for a new trial is not reviewable in the supreme court. *McKenney v. Fawcett*, 138 P. S. 344.

31. An assignment of error to the refusal to grant a new trial will not be considered, even where the case was tried without a jury. *Comm'th v. Delaware, Susquehanna & Schuylkill R. R. Co.*, 165 P. S. 44; affirming s. c. 14 C. C. 440.

32. The refusal of the court below to make a rule for a discontinuance absolute in pursuance of an alleged agreement between the parties, is not reviewable by the supreme court. *Bach v. Burke*, 141 P. S. 649.

33. Where a rule is made absolute reconsidering a former order, striking off an appeal and reinstating the appeal, the order making such rule absolute is not a final judgment from which an appeal to the supreme court will lie. *Cupples Woodenware Co. v. Howe*, 164 P. S. 85.

34. The refusal to open a judgment could only be reviewed by appeal. Error did not lie. *Gillespie v. Campbell*, 1 Cent. 558.

35. The act of 4 April 1877 (Brightly's Purdon 789), providing for appeals in cases of applications for opening judgments on warrants of attorney, does not include a judgment confessed in an amicable action. *Blythe Township's Appeal*, 12 Atlan. 849.

36. Neither appeal nor error lies to the refusal to open a judgment regu-

larly entered on a verdict. *Gaskill v. Crawford*, 130 P. S. 28.

37. The refusal to open a judgment by default and to permit the defendant to file an affidavit of defence is not reviewable in the supreme court. *Horner v. Horner*, 145 P. S. 258.

38. Where a judgment in ejectment is entered under a warrant in a lease in which the lessee has waived his right to an appeal, no appeal lies to the supreme court from the refusal of the court below to open the judgment. *Groll v. Gegenheimer*, 147 P. S. 162.

39. Opening a judgment, upon a *scire facias* to revive, rests in the sound discretion of the court and is not reviewable by the supreme court. *Gibson v. Simmons*, 134 P. S. 189.

40. Where a judgment for want of an affidavit of defence is opened upon the petition of the defendant, that she was prevented by illness from appearing, that she never received notice of the assignment to the plaintiff and that she had paid nearly the whole of the amount of the mortgage to the plaintiff's assignor, and that only a small balance remained for which she tendered judgment, the supreme court will not review the order opening the judgment. *Foster v. Carson*, 147 P. S. 157; see s. c. 13 C. C. 86.

41. Upon an application to open a judgment, the judge acts as chancellor and the supreme court on appeal will only see that his discretion has been properly exercised. *Comm'th v. Titman*, 148 P. S. 168.

42. An order refusing to open a judgment will not be reviewed by the supreme court where the plaintiff's testimony is not brought up with the record; where such testimony has been lost or mislaid, it must be supplied in the proper way. *Humphrey v. Tozier*, 154 P. S. 410.

43. The affirmation of a judgment entered for want of an affidavit of defence is conclusive as to all matters that were actually considered and those which might have been considered if the defendant had been vigilant; after such an

affirmance, an appeal cannot be taken from a subsequent order of the lower court refusing to open the judgment, where the only ground alleged was after discovered evidence, which was not offered before on account of the unwillingness of witnesses to give information. *Pennock v. Kennedy*, 153 P. S. 579.

44. The refusal of the court to grant a non-suit is not reviewable in the supreme court. *Schubkagel v. Dierstein*, 131 P. S. 46; *Kelly v. Bennett*, 132 Ibid. 218; s. c. 25 W. N. C. 368; *Lower Providence Live Stock Insurance Co. v. Weikel*, 13 Atlan. 82; s. c. 4 Montg. 55; *Lowrey v. Robinson*, 141 P. S. 189; *Wray v. Spence*, 145 P. S. 399; *Medary v. Cathers*, 161 P. S. 87; affirming s. c. 8 Montg. 123; *Crawford v. McKinney*, 165 P. S. 605.

45. Error does not lie to the entry of a compulsory non-suit nor to the refusal to enter such a judgment; it lies only to the refusal of the court to take off the non-suit. *Scranton v. Barnes*, 147 P. S. 461.

46. There is no authority for opening a judgment of non-suit. A motion should be made to strike it off, and upon a refusal to take it off, the plaintiff should except to such refusal; otherwise no appeal will lie. *Harvey v. Pollock*, 148 P. S. 534.

47. Error does not lie either to the entry or the refusal to enter a judgment of non-suit, but only to the refusal of the court to set aside such a judgment; such a refusal being in the nature of a demurrer to evidence, it is necessary to bring the testimony upon the record by a bill of exceptions. *Scanlon v. Suter*, 158 P. S. 275.

48. It appears that an order setting aside the service of a writ is but interlocutory, and not reviewable on error. *Ben-nethum v. Bowers*, 133 P. S. 332; s. c. 26 W. N. C. 8.

49. No appeal is authorized from the refusal of a court to set aside a decree of adoption. *Lewis's Appeal*, 10 Atlan. 126.

50. An appeal and *certiorari* does not lie to review a final decree incorporating

a borough, if the same be taken more than two years after the decree and by less than three persons aggrieved thereby. *Wilkinsburg Borough*, 131 P. S. 365.

51. No appeal on the merits lies to the supreme court in proceedings to annex adjacent territory to a borough, under the act 11 June 1879 (Brightly's Purdon 232). *Camp Hill Borough*, 142 P. S. 511.

52. No appeal lies from the quarter sessions to a decree dismissing proceedings under the act of 12 May 1887 (Brightly's Purdon 276), for the removal of the dead from burying-grounds. *Zion German Reformed Congregation's Appeal*, 1 Mona. 635.

53. The quashing of a case stated and granting a new trial on the ground that the case stated fails to disclose facts necessary to an intelligent judgment, is not a final judgment from which an appeal will lie; when a case stated is quashed, the action stands precisely as if no case stated had been agreed upon. *Comm'th v. Howard*, 149 P. S. 302.

54. Where there is no reservation in a case stated of a right of appeal or *certiorari*, the decision of the lower court is final. *Comm'th v. Callahan*, 153 P. S. 625; s. c. 12 C. C. 170.

55. The judgment of the court of common pleas on *certiorari* to a city recorder in a civil action is final. *Foster v. Erie*, 142 P. S. 407.

56. No appeal lies from the judgment of a court of common pleas upon a *certiorari* to a justice of the peace. *Jacobs v. Ellis*, 156 P. S. 253.

57. An appeal does not lie to the supreme court from an order making absolute a rule for an appeal *nunc pro tunc* from a magistrate. *Comm'th v. Reiser*, 147 P. S. 342.

58. No appeal lies to the supreme court to a judgment of the common pleas reversing the proceedings of a justice of the peace, in an action to recover the penalty provided by an ordinance prohibiting an act not an indictable or public offence. Such a proceeding is a civil action within section 22 of the act 20

March 1810 (Brightly's Purdon 794). *Mahanoy v. Wallinger*, 142 P. S. 308.

59. A writ of error does not lie on an appeal from a township auditor's report on a school district treasurer's account. *Mohney v. Red Bank School District*, 15 Atlan. 891.

60. No appeal lies to the supreme court from an order of the quarter sessions under the act 17 April 1876 (Brightly's Purdon 340), annexing lands in one township or borough to another township or borough for school purposes; an appeal under the act 9 May 1889 brings up nothing but the record. *Elk Township School District* 146 P. S. 1.

61. In an issue directed on an appeal from the report of county auditors, the judgment of the court of common pleas is final and not reviewable in the supreme court. *Gifford v. Erie*, 142 P. S. 408.

62. The supreme court will not, on appeal in a support case, review a bill of costs and expenses, of which the appellant had notice and an opportunity of being heard in opposition. *Parker Township Overseers' Appeal*, 1 Cent. 577.

63. Whether the proponent in an issue *devisavit vel non* shall be made plaintiff or defendant is in the discretion of the orphans' court; the supreme court will not review the exercise of such discretion on appeal. *Palmer's Estate*, 132 P. S. 297.

64. No appeal lies to the supreme court in contested election cases. *Yonkin's Appeal*, 12 Cent. 371; affirming *Yonkin's Contested Election*, 2 C. C. 550.

65. No appeal lies from an order of the court of quarter sessions refusing to quash a petition in a contested election case. *Moock v. Conrad*, 155 P. S. 586; affirming s. c. 2 Dist. Rep. 469.

66. A refusal to set aside a sale of corporate franchises under an execution is not reviewable in the supreme court. *Southwest Natural Gas Co. v. Fayette Fuel Gas Co.*, 145 P. S. 13.

67. Where judgment has been entered in foreign attachment against the defendant for want of a sufficient affidavit of defence, the proper remedy of the de-

fendant is by appeal and not by motion to strike off the judgment. No appeal lies, however, from the refusal of the court below to set aside the return of a writ of foreign attachment and to quash the writ. *Philadelphia & Reading R. R. Co. v. Snowden*, 161 P. S. 201. See *Philadelphia & Reading R. R. Co. v. Snowden*, 166 P. S. 236.

68. No appeal lies from an order in *habeas corpus* proceedings remanding a child into the custody of its father and directing the writ to stand over subject to the further consideration of the court. *Comm'th v. Blatt*, 165 P. S. 213.

69. No appeal lies to a refusal to strike off an order of confirmation of a report of road viewers, five years after such confirmation. *Road in Adams*, 130 P. S. 190.

70. It has been the universal practice to designate a fixed sum as a penalty in bonds securing compensation in condemnation proceedings; there is no appeal from the order of the common pleas approving such a bond as adequate in amount and executed by sufficient sureties. *Twelfth Street Market Co. v. Philadelphia & Reading Terminal R. R. Co.*, 142 P. S. 580; affirming s. c. 10 C. C. 25.

71. Making absolute a rule for an alternative mandamus is not such a final judgment from which a writ of error may be taken. *Lower Saucon Township v. Broadhead*, 9 Atlan. 63. See *Broadhead v. Lower Saucon Township*, 2 L. V. 381.

72. No appeal lies under the act of 14 June 1836, sec. 32 (P. L. 626), from an order discharging a rule for an alternative writ of mandamus. *Comm'th v. Lackawanna County*, 133 P. S. 180.

73. An appeal does not lie from the refusal of the court to strike off a mechanic's lien. *Carter v. Caldwell*, 147 P. S. 370.

74. A decree of partition in the common pleas could only be reviewed on writ of error. An appeal did not lie. *Laird's Appeal*, 1 Mona. 755.

75. The refusal of the orphans' court for satisfactory reasons to open a decree

of partition will not be disturbed on appeal. *Wilson's Appeal*, 1 Cent. 604.

76. An order to produce books and papers on the trial is not reviewable in the supreme court. *Logan v. Pennsylvania Railroad Co.*, 132 P. S. 403.

77. An order refusing to remit the forfeiture of a recognizance is not reviewable on appeal to the supreme court. *Comm'th v. Oblender*, 135 P. S. 536; see s. c. *Ibid.* 530.

78. No appeal lies to the supreme court from the order of the quarter sessions in proceedings for the erection of a new township under the act 15 April 1834 (*Brightly's Purdon* 443). *Valley Township*, 146 P. S. 111.

79. Under sec. 104 of the act 15 April 1834 (*Brightly's Purdon* 2015), authorizing township officers to appeal to the common pleas from the settlement of their accounts, no appeal lies to the supreme court. *Thomas v. Upper Merion*, 148 P. S. 116.

80. An order opening a decree confirming a sale of real estate for the payment of debts and setting aside the sale, is within the discretion of the orphans' court, and no appeal lies therefrom to the supreme court. *Williams's Estate*, 140 P. S. 187.

81. In a proceeding before the register to annul the probate of a will, to grant letters upon a will of later date, where the register under the act 15 March 1832, sec. 25 (*Brightly's Purdon* 1849 note e), called an orphans' court and certified certain questions for decision and the court decided that the register must decide the questions, after which they would come before the court on appeal, and thereupon the objecting parties presented their petition to the court, averring that there were disputable and difficult matters involved, and asking the court to hear the testimony and direct an issue, and the court refused the petition and made a decree returning the record to the register; it was held, that no appeal would lie to the supreme court. *Hoopes's Estate*, 152 P. S. 105; affirming s. c. 12 C. C. 331.

82. No appeal lies from an order of the orphans' court directing the payment out of the estate, of the costs of a proceeding to compel one of the executors to join with the others in a deed of sale. *Schaifer's Estate*, 155 P. S. 250.

83. No appeal lies to the supreme court from a decree of the orphans' court citing an executor to file an account. *Palethorp's Estate*, 160 P. S. 316. See s. c. 14 C. C. 287.

VI. What is brought up, and what will be reviewed on appeal.

84. Upon specifications of error to the findings of a referee, being approved by the court, where the testimony is not fully presented, findings of fact cannot be reviewed by the supreme court. *Borda v. Philadelphia & Reading R. R. Co.*, 141 P. S. 484.

85. The supreme court will not consider specifications of error that the court erred in not setting aside the report of a referee upon questions of fact, where there was evidence upon such questions sufficient to submit to a jury. *Ellison v. Hosie*, 147 P. S. 336.

86. The finding of an auditor approved by the court below will not be questioned in the supreme court unless the evidence submitted was insufficient fairly to sustain the findings; his admission of incompetent testimony is no ground for reversal unless it also appears that he was influenced by it or that it might and ought to have led to a different conclusion. *Harbison's Estate*, 145 P. S. 456.

87. Where a cause is submitted to the decision of the court under the act 22 April 1874 (*Brightly's Purdon* 2023), the findings of fact are no more reviewable by the supreme court than is the verdict of a jury. *Comm'th v. Westinghouse Electric Manufacturing Co.*, 151 P. S. 265.

88. The refusal of the court below to give the counsel for the defendant the conclusion of the argument is not re-

viewable by the supreme court. *Patterson v. Marine National Bank*, 130 P. S. 419.

89. There is no way by which objectionable remarks by counsel to the jury may be brought on the record and errors assigned. *Comm'th v. Nicely*, 130 P. S. 261. *McCloskey v. Bell's Gap R. R. Co.*, 156 P. S. 254.

90. The supreme court will review a refusal to continue, which subjects the parties to a trial without witnesses and in violation of a written rule of court. *Schrimpton v. Bertolet*, 155 P. S. 638; reversing s. c. 10 Lanc. 139.

91. Upon an assignment of error to the refusal to arrest a judgment, the supreme court will not pass upon the sufficiency of the evidence to support the verdict, but simply upon the sufficiency of the declaration. *Schubkagel v. Dierstein*, 131 P. S. 46.

92. The supreme court will not consider appeals from interlocutory orders requiring money to be paid to or by receivers unless such orders are shown to have been improvidently made. *Sykes v. Thornton*, 152 P. S. 94.

93. An appeal from an order of the court of common pleas will not be entertained where it is neither alleged nor shown that the exercise of the discretionary power of the lower court was abused. *Felts v. Delaware, Lackawanna & Western R. R. Co.*, 160 P. S. 503.

94. A plaintiff having, upon the order of the court below, exercised its election as to which of three judgments it would enter, is estopped from complaining of the order on error. *Scranton Building Association v. Rauck*, 13 Atlan. 840.

95. A verdict for a greater sum than the evidence justified cannot be corrected in the supreme court on error. *Charles v. Bishoff*, 1 Atlan. 572.

96. Where the objection is not raised below that the verdict exceeded the amount properly recoverable under the narr., such objection will not be considered in error. *Readdy v. Shamokin Borough*, 137 P. S. 92.

97. An appeal from the judgment of the common pleas discharging the defendant's rule to show cause of action and dissolve a foreign attachment brings up nothing not upon the record proper. *Conshocken Tube Co. v. Iron Car Equipment Co.*, 167 P. S. 589; s. c. 36 W. N. C. 254.

98. A proceeding in the supreme court to review a road case is but a common law proceeding by *certiorari*, and the review is confined to the regularity of the record. When such a case is removed to the supreme court more than two years after the final confirmation, the writ must be quashed; and this, though an application to set aside was made and refused within two years. *Roaring Brook Township Road*, 140 P. S. 632.

99. Upon an appeal from the quarter sessions in a road case, the jurisdiction of the court and the regularity of the proceedings are the only questions to be determined; the facts cannot be considered even though they be set forth in the opinion of the court. *Hamilton Street*, 148 P. S. 640; affirming s. c. 7 Montg. 67.

100. Upon an appeal from an order overruling exceptions to a report of road viewers, the supreme court can review only the regularity of the proceedings; exceptions which raise only questions of fact will not be considered, and it is useless to print the testimony. *Keller's Private Road*, 154 P. S. 547.

101. An appeal and *certiorari* from an order dismissing the petition of an alleged insolvent for a discharge, under the insolvent law, does not bring up the opinion of the court, especially when no exception was sealed; whether the petitioner was a fraudulent debtor is a question of fact, and the evidence not being brought up by the writ, the finding of the court below will be presumed to have been upon sufficient evidence. *Owen's Case*, 140 P. S. 565.

102. Where the court sits in the place of triers, to determine the question of the impartiality of a juror as a matter of fact, its determination is conclusive and

cannot be reviewed by the supreme court; the rule is different, however, where the juror's position is such that his incompetency is a conclusion of law. *Catasauqua Mfg. Co. v. Hopkins*, 141 P. S. 30.

103. An appeal from an order refusing a petition for a license to sell liquors at retail, is but a substitute for a common law *certiorari*; it brings up nothing but the record of which the reasons given for the refusal form a part. *Berg's Petition*, 139 P. S. 354.

104. Upon an appeal from an order granting a liquor license, the supreme court cannot consider the merits, but can only determine whether the license court has proceeded according to law. *Branch's License*, 164 P. S. 427.

105. Under the act 16 March 1868 (Brightly's Purdon 789), authorizing writs of error to orders of removal, there can be no review of the judgment of the quarter sessions on the facts and merits of the case; but only of such decisions on points of law and evidence as may have been excepted to. *Overseers of Laporte v. Overseers of Hills Grove*, 1 York 223.

106. The question whether the pumping of an oil well on Sunday was a work of necessity was a question of fact and could not be reviewed on the merits by the supreme court. *Comm'th v. Gillespie*, 146 P. S. 546; affirming s. c. 38 P. L. J. 213. See *Comm'th v. Gillespie*, 38 P. L. J. 463; s. c. 10 C. C. 89.

107. A proceeding in the orphans' court by which dower is assigned, will not be reviewed on appeal from distribution, the decision as to dower being a collateral proceeding from which no appeal was taken. *Evans's Estate*, 150 P. S. 212; affirming s. c. 8 Lanc. 321.

VII. Error.

(a) Assignable error.

108. The refusal to grant a continuance is not assignable as error. *Lingenfelter v. Williams*, 9 Atl. 653.

109. The refusal, upon the trial, of a

short rule to take the testimony of a sick witness, was *held* not to be error, no exception being taken. *Munger v. Casey*, 1 Mona. 688; s. c. 17 Atlan. 36.

(b) Reversible error.

110. The want of jurisdiction in the justice may be shown as error in the supreme court after the trial of an appeal in the common pleas, where the question was not raised. *Hill v. Tionesta Township*, 129 P. S. 525.

(c) Harmless error.

111. The supreme court will not reverse for error by which the appellant was not injured. *Worrall v. Pyle*, 132 P. S. 529; *Montgomery v. Waynesburg Exchange Bank*, 5 Cent. 261; *Depew v. Depew*, 2 Ibid. 611; *Haupt v. Haupt*, 15 Atlan. 700; *Lewis v. Protherol*, 17 Ibid. 200; *Hoar v. Leaman*, 15 Ibid. 716; *Diehl v. Lee*, 9 Ibid. 865; *Bedell v. Errett*, 11 Ibid. 571; *Clarke v. State Valley Railroad Co.*, 136 P. S. 408; s. c. 26 W. N. C. 541; *Sommer v. Gilmore*, 168 P. S. 117.

112. The supreme court will not reverse for the admission of irrelevant and harmless testimony. *Montgomery v. Waynesburg Exchange Bank*, 5 Cent. 261. *Shepherd v. Busch*, 154 P. S. 149; *Malone v. Philadelphia & Reading R. R. Co.*, 157 P. S. 430.

113. Upon an issue of testamentary capacity, the weight of the evidence being in favor of the will, the supreme court will not reverse on the ground of immaterial errors in the admission and rejection of evidence. *Hoar v. Leaman*, 15 Atlan. 716.

114. The supreme court will not reverse for an immaterial error in the statement of evidence where such error has not prejudiced the unsuccessful party. *Jaffray v. Frothingham*, 148 P. S. 213.

115. The supreme court will not reverse for an error in the admission of a deposition, which, when read, was not prejudicial to the objecting party. *Depew v. Depew*, 2 Cent. 611.

116. If a witness in reply to a question answered, "I couldn't tell," it is an immaterial error that the question itself was improperly admitted. *Haupt v. Haupt*, 15 Atlan. 700.

117. The letter containing the alleged libel being sufficiently proved, and being complete in itself, it was of no importance that the envelope containing the letter was also admitted without sufficient evidence of its authenticity; the error was harmless. *Aspell v. Smith*, 134 P. S. 59.

118. In trespass for a wrongful levy and sale the bond given by defendants to the sheriff should properly be excluded, but in view of the fact that the jury did not give the plaintiff any punitive damages, its admission did the defendants no harm, and was therefore not error of which they could complain. *Lewis v. Protherol*, 17 Atlan. 200.

119. Language in a charge, though erroneous, cannot be complained of by one to whom it worked no injury. *Diehl v. Lee*, 9 Atlan. 865.

120. A judgment will not be reversed for an error in the charge which did not affect the result. *Bedell v. Errett*, 11 Atlan. 571.

121. A case will not be reversed for an inaccuracy in referring to the testimony of a witness, where it appears that the error was too slight to do any harm to the appellant. *Lewis v. Rattigan*, 138 P. S. 308.

122. Where an objection is made to an offer of evidence and the offer is refused, but the witness subsequently testifies without limitation, to everything relating to the subject, the refusal of the offer works no harm and an assignment thereto is without merit. *Collins v. Houston*, 138 P. S. 481.

123. Where an erroneous admission of evidence is rendered harmless by the verdict, there is no cause for reversal. *Cornish v. Hooker*, 141 P. S. 138.

124. Where the admission of a memorandum book to refresh the memory of a witness could have done no harm, it is not sufficient ground for reversal.

Vulcanite Paving Co. v. Ruch, 147 P. S. 251.

125. Where the construction of a deed is erroneously submitted to a jury, but a verdict establishes the sufficiency of the deed, and the supreme court is of the opinion that the deed is sufficient, the judgment entered on the verdict will not be reversed. *Beeson v. Porter*, 155 P. S. 579.

126. Where the refusal to allow a question did not injure the complaining party, such refusal is no ground for reversal. *Commonwealth Title Ins. & Trust Co. v. Gray*, 150 P. S. 255.

127. The supreme court will not reverse the finding of an auditor because of the admission of irrelevant testimony, where such evidence was not the basis of any finding and did no harm. *Countryman's Estate*, 151 P. S. 577.

(d) How error may be cured.

128. The wrongful admission of a deed in evidence is cured by a pointed and positive instruction to the jury to disregard it. *Cadwallader v. Brodie*, 13 Atlan. 483; s. c. 12 Cent. 152.

129. An error in permitting a witness to testify as to the existence of a paper is cured by its subsequent production in evidence. *Van Horne v. Dick*, 151 P. S. 341.

130. An error in directing the amount of the verdict is cured by a subsequent *remittitur*, for the excess. *Jones v. Hughes*, 16 Atlan. 849; affirming *Hughes v. Jones*, 4 Montg. 215.

(e) Errors in the record.

131. Depositions taken on a rule to open judgment do not form part of the record, and cannot be considered on error in the supreme court. *France v. Ruddiman*, 126 P. S. 257.

132. It is no ground for reversing a decree that objections were filed after the master's report, that no issue was made as to the defendant company, and that after the reference to the master, parties

both plaintiff and defendant were added but the pleadings remained unchanged. *Bailey v. Pittsburgh Coal R. R. Co.*, 139 P. S. 213.

133. Upon an appeal from an order for the removal of a pauper where the exceptions sealed do not relate to a decision on a point of evidence, and the facts as found render the points of law presented inapplicable, there is nothing to review in the supreme court. *Kittanning Township v. Madison Township*, 146 P. S. 108.

134. The record is within the reach of the court below for the correction of clerical errors until the return day of a writ of error; and this, whether the record is in fact made up and transmitted or only constructively removed. *Gunn v. Bowers*, 126 P. S. 552.

135. Upon an appeal in equitable proceedings, the opinion of the chancellor is an integral part of the proceedings. *Miller's Estate*, 38 P. L. J. 111.

(g) Questions of evidence.

136. Where evidence is given without objection, the refusal, to strike it out is not reviewable in the supreme court. *Lowrey v. Robinson*, 141 P. S. 189.

137. Error cannot be assigned to the rejection of testimony which is subsequently admitted. *Nesbitt v. Turner*, 155 P. S. 429; affirming s. c. 7 Kulp 41.

138. Upon reviewing a case tried by the court on assignments of error to the rejection of testimony, the supreme court will treat the offers as stating the facts; their relevancy, the inferences to be drawn from them, and the legal conclusions are for the court. *Comm'th v. Philadelphia County*, 157 P. S. 531.

139. A judgment will not be reversed for the admission of incompetent evidence which was withdrawn before argument. *Sidney School Furniture Co. v. Warsaw Township School District*, 158 P. S. 35.

140. Where a witness offered was only competent under the exception contained in the act 11 June 1891 (Brightly's Purdon 819), and the offer did not set

forth sufficient to enable the court to determine whether or not the witness was within the exception; it was held, that the supreme court would not consider an assignment of error to the rejection of the offer. *Krumrine v. Grenoble*, 165 P. S. 98.

(h) Errors in the charge.

141. If the jury be misled by the charge of the court, the supreme court will reverse the judgment. *Skinner v. McAllister*, 4 Cent. 750.

142. If the trial judge states to the jury a fact which was unauthorized by the evidence and was misleading, it is an error for which the supreme court will reverse. *Philadelphia, Wilm. & Balto. Railroad Co. v. Alvord*, 128 P. S. 42.

143. If, in trespass for taking lumber, there was other evidence from which the jury might have found for the plaintiff, it was error to instruct them to find for the defendant, if they believed that the lumber in suit was not part of a lot of lumber formerly replevied between the parties, and as to which there had been an adjudication in favor of the plaintiff. *Garey v. Woodward*, 127 P. S. 251. See *Seeley v. Garey*, 109 Ibid. 301.

144. If negligence be not a fact conceded, it is error to charge the jury that there is little if any dispute that the defendant was negligent. *Forker v. Sandy Lake Borough*, 130 P. S. 123.

145. It is not enough to charge generally that if the plaintiff was guilty of contributory negligence he cannot recover; the judge should state what facts would constitute such negligence in view of the testimony. *New York, L. E. & W. Railroad Co. v. Enches*, 127 P. S. 316.

146. Upon an issue *devisavit vel non*, if the whole charge be not inaccurate or misleading, the court will not reverse, though some extracts of the charge, disconnected from the residue, might appear erroneous. *Heffley v. Poorbaugh*, 10 Atlan. 12.

147. A judgment will be affirmed though the charge might give the impression to the jury that the defendant's evi-

dence was more worthy of credit than that adduced by the plaintiff. *Dimmick v. Sexton*, 125 P. S. 334.

148. If the disputed facts be fairly submitted, the fact that the trial judge commented on the testimony of one side more than on the other is not cause for reversal. *McKnight v. Mathews*, 10 Cent. 287; s. c. 11 Atlan. 676.

149. The court will not reverse for "not reviewing and analyzing the evidence," nor for "not instructing the jury sufficiently as to the rule for weighing the value of testimony." Specific instructions should be asked for. *Grantz v. Price*, 130 P. S. 415.

150. If no charge was requested on particular testimony, a failure to so charge will not be considered an error. *Kurtz v. Haines*, 15 Atlan. 716.

151. It is not error for the trial judge to omit to rule on a question which neither party presented or suggested at the trial. *Goven v. Glaser*, 3 Cent. 109.

152. If a judge in clear and emphatic language withdraws statements made in his charge, they will, on error, be treated as never having been uttered. *Sargeant v. Martin*, 133 P. S. 122; s. c. 25 W. N. C. 565.

153. A judge is entitled to considerable latitude and discretion in commenting on the evidence; unless he be unfair or misleading the supreme court will not interfere. *Comm'th v. Doughty*, 139 P. S. 383; s. c. 38 P. L. J. 261.

154. It is not error for the trial judge to use assumed facts merely by way of illustration as to legal negligence; and this, though the facts assumed conformed to a theory urged by one of the parties. *Long v. Milford*, 137 P. S. 122.

155. Slight inaccuracies in reviewing the facts with expressions of opinion as to the merits are not ground for reversal, when accompanied by instruction that the facts are for the jury and they should remember them, and the errors were not called to the attention of the court before the jury retired. *Knapp v. Griffin*, 140 P. S. 604.

156. In an action for a conspiracy to defraud, it is error for the court to call the attention of the jury to the fact that if judgment be given for the plaintiff, the defendants will not be entitled to the exemption and will be liable to arrest. So, it is error to charge that before finding against the defendants, the jury ought to be satisfied of their guilt by "clear and full evidence," and that the circumstances ought to be such as are inconsistent with the theory of innocence; and this, though the court add that the jury need not be satisfied beyond a reasonable doubt. *Catasauqua Mfg. Co. v. Hopkins*, 141 P. S. 30.

157. Where there is nothing in the testimony to justify an inference made in the charge, the same will be held misleading in that respect and prejudicial to the appellant. *Kelly v. Eby*, 141 P. S. 176.

158. Where a sentence of the charge taken with its context and with other instructions could not have misled the jury, the supreme court refused to reverse. *Rogers v. Davidson*, 142 P. S. 436.

159. A party to a suit is not estopped from alleging an instruction as to the construction of an instrument for error, by the fact that on the trial his counsel made a verbal statement, when offering the agreement, that such was the proper construction. *Hoffman v. Bloomsburg & Sullivan R. R. Co.*, 143 P. S. 503; s. c. 157 P. S. 174.

160. Where a portion of a charge assigned for error bears the appearance of having been reported with some error or omission altering its meaning, but, as presented, it plainly is contradictory of proper instructions given prior thereto on material questions involved, the judgment must be reversed. *Gearing v. Lacher*, 146 P. S. 397.

161. An erroneous statement of the evidence upon the pivotal fact in the case is a cause for reversal; and this, though inadvertently made and inconsistent with prior parts of the charge. *Steinbrunner*

v. *Pittsburgh & Western Ry. Co.*, 146 P. S. 504.

162. Where the questions of fact are fairly submitted, explanatory comments upon the weight of certain testimony, though unfavorable to one of the parties, are not ground for reversal. *Follmer v. McGinley*, 146 P. S. 517.

163. If the material questions of fact are fairly submitted as presented by the evidence, an expression of opinion upon the weight of the plaintiff's testimony is not error. *Didier v. Pennsylvania Co.*, 146 P. S. 582.

164. Where the defendant's contention is confirmed by the testimony of a witness, it is not a full and adequate presentation of the witness's testimony that if they believe his evidence, it may throw some light upon the plaintiff's motive and conduct. *Webb v. Lees*, 149 P. S. 15; s. c. 153 P. S. 436.

165. In an action to recover money invested through alleged fraudulent representations of defendant, it is error for the court to call the attention of the jury to the fact that the defendant had held a high and honorable position in the community, and that his reputation was at stake. *Rosenagle v. Handley*, 151 P. S. 107.

166. It cannot be said to be error for a trial judge in explaining a map to leave the bench and point out the plaintiff's theory of location. *Irvin v. Kutruff*, 152 P. S. 609.

167. It is unfair to sever a single sentence from the body of a judge's charge and undertake to construe it by itself, without regard to what may have been said in the same connection or in other portions of the charge. *Irvin v. Kutruff*, 152 P. S. 609.

168. It is error to confine the attention of the jury to one view of a case where there is more than one which they should consider; so, if the general effect of a charge has a tendency to mislead, it is cause for reversal, though no particular portion of the charge be clearly erroneous. *Peirson v. Duncan*, 162 P. S. 187.

169. In an action on a promissory note where the defendant's signature was not disputed, but the issue was, whether the plaintiff had fraudulently altered the amount; it was held to be error to so charge the jury as to give them the idea that the defence denied the execution of the note altogether. *Winters v. Mowrer*, 163 P. S. 235.

170. Where a charge is in the nature of an argument for the plaintiff and is partial, inadequate and misleading, it is good ground for reversal. *Young v. Merkel*, 163 P. S. 513.

171. Where a charge is not in expression and tone a judicial presentation of the case, but its tendency as a whole is to belittle and prejudice one side, the judgment will be reversed. *Heydrick v. Hutchinson*, 165 P. S. 208.

172. Where the effect of an instruction was to take from the jury all testimony except that of a particular witness and to leave to the jury the construction of a paper which was properly for the court; it was held, that such error was not cured by telling the jury that the whole testimony was for it to pass on. *Heydrick v. Hutchinson*, 165 P. S. 208.

173. The omission to charge more fully upon the evidence (no instructions being asked for) is not necessarily error, the substance and general tenor of the charge being correct. *Frothingham v. Laflin & Rand Powder Co.*, 2 Cent. 524.

174. In an action for personal injuries, where plaintiff's case depends almost entirely upon his own testimony and a large amount of evidence is offered tending to show his bad character for veracity, it is error for the court to omit in its charge all mention of such evidence. *Herstine v. Lehigh Valley R. R. Co.*, 151 P. S. 244.

175. In an action for personal injuries, where the company introduces testimony tending to show that plaintiff's ill-health was caused by lumbago of long standing and not to the injuries, it is error for the court to entirely refrain from alluding to such testimony in its charge. *Herstine v. Lehigh Valley R. R. Co.*, 151 P. S. 244.

176. Where a witness estimated the damages to a life estate at a sum fifteen times greater than the entire value of the property; it was *held* to be error for the court not to caution the jury as to the worthlessness of the testimony. *Herbert v. Rainey*, 162 P. S. 525.

177. It is not a reversible error to affirm a point with a reference to what is said in the general charge upon the same subject, where it appears that the instruction in the general charge is not a qualification of the affirmation. *Readdy v. Shamokin*, 137 P. S. 92.

178. A specification that the court erred in not directing a verdict for defendant will not be sustained, where no request was made for such an instruction. *Readdy v. Shamokin*, 137 P. S. 98.

179. Where parties desire specific instructions, it is their duty to request them to be given; otherwise their omission is not assignable for error. *Serfass v. Dreisbach*, 141 P. S. 142. See s. c. 12 C. C. 60.

180. When a hypothetical point prays for instructions upon the legal effect of certain facts which are supported by evidence, the point should not be answered by simply submitting the facts to the determination of the jury; it is the duty of the judge to instruct the jury as to their duty, in case they should find the facts to be as stated. *Ham v. Delaware & Hudson Canal Co.*, 142 P. S. 617. See s. c. 155 P. S. 548.

181. Where a point assumes that a certain question of fact is before the jury and prays for instruction upon that assumption, the party presenting it cannot afterwards raise the objection that there was no evidence in the case justifying the submission of the question. *Auburn Bolt & Nut Works v. Shultz*, 143 P. S. 256.

182. The supreme court will not consider the law as stated in a point where such point is not based on the testimony. *Sondheimer v. Hoover*, 144 P. S. 221.

183. A request for binding instructions is necessary to support an assignment of

error alleging a refusal to submit to the jury. *Kitchen v. McCloskey*, 150 P. S. 376.

See CRIMINAL LAW, XVI.
PRACTICE, XXIII.

VIII. Exceptions.

(a) Bill of exceptions.

184. Under the act 24 March 1877, sec. 2 (Brightly's Purdon 1624), error may be assigned with respect to any part of the charge of the court which has been filed, with or without request, and whether excepted to in the court below or not; an assignment of error in this case was allowed to be filed on the argument of the case in the supreme court. *Janney v. Howard*, 150 P. S. 339.

185. Error may be assigned to answers to points or to the charge of the court, although no exceptions were taken thereto in the court below. *Fries v. Null*, 154 P. S. 573. See *Connell v. O'Neil*, 154 P. S. 582.

186. Matters of evidence can only be placed upon the record in the supreme court by a bill of exceptions; an exception is as equally indispensable in such a case since the passage of the act 24 May 1887 (Brightly's Purdon 1944), providing for stenographers, as it was before; an exception, though noted by the stenographer, is the act of the judge, and it is the duty of the judge to see that the bill is correct and that his signature to it is a certificate of correctness on which the supreme court may rely; when an exception is noted by the direction of the judge, it is not absolutely necessary that it be signed by him, yet such signing is the better and more desirable practice. *Connell v. O'Neil*, 154 P. S. 582. See *Rosenthal v. Ehrlicher*, 154 P. S. 396; *Hill v. Egan*, 160 P. S. 119.

187. Under the act 24 March 1877 (Brightly's Purdon 1624) error may be assigned to any part of the charge which has been filed with or without request, and whether excepted to in the court

below or not. *Grugan v. Philadelphia*, 158 P. S. 337.

188. It is the duty of a stenographer to record fully and accurately all that transpires upon the trial of a cause, all the oral testimony given and all the instructions given by the trial judge to the jury; an offer to prove a fact or to use a person as a witness should be entered at length on his notes; if objection be made to the admission of evidence or the person, this should be put down on his notes, and the ruling of the court upon the offer should be fully and correctly set down. If an exception is taken to the ruling, this should be stated, and if the judge directs that the exception be noted, this fact should be stated, but the noting of an exception is the work of the judge, and the stenographer cannot note one unless he is directed so to do by the judge; if the judge refuses to allow an exception, the stenographer should state the fact on his notes, but he should not attempt to note or allow an exception simply because an objection has been made and overruled in his hearing, nor because counsel request him to do so; the direction to note an exception or seal a bill must come from the judge. When the notes of trial have been duly filed, an appellant may assign as error an instruction appearing in the charge, or any answer to points, whether the particular point had been previously made or not. *Rosenthal v. Ehrlicher*, 154 P. S. 396. See *Connell v. O'Neil*, 154 P. S. 582; *Hill v. Egan*, 160 P. S. 119.

189. The statute of Westminster 2d has not been repealed nor has it become obsolete; bills of exception fill the same place in regard to trial as they always have, and they are still the only means known to the law for putting on the record matters of evidence and of the competency of witnesses. The act 24 May 1887 (Brightly's Purdon 1944) has not relieved the trial judge of examining the bill and charge filed and certifying them by his own proper signature, which is a personal

duty which cannot constitutionally be delegated by him or transferred by the legislature to any subordinate. When the judge has certified and filed the transcript of the evidence showing the exceptions and the charge, he is not under any obligation to sign a second bill marking certain parts of the charge as specifically excepted to, but it is a good practice to do so. *Comm'th v. Arnold*, 161 P. S. 320.

190. Where the stenographer who took the evidence died before writing out his notes, and no one was able to translate the same; it was *held*, upon appeal, that the evidence might be supplied in the same way that lost or destroyed records are supplied. *Walter v. Sun Fire Office*, 165 P. S. 381.

191. Where an assignment of error depends for the correctness of its application on the evidence, it will not be considered if the evidence is not presented by bill of exceptions. *Connell v. O'Neil*, 154 P. S. 582.

192. An assignment of error to the admission of testimony which was admissible for some purposes, will not be considered where the bill of exceptions does not show the purpose of the offer or the reason for the objection or admission of the evidence. *Norbeck v. Davis*, 157 P. S. 399.

193. The supreme court will in a proper case return the record to the court below to afford the judges thereof an opportunity to see that the record be properly perfected by the stenographer. *Waln v. Beaver*, 161 P. S. 605.

194. As to the preparation and settlement of the bill of exceptions, see authorities cited in note to *Field v. Gellerson*, 14 Atlan. 70.

195. An objection that no exception was taken to the judgment of the court below refusing to take off a non-suit, will not be noticed where the exception in form has been filed since the record was made up in the common pleas. *Yerkes v. Richards*, 153 P. S. 646; reversing s. o. 8 Montg. 47. See s. c. 11 Lanc. 308.

(b) When an exception must be taken.

196. If no exception be taken to the reservation of a point at the time of its reservation, the supreme court will presume that it was assented to. *Headley v. Renner*, 129 P. S. 542.

197. There being no exception to a judgment on a point reserved, it cannot be reviewed on error. *Lower Providence Live Stock Insurance Association v. Weikel*, 13 Atlan. 82; affirming *Weikel v. Lower Providence Live Stock Insurance Association*, 3 Montg. 207, 211.

198. Exceptions must be taken to answers to points, or assignments of error to them will not be considered. *Huckenstein v. Kelly*, 139 P. S. 201; s. c. 38 P. L. J. 227.

199. The supreme court will not consider the form in which a question of law was reserved, unless proper exception was taken to the reservation at the time it was made. *Blake v. Metzgar*, 150 P. S. 291.

200. The form of a reserved point will not be considered by the supreme court where no specific exception was taken to the same in the court below. *Heany v. Schwartz*, 155 P. S. 154; affirming s. c. 8 Montg. 113.

201. There being no exception in the court below to its ruling which is specified as error, its judgment will be affirmed. *Shaffer v. Eichert*, 132 P. S. 285.

202. In the absence of a bill of exceptions, the supreme court has nothing before it but the bare record, such as would be sent up upon a writ of *certiorari*. *Comm'th v. Ware*, 137 P. S. 465; s. c. 26 W. N. C. 462.

203. Where a point is presented for instructions and is reserved as a question of law without exception, a specification of error in the supreme court in entering judgment for the defendant *non obstante veredicto* cannot be considered. *Fulton v. Peters*, 137 P. S. 613.

204. Where the defendant makes no request for a binding instruction in his favor, an assignment in the supreme court

specifying error in submitting the case to the jury on the evidence cannot be sustained. *Wray v. Spence*, 145 P. S. 399.

205. No exception being taken to the refusal to excuse a juror or to an alleged separation of the jury, an assignment of error to the same will be dismissed. *Bradwell v. Pittsburgh & West End Pass. Railway Co.*, 139 P. S. 404; s. c. 27 W. N. C. 264.

206. The question of the qualification of the petitioners in a road proceeding must be raised in the court below by a specific exception; it cannot be considered by the supreme court when raised for the first time by an assignment of error. *Swanson Street*, 163 P. S. 323.

207. Upon a submission to the decision of the court under the act of 22 April 1874 (Brightly's Purdon 2023) the supreme court, upon appeal, can hear and determine only questions arising upon bills of exception to the rulings of the trial judge relating to the evidence or to the law. *Comm'th v. Hulings*, 129 P. S. 317.

208. If no exceptions be taken before a referee as to his findings of facts, the supreme court on appeal cannot question the correctness of such findings. *Torrey v. Scranton*, 133 P. S. 173.

209. An exception to the refusal of the court to take off a nonsuit is necessary to bring up the evidence for review. *Bondz v. Pennsylvania Co.*, 138 P. S. 153; s. c. 38 P. L. J. 131. And this, though the court directed the stenographer to file his notes. *Anderson v. Oliver*, 138 P. S. 156.

210. Assignments of error specifying orders for a peremptory non-suit and refusing to take the judgment off, for error, will not bring up the testimony for the plaintiff, where no exceptions were taken to the orders in the court below. *Miller v. Balfour*, 138 P. S. 183.

211. Where there is no bill of exceptions to the order of the court below refusing to take off a non-suit, the supreme court will not look at the evidence. *Finck v. Conrade's Executor*, 154 P. S. 326.

212. An assignment of error to an order discharging a rule for judgment for want of a sufficient affidavit of defence, will not be considered unless an exception was taken; when such a rule is discharged in open court in the presence of the plaintiff's counsel, then is the proper time to except and request the court to seal a bill. *Comm'th v. Fleming*, 157 P. S. 644.

IX. Bail upon appeal.

213. An unauthorized condition in a recognizance for a writ of error renders the whole recognizance void. *Comm'th v. Serfass*, 1 Northam. 317.

214. A decree of disbarment executes itself, and a recognizance on a writ of error to obtain a *supersedeas* is a nullity. *Ibid.*

215. Though a recognizance be defective in form, if the defendant in error treat it as valid, neither the principal nor surety can evade liability on the ground of such informality. *Erdman v. Hartman*, 7 C. C. 609.

216. Pending an appeal from a conviction of murder in the second degree, the appellant will not be admitted to bail without a previous examination of the record, bill of exceptions, and assignments of error. *Comm'th v. Myers*, 137 P. S. 407; s. c. 27 W. N. C. 205.

217. In a recognizance for an appeal, the use of the word "appeal" instead of "judgment" being evidently a clerical error, will be construed to cover all costs both in the court below and in the supreme court. *Serfass v. Dreisbach*, 12 C. C. 60. See s. c. 141 P. S. 142.

218. Where, on the sale of plaintiff's real estate, the sheriff retained certain costs which were subsequently stricken out and the sheriff appealed to the supreme court who dismissed his appeal; it was *held*, that a suit against the sheriff to recover back the costs so retained was properly brought on his appeal bond instead of on his official

bond. *Johnson v. Burkholder*, 10 Lane. 393; s. c. 5 Del. 366. See *Boyd v. Johnson*, 144 P. S. 174.

219. On an appeal from the orphans' court, the amount of security is within the discretion of the court; when the appellant owes no duty of a fiduciary nature in respect of the subject-matter of the appeal, the orphans' court has no power to exact as a condition, security in a different form from that prescribed by sec. 59 of the act 29 March 1832 (*Brightly's Purdon* 1633). In an action on the recognizance, interest upon the fund cannot be recovered for the period of delay occasioned by an unsuccessful appeal. *Comm'th v. Wistar*, 142 P. S. 373.

220. An appeal and *certiorari* from the decree of the orphans' court dismissing the petition of a legatee for a decree for the payment of his legacy as a charge on land, will not be quashed because no security has been entered in the orphans' court. *Duval's Estate*, 146 P. S. 176.

221. A bond given under the act 17 March 1845 (*Brightly's Purdon* 785), to secure mesne profits on appeal from partition proceedings, is for the use of the parties entitled to the mesne profits without regard to the obligee named in the bond, and suit is properly brought in the name of the obligee for the use of all the parties in interest, and judgment should be entered in the aggregate, to be distributed among the parties entitled. *Lynch v. Lynch*, 150 P. S. 336.

222. A surety upon an appeal will not be relieved from liability by the mere fact that she was ignorant and not able to sign her name, and that she executed the recognizance upon the fraudulent misrepresentation of the appellant as to her ultimate liability. *Hall v. Tobin*, 10 C. C. 105; s. c. 28 W. N. C. 164.

X. Supersedeas.

223. An appeal from a final decree of the orphans' court taken after the expira-

and of twenty days, does not operate as a *supersedeas*. *Rankin's Estate*, 7 C. C. 442; s. c. 46 L. I. 270.

224. A writ of error to be a *supersedeas* must not only issue, but be served within three weeks of the judgment. *Taylor v. Breisch*, 8 C. C. 286.

225. An appeal from the orphans' court will not operate as a *supersedeas*, unless brought up and filed in the supreme court on the first day of the term next following the day it was perfected. *Miller's Appeal*, 1 East 635.

226. A *certiorari* in a road case not lodged in the court below until after an order to open has been issued to the supervisor, is not a *supersedeas* of such order. *Roaring Brook Township Road*, 140 P. S. 632.

227. Where an appeal was taken from a decree of the quarter sessions dividing a borough into wards and ordering an election therein, and a *certiorari* was issued; it was *held*, that an election held under the decree appealed from before the dismissal of the appeal by the supreme court was valid. *Comm'th v. Kistler*, 149 P. S. 345.

228. Where upon the granting of a preliminary injunction, a temporary receiver is appointed at the same time, the right of appeal from the order appointing a receiver depends on the act 14 February 1866 (Brightly's Purdon 784), which expressly provides that such appeal shall not be a *supersedeas*. *Haught v. Irwin*, 166 P. S. 548.

229. Where a decree has been made regulating the crossing of one railroad by another, and an appeal has been regularly taken and a recognizance given, such appeal operates as a *supersedeas* of all proceedings by the plaintiff company. *Citizens' Pass. Ry. Co. v. East Harrisburg Pass. Ry. Co.*, 161 P. S. 121.

230. Where, upon an appeal, the supreme court has entered a *non pros.*, a second appeal is not a *supersedeas*. *Upland Borough v. Delaware County Trust Co.*, 4 Del. 475; *Upland Borough v. New Chester Water Co.*, 4 Del. 489.

231. Where a *certiorari* and appeal were not applied for until more than three weeks after judgment, and the *certiorari* was not served until after the plaintiff had issued execution, but it was filed and served before the sheriff did anything under the execution; it was *held*, that the defendant was entitled to have the writ stayed upon payment of the execution costs that had accrued at the time the *certiorari* was filed and served. *Rand v. Long*, 6 Kulp 299.

232. Where the quarter sessions directs the transfer of a retail liquor license, a *certiorari* to the judgment is not a *supersedeas*; such an action of the court cannot be questioned by a creditor of the original licensee. *Breen's License*, 13 C. C. 141.

XI. Assignments of error.

233. The dismissal of each exception to an auditor's report must be made the subject of a separate assignment of error. *First National Bank's Appeal*, 5 Cent. 701.

234. Where an assignment of error embraces more than one point, it will not be considered. *Crawford v. McKinney*, 165 P. S. 605.

235. A specification of error, that depositions were not taken in conformity with the rules of court, such rules not being made known to the supreme court, will not be considered. *Express Publishing Co. v. Aldine Press*, 126 P. S. 347.

236. A specification assigning error in the violation of a court rule, should make it clearly appear that there was such a violation. *Morrison v. Nevin*, 130 P. S. 344.

237. An assignment of error that the court erred in confirming the auditor's report is too vague to be considered. *Wolf v. Ferguson*, 129 P. S. 272. See *Trullinger v. Charles*, Ibid. 289.

238. An assignment that the court erred in making a certain order should set out the order. *Road in Benzinger*, 135 P. S. 176; s. c. 26 W. N. C. 197.

239. Unless clear error be pointed out, specifications that the court erred "in sustaining the master's finding" or "in confirming the master's report" are insufficient. *Holton v. Newcastle, Northern Ry. Co.*, 138 P. S. 111.

240. A general assignment that "the charge of the court below, as a whole, was misleading to the jury" will not be considered. *Udderzook v. Harris*, 140 P. S. 236.

241. An assignment of error to a final decree on the report of an auditor, that the court erred in confirming the auditor's report, is too general and will not be considered. *Second National Bank v. Pennsylvania Anthracite Coal Co.*, 140 P. S. 628.

242. Where the report of a referee directing judgment for plaintiff was excepted to, but confirmed by the court, a specification of error that the court erred "in overruling the exceptions to the report of the referee" does not conform to the rule. *McCarthy v. Masters*, 142 P. S. 82.

243. An assignment that the court erred in making the decree confirming the auditor's report points out no specific error. *Maurer's Estate*, 148 P. S. 272.

244. Where it appeared that the court answered all the points presented, the supreme court refused to entertain an assignment of error that "the court erred in not instructing the jury upon the question to be decided." *Brookville v. Arthurs*, 152 P. S. 334.

245. A specification of error must be self-sustaining; an extract from the charge, which is unintelligible without the context, will not be considered. *Irvin v. Kutruff*, 152 P. S. 609.

246. An assignment of error that the evidence does not justify or sustain the verdict, the verdict was against the law, will not be considered. *Comm'th v. Zappe*, 153 P. S. 498.

247. An assignment of error relating to the admission or rejection of testimony should show the testimony adduced, or proposed to be adduced, under the offer

admitted or rejected. *Battles v. Sliney*, 126 P. S. 460; *Gates v. Watt*, 127 Ibid. 20; *Sticker v. Overpeck*, Ibid. 446.

248. Specifications of error to the admission or rejection of evidence must contain the offers, the objections, and the rulings of the court thereon. *Warfel v. Knott*, 128 P. S. 528.

249. Specifications of error will not be considered, which are based upon testimony which the appellant has neglected to fully present in his paper-books. *Brooks v. First Presbyterian Church*, 135 P. S. 137.

250. In an assignment of error the name of the witness should be given, and a reference made to the page of the testimony where the offer and its connection may be found. *Hawes v. O'Reilly*, 126 P. S. 440.

251. Where an assignment of error depends upon the consideration of the evidence, such evidence must be made a part of and returned with the record. *Pittenger v. Kennedy*, 148 P. S. 198.

252. An assignment of error to the admission and rejection of evidence should state the objection and the ruling of the court, and also that an exception was taken and allowed by the judge. *Rosenthal v. Ehrlicher*, 154 P. S. 396.

253. Assignments of error to the admission or rejection of evidence will not be considered where the purpose of the offer and the reason for its rejection or admission are not disclosed. *Malone v. Philadelphia & Reading R. R. Co.*, 157 P. S. 430.

254. Assignments of error to the admission or rejection of testimony must set forth so much of the proceeding or the accompanying evidence as is necessary to a proper understanding of the offer and the ruling of the court; the neglect of such requirement is not cured by putting the necessary matter in the bill of exceptions or elsewhere. *Comm'th v. Werntz*, 161 P. S. 591.

255. Assignments of error to the admission of evidence must set forth the evidence admitted. *Augerstein v. Jones*,

139 P. S. 183; s. c. 27 W. N. C. 169; *Philadelphia Trust, S. D. & I. Co. v. Purves*, 12 Cent. 659; s. c. 13 Atlan. 936; *Logan v. Friedline*, 12 Cent. 677; s. c. 14 Atlan. 343. *Broadnax v. Cheraw & Salisbury R. R. Co.*, 157 P. S. 140; s. c. 1 Dist. Rep. 251; *Bidwell v. Evans*, 156 P. S. 30; *Butchers' Ice & Coal Co. v. Philadelphia*, 156 P. S. 54; *Kramer v. Winslow*, 154 P. S. 637; *Holthouse v. Rynd*, 155 P. S. 43; *Hauch v. Tidewater Pipe Line Co.*, 153 P. S. 366; *McElroy v. Braden*, 152 P. S. 78; *Commonwealth Title Ins. & Trust Co. v. Gray*, 150 P. S. 255; *Arnold v. Blabon*, 147 P. S. 372; *Cornish v. Hooker*, 141 P. S. 138; *Fisher v. Baden Gas Co.*, 138 P. S. 301.

256. A specification of error as to the admission of evidence must quote the full substance of the bill of exceptions. *Melvin v. Melvin*, 130 P. S. 6.

257. A specification alleging error in overruling an objection to the offer of an exhibit, urged on account of the non-production of the original, should set out the paper and the evidence on which it was admitted. *Reynolds v. Cridge*, 131 P. S. 189.

258. An assignment of error to the admission of testimony will be dismissed which does not embody the offer, the objection, and the ruling of court. *Wylie v. Mansley*, 132 P. S. 65; s. c. 25 W. N. C. 279.

259. A specification to the admission of evidence should set out the evidence admitted under the offer and show that a bill of exceptions was sealed. *Readdy v. Shamokin*, 137 P. S. 98; *Long v. Milford*, Ibid. 122.

260. An assignment to the admission of an offer of evidence which does not show the full substance of the testimony admitted under the offer, is not in conformity with the rule. *Markle v. Berwick*, 142 P. S. 84.

261. An assignment of error to the admission of evidence must set forth not merely the question but the answer; if the answer be omitted, the assignment will not be considered. *Beck v. Penn-*

sylvania P. & B. R. R. Co., 148 P. S. 271.

262. An assignment of error to the refusal to strike out testimony which recites that portion of the witness's testimony to which objection was taken, is improper where it fails to conform to the motion in the court below which was to strike out all of the witness's testimony. *Miller v. Windsor Water Co.*, 148 P. S. 429.

263. An assignment of error to the admission of evidence will not be considered where it only gives the question objected to and the ruling of the court. *Wust v. Erie City Iron Works*, 149 P. S. 263.

264. The rule that an assignment of error to the admission of evidence must recite the evidence, applies to a case where the offer of evidence recites the evidence proposed to be given. *Kennedy v. Erdman*, 150 P. S. 427.

265. An assignment of error to the admission in evidence of a question is bad which does not quote the answer to the question. *Van Horne v. Dick*, 151 P. S. 341.

266. An assignment of error to the admission of record evidence should recite the record in full. *Cochran v. Sanderson*, 151 P. S. 591.

267. An assignment of error to the admission of evidence will not be considered which quotes the bill of exceptions, but not the evidence. *Fritz v. Lebanon Mutual Ins. Co.*, 154 P. S. 384.

268. An assignment of error to the admission of evidence is irregular which fails to set forth the full substance of the bill of exceptions, but the court may, in its discretion, permit an amendment of the assignment at bar. *Zimmerman v. Camp*, 155 P. S. 152.

269. The court will not consider an assignment of error to the refusal to admit in evidence an exemplification of record, not setting out such record. *Kreiner v. Rochester & Pitts. Railroad Co.*, 135 P. S. 184.

270. An assignment of error to the

exclusion of evidence must disclose that an exception was taken in the court below. *Augerstein v. Jones*, 139 P. S. 183; s. c. 27 W. N. C. 169.

271. Where error is assigned to rejection of testimony, a specification will not be considered which does not contain the offer refused nor show the sealing of an exception to its refusal; and this, though the specification refer to the page of the paper-book where such facts appear. *Chambers v. South Chester Borough*, 140 P. S. 510. See *Baird v. Schuylkill River E. S. Railroad Co.*, 154 P. S. 459.

272. Where error is assigned to the rejection of a witness, the specification should quote the full substance of the bill of exceptions or copy the bill in immediate connection with the specifications. *Walton v. Hinnau*, 146 P. S. 396.

273. An assignment that the court erred in disallowing a question, and which quotes the question but not the bill of exceptions, is not in compliance with the rule of court. *Kent Iron & Hardware Co. v. Norbeck*, 150 P. S. 559.

274. Only one point should be embraced in an assignment of error. *Kelly v. Bennett*, 132 P. S. 218; s. c. 25 W. N. C. 368.

275. Where the court below without specific answers declines generally to affirm certain points, a specification of error is insufficient which groups the refusal of all the points under one assignment. *Borland v. Meurer*, 139 P. S. 513.

276. In assignments of error, the points presented to the court below and the answers thereto should be quoted *totidem verbis*. *Laftin & Rand Powder Co. v. Murray*, 1 Atl. 664.

277. An assignment of error to the charge and to the answer to a point will not be considered where the portions of the charge and the point and answer are not quoted *totidem verbis* in the specifications. *Walton v. Hinnau*, 146 P. S. 396.

278. An assignment of error to an answer to a point will not be considered

where the assignment, although containing the point, does not quote the answer *totidem verbis*. *Hall v. Phillips*, 164 P. S. 494.

279. If it be alleged that the whole charge was unfair, the assignment of error should set forth the whole charge *in totidem verbis*. *Comm'th v. Orr*, 138 P. S. 276; s. c. 38 P. L. J. 141.

280. An assignment that the court erred "in their answers to defendant's several points, and in not affirming without qualification first, second, third, and fifth points," is not framed according to rule and will not be considered. *Kurtz v. Haines*, 15 Atl. 716.

281. An assignment that the court erred in not answering the appellant's points will not be considered. *Headley v. Renner*, 129 P. S. 542.

282. A specification which alleges that the court erred in not affirming certain points, and which sets out the points but not the answers made thereto, will not be considered. *Readdy v. Shamokin*, 137 P. S. 92; *Long v. Milford*, Ibid. 122.

283. An assignment of error which quotes the answer to a point but not the point, will not be considered. *Irvin v. Kutruff*, 152 P. S. 609.

284. An assignment of error in affirming plaintiff's points should specify the particular error, and each error should be specified particularly and by itself. *Irvin v. Kutruff*, 152 P. S. 609.

285. An assignment of error should state the answer or instruction complained of. *Rosenthal v. Ehrlicher*, 154 P. S. 396.

286. An assignment of error to an answer to a point should not include evidence and argument. *Duquesne Nat. Bank v. Williams*, 155 P. S. 48.

287. An assignment of error will not be considered which fails to quote the point or the court's answer thereto, but in lieu thereof quotes a garbled extract from a sentence of the answer. *Crawford v. McKinney*, 165 P. S. 605.

288. An assignment of error in the charge, which does not give the language

of the court, but merely the counsel's idea of its legal effect, is violative of Rule XXIII. of the supreme court. *Aspell v. Smith*, 134 P. S. 59; *McCord v. Durant*, *Ibid.* 184.

289. An assignment of error that the court erred in submitting a question of fact without evidence, should show what question of fact was so submitted. *Sweeney v. Ten Mile Oil and Gas Co.*, 130 P. S. 193.

290. It is improper to assign as error, isolated sentences in a general charge which, when read in their proper connection, are free from error. *Comm'th v. Zappe*, 153 P. S. 498.

291. A specification of error that a master erred in finding and omitting to find certain facts is insufficient. Error should be assigned to the action of the court in approving the master's findings. *Warner v. McMullin*, 131 P. S. 370.

292. An assignment averring that the court erred in dismissing the exceptions to the master's report, without setting out the exceptions, will not be considered. *Bowers v. Bennethum*, 133 P. S. 306.

293. The supreme court will not consider a specification that "the court erred in overruling each and all plaintiff's exceptions to the master's report." *Holton v. Newcastle, Northern Ry. Co.*, 138 P. S. 111.

294. An assignment alleging error in sustaining exceptions filed to the report of a master, should set out the exceptions themselves specifically. *Sauer v. Molinger*, 138 P. S. 338.

295. An assignment that the court erred in overruling the several exceptions filed by the appellants to the master's report is not in accordance with the rules of the supreme court. *Pottsville v. People's Ry. Co.*, 148 P. S. 175.

296. An assignment of error that the court erred in overruling or dismissing the exceptions does not conform to the rules of court. *Maurer's Estate*, 148 P. S. 272.

297. An assignment of error in overruling the exceptions to an auditor's

report will not be considered if it does not set forth the exceptions. *Allen v. Oxnard*, 152 P. S. 621.

298. An assignment of error to the dismissal of exceptions will not be considered, if it does not set forth the exceptions in their exact words. *Wright's Estate*, 155 P. S. 64; affirming s. c. 11 C. C. 492.

299. Upon appeal from the orphans' court it is always safer to assign error to the decree, rather than to the opinion, as the supreme court will not reverse a decree because of a wrong reason given. *Powell's Estate*, 138 P. S. 322; *Fullerton's Estate*, 146 P. S. 61.

300. On an appeal from the orphans' court assignments that the court erred in confirming the master's report; or in passages quoted from the opinion; or in not sustaining exceptions which are not set out in the assignments, are defective. *Fullerton's Estate*, 146 P. S. 61.

XII. Paper-books.

301. An attorney will be disbarred for intentionally presenting in his paper-book in the supreme court the docket entries of the court below in an altered or garbled form; otherwise, if the misstatement be not made with an intent to mislead the court. *In re Van Horn*, 135 P. S. 110; s. c. 26 W. N. C. 40.

302. If the appellant's paper-book contains no argument in support of the specifications of error, the appeal may be dismissed. *Stockdale v. Maginn*, 131 P. S. 507.

303. The pleadings should in all cases form a part of the paper-book of the plaintiff in error; otherwise the court will assume that they sustain the verdict. *Rundell v. Kalbfus*, 125 P. S. 123.

304. Upon error to the common pleas on appeal from a justice, if the justice's jurisdiction be called in question, a copy of his transcript must be exhibited to the supreme court; otherwise the demand will be assumed to be within his jurisdiction. *Wise v. Allen*, 13 Atlan. 544.

305. If depositions upon which the court below based their decree be not furnished to the supreme court, the finding of the court below will, on error, be taken as correct. *Feagley v. Norbeck*, 127 P. S. 238.

306. If the record as shown in the paper-book gives no intelligent information of the facts on which the court acted, the decree will be affirmed and appeal dismissed. *Schultz's Appeal*, 9 Atlan. 320.

307. On an appeal from an order of removal the case will not be reviewed by the supreme court unless it be furnished with the evidence in full; the opinion of the quarter sessions, though it contain the evidence in substance, is no part of the record. *Overseers of Madison v. Overseers of Brady*, 7 Atlan. 204.

308. Where an account was stated in accordance with a preliminary decree ordering the same, and exceptions to the same were dismissed by the court below, the supreme court will not on appeal revise or correct such account, the evidence upon which the original decree was based not being supplied. *Wagenhorst's Appeal*, 126 P. S. 127.

309. Where appellant's paper-book does not contain an index as required by the rules of court, it will be suppressed. *Hessel v. Bradstreet*, 141 P. S. 501.

310. A brief table of contents is not an index; in making up assignments of error counsel should add a reference to the printed page where evidence referred to is to be found in its appropriate place. *Wilson v. Scranton*, 141 P. S. 621.

311. Paper-books will be suppressed in which Pennsylvania cases are cited by the name of the reporter. *Farquhar v. McAlevy*, 142 P. S. 233.

312. Where the error assigned is to the finding of fact by an auditor or master, the printed argument must contain a synopsis of all the evidence bearing upon such disputed question of fact, with a reference to the page or pages of the paper-book where such evidence may be found *in extenso*; this rule will be enforced. *Silliman v. Kuhn*, 142 P. S. 461.

313. Upon an appeal from a judgment on a verdict, where the evidence is not printed in full, assignments of error based on the alleged insufficiency of the evidence to carry the questions to the jury will not be considered. *Greenhoe v. College*, 144 P. S. 131.

314. Where the appellant has failed to print his declaration in his paper-book and all his assignments refer to the declaration, the supreme court is justified in affirming the judgment without further examination of the case. *Murdock v. Martin*, 147 P. S. 203.

315. An assignment of error based upon objections to questions on the cross-examination of a witness will not be considered where the appellant has failed to print the witness's testimony in chief. *McElheny v. McKeesport & Duquesne Bridge Co.*, 153 P. S. 108.

316. An appeal from a decree in partition will be dismissed where the appellant's paper-book contains none of the documentary evidence necessary to an understanding of the case. *Clever's Estate*, 154 P. S. 481; affirming s. c. 40 P. L. J. 358.

317. Upon an appeal from an order refusing to take off a non-suit, the appellant's paper-book must contain the pleadings in full. *Finch v. Conrade's Executor*, 154 P. S. 326.

318. It is the duty of counsel to refer in their paper-books to the Pennsylvania decisions relevant and material to the question under examination. *Duggan v. Baltimore & Ohio R. R. Co.*, 159 P. S. 248,

319. In the preparation of their argument, counsel should state the volume, page and names of the parties in each case cited. *Tanney v. Tanney*, 159 P. S. 277; affirming s. c. 41 P. L. J. 43.

320. The supreme court will not consider such portions of the record of a case as are not printed in the paper-book. *Talcott v. Oppenheimer*, 159 P. S. 506.

321. It is not good practice to blend in the same paper-book appeals in two distinct and different actions in which there are different defendants and differ-

ent counsel. *Philadelphia v. Merkle*, 159 P. S. 515.

322. Where a rule to open a confessed judgment has been discharged, the defendant cannot, upon a subsequent *scire facias* to revive, set up the same matters in defence that were passed upon on the rule to open. In such a case on an appeal from a judgment on the *scire facias*, the appellant's paper-book must contain the affidavit of defence to the *scire facias* and the opinion of the court discharging the rule to open. *Ahl v. Goodhart*, 161 P. S. 455.

323. In a suit against a fire insurance company, where the appellant has failed to print the statement of claim, the policy and the evidence necessary to a proper consideration of the case, the supreme court will not reverse the judgment in favor of the plaintiff. *Walter v. Sun Fire Office*, 165 P. S. 381.

324. Where the appellant fails to print in his paper-book the greater part of the testimony, the supreme court will assume that the portions of the charge assigned for error are fully warranted by the testimony. *Bradley v. Vernon*, 166 P. S. 603.

XIII. Judgment.

325. A judge of the supreme court may, in vacation, and after the record has been remitted, grant a rule to show cause why a judgment of *non pros.* of a writ of error should not be taken off. *Lebanon Mutual Insurance Co. v. Erb*, 1 Cent. 644.

326. If the supreme court reverse a decision refusing judgment for want of a sufficient affidavit of defence, on a *scire facias sur mechanics' lien*, and direct judgment to be entered for the plaintiff, the status of the case is fixed, and the court below cannot subsequently strike the claim from the record on the ground that it is insufficient. *Titusville Iron Works v. Keystone Oil Co.*, 130 P. S. 211. See s. c. 122 P. S. 627.

327. Where an order of confirmation of a portion of a road only was reversed

by the supreme court, and the common pleas thereupon proceeded to confirm the report of viewers absolutely; it was *held* to be an entirely proper proceeding; and this, though the supreme court had not awarded a *procedendo*. *Road in Benzinger*, 135 P. S. 176; s. c. 26 W. N. C. 197. See s. c. 115 P. S. 436.

328. Upon the orphans' court reversing the register, on appeal, and admitting the will to probate, no issue being asked, the supreme court will, on appeal to them, dismiss the same, if under the evidence the finding was correct. *Bearmer's Appeal*, 126 P. S. 77.

329. Upon an appeal from an order refusing judgment for want of sufficient affidavit of defence, the order will be affirmed unless plain error of law is made to appear in it. *Radcliffe v. Herbst*, 135 P. S. 568.

330. An order refusing judgment for want of sufficient affidavit of defence will be reversed by the supreme court only in a clear case. *Murphy v. Cappeau*, 147 P. S. 45; *Ensign v. Kindred*, 163 P. S. 638.

331. In a suit by an infant by her father as next friend, brought for damages for negligence, the father cannot enter satisfaction without the sanction of the court; and where such an attempt is made, pending an appeal to the supreme court, the latter court will grant damages at six per cent on the verdict and an attorney fee of twenty dollars under the act 25 May 1874 (Brightly's Purdon 793). *O'Donnell v. Broad*, 149 P. S. 24; s. c. 2 Dist. Rep. 84. See s. c. 11 C. C. 622.

332. Where upon a *scire facias* to collect taxes whose lien is gone, judgment is entered for want of an affidavit of defence, the supreme court will not, on appeal, open the judgment for invalidity of the lien; the taxes may still be due and collectable although the lien is gone and the opening of the judgment in such a case is a matter for the court below. *Philadelphia v. Kates*, 150 P. S. 30.

333. Where it appears upon the face of a contract that it may be terminated

upon certain notice, the supreme court will, on appeal, modify an injunction against a threatened breach, so as to correspond with the provisions of the contract. *Martinsburg Bank v. Central Pennsylvania Telephone & Supply Co.*, 150 P. S. 36.

334. Where the jury in ejectment find for the plaintiff for a part of the land and for the defendant for the balance, the plaintiff, in the absence of a disclaimer, is entitled to full costs; and, upon an appeal in such case, the court will impose the penalty of twenty dollars under the act 25 May 1874 (Brightly's Purdon 793). *Bachman v. Gross*, 150 P. S. 516.

335. Where, on an appeal from a judgment against several defendants as partners, the supreme court decides that certain of the defendants are not partners, but no error appears in the judgment against the remaining defendants, the judgment will be reversed as to the former and affirmed as to the latter, without a new *venire*. *Walker v. Tupper*, 152 P. S. 1.

336. Where an action against a master was tried upon an erroneous theory as to proof of negligence, the supreme court granted a new *venire* to give the plaintiff the opportunity to show other facts if there were such tending to show the master's liability. *Mixter v. Imperial Coal Co.*, 152 P. S. 395.

337. Where a jury in the common pleas decided in an issue *devasavit vel non* that the paper was not intended as a will, and the judgment on the verdict was sustained by the supreme court, as there was no question raised upon which they could reverse it, the court being of the opinion, however, that the paper was testamentary, but no return was made to the orphans' court from the common pleas and no final decree was made by the orphans' court vacating the probate, and subsequently the contestants brought an action of ejectment against the proponents; it was held, that the court below improperly admitted in evidence the record of the common pleas, but as the view of the

supreme court on the whole case would prevent the orphans' court from ever making a decree vacating the probate, the supreme court in reversing the judgment for plaintiffs, refused a new *venire*. *Tozer v. Jackson*, 164 P. S. 373. See *Jackson v. Tozer*, 154 P. S. 223.

338. Where a land owner was awarded damages for a street opened through one piece of ground owned by him and at the same time was assessed with benefits accruing to another piece of ground, and he appealed from both awards, and pending the appeals, the borough, without tender of security, demanded that he should build a footwalk and gutter along the new street, and upon his refusal, the borough built the same and filed a municipal claim against the property for the cost, together with twenty per cent penalty; it was held, that the entry of the claim, pending the appeal, was irregular but that the supreme court under the power conferred by the act 20 May 1891 (Brightly's Purdon 1790) would modify the judgment by entering judgment for the amount of the lien with interest from the date of entry and for the costs accrued since the appeal of the defendant in the appraisement case was *non prossed*. *Connellsville v. Hogg*, 156 P. S. 326.

339. Where the *præcipe* in an ejectment included by mistake more land than the plaintiff claimed, and a verdict was rendered for the plaintiff for the land described in the *præcipe*; it was held, that the plaintiff might amend his *præcipe* in the supreme court by disclaiming the land included by mistake, and the judgment would then be affirmed; in such a case the supreme court will impose the costs up to the time of the application for amendment, upon the plaintiff as a condition of the affirmance of the judgment. *Brothers v. Mitchell*, 157 P. S. 484.

340. Where, after verdict and judgment, the defendant offered to settle for an amount less than judgment and threatened to appeal if his offer was not accepted, and after it was declined he took out the record but never filed it in the

supreme court and never printed any paper-book or made any effort to prepare his case; it was *held*, that the penalty provided by the act 25 May 1874 (Brightly's Purdon 793) would be imposed. *Pennypacker v. Dear*, 166 P. S. 284.

XIV. Reargument.

341. If an appeal be dismissed because the appellant had no standing in the case, and upon another suit it be *held* that he was concluded by the former decree, the supreme court will, upon a writ of error to the last judgment, order a *certiorari* to bring up the record in the first case, and order a reargument of both decrees. *Gravenstine v. Feger*, 2 Cent. 787. See *Gravenstine's Appeal*, 2 Penny. 61, and *Gravenstine v. Feger*, 42 L. I. 407.

342. On a motion for reargument, the supreme court will not consider an *ex parte* affidavit made after the affirmance of the judgment. *McMeen v. Comm'th*, 7 Cent. 152. See s. c. 114 P. S. 300.

XV. Error coram vobis.

343. A writ of error *coram vobis* will be allowed to remedy a fact not appearing on the record, that one of the defendants, who agreed to an amicable revival of a judgment, was at the time of revival a married woman and the wife of the other. *Wind v. Edelman*, 3 Del. 574; s. c. 1 Northam. 356.

XVI. Appeal in criminal cases.

344. Upon a motion to quash an indictment, if the testimony of a grand juror be objected to, objection overruled and exception sealed, the question of admissibility is properly, under the act of 19 May 1874 (Brightly's Purdon 796), brought upon the record. *Comm'th v. Green*, 126 P. S. 531.

345. It is an error in a criminal case

for the court to place before the jury the probable result of a verdict of guilty, and this, though the mistake be explicitly rectified. *Comm'th v. Switzer*, 134 P. S. 383; s. c. 26 W. N. C. 46.

346. On appeal and *certiorari* under the act 9 May 1889 (Brightly's Purdon 790), from the refusal of the quarter sessions to order the forfeiture of a recognizance to be stricken off, the supreme court cannot go behind the record to inquire into the merits of the proceeding. *Comm'th v. Bird*, 144 P. S. 194.

347. After a defendant has been tried and acquitted, upon an indictment charging a felony, the supreme court will not reverse the judgment and award a new *venire*; and this, whether the acquittal be the result of error alleged to have been committed by the judge in stating the law to the jury. *Comm'th v. Steimling*, 156 P. S. 400. See *Steimling v. Bower*, 156 P. S. 408.

348. In a criminal case where the evidence offered is part of the commonwealth's case in chief, the admission of it in rebuttal is not assignable as error. *Comm'th v. Bell*, 166 P. S. 405.

349. The act 31 March 1860, sec. 59 (Brightly's Purdon 796), providing that the supreme court upon error in indictments for murder shall make all proper orders as to paper-books, has been superseded by the act 15 February 1870 (Brightly's Purdon 797). Since the passage of that act the supreme court has no longer any duty to perform as to the printing of paper-books, and has no authority to make an order to compel the county to pay for them. *Comm'th v. Buccieri*, 153 P. S. 570.

350. Upon an appeal from a judgment on a verdict of murder in the first degree, the court will not consider an assignment of error alleging improper comment by the district attorney upon the evidence where no objection was made at the trial, and the only report of what he said is contained in the notes of a private stenographer of the counsel for the prisoner. *Comm'th v. Weber*, 167 P. S. 153.

APPEARANCE.

See PRACTICE, II.

APPLICATION OF PAYMENTS.

See BUILDING ASSOCIATIONS, X.: DEBTOR
AND CREDITOR, IV.: DECEDENTS' ES-
TATES.

APPOINTMENT.

See OFFICE, I.: TRUSTEES, II.

APPORTIONMENT.

See EQUITY, XVI.: ESTATE FOR LIFE.

APPRAISEMENT.

See DECEDENTS' ESTATES: EXECUTORS:
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I. Of the submission.**(a) What amounts to a submission.**

1. An authority to the accounting warden of a church to settle a claim is, at most, a revocable power of attorney, and not a submission to arbitration. *Rittenhouse's Estate*, 140 P. S. 172.

2. Where the plaintiff, claiming an over-payment, testified that he told the defendant that he proposed to have an account stated by one A, when defendant replied, he would as lief A would do it as any one, and he further said, "if you owe me anything you must pay me, and if I owe you I will pay you"; it was held, that the testimony was insufficient to be considered as evidence of a submission to arbitration. *Linderman v. Pomeroy*, 142 P. S. 168.

3. The local act. 6 April 1870, P. L. 948, providing for the voluntary choice of a legal arbitrator without right of appeal, is constitutional; but the supplement 25 March 1873, P. L. 396, substituting a compulsory mode of procedure, is unconstitutional. The act of 1870 cannot be read into the compulsory arbitration act of 16 June 1836 (Brightly's Purdon 125) so as to give a right of appeal. *Cutler v. Hinds*, 151 P. S. 195; *Spratt v. Raymond*, 149 P. S. 258.

4. A submission to arbitration is valid although not in writing. *Heist v. Kohler*, 10 Lanc. 140.

(b) Effect of submission.

5. Where, pending an action for consequential injuries, the parties entered into a contract under seal, by which the valuation of the land was referred to arbitrators and the appraisalment was made and the defendant tendered the

valuation to the plaintiff who refused to accept it; it was *held*, in an action for trespass, that the agreement was available as a defence to the action; and this, although it was not pleaded until three years after the date of the award, and at the time of trial more than six years had elapsed without any attempt of defendant to enforce specific performance. *Jones v. Pennsylvania R. R. Co.*, 143 P. S. 374.

6. Where testator directed that in case of any difficulty, the matter should be referred to a specified person whose decision would be final; it was *held*, that the law would enforce such a direction in questions of interpretation, and that the finding of the referee was not affected by the fact that he subsequently became counsel for a person interested in the estate. *Phillips's Estate*, 10 C. C. 374; s. c. 28 W. N. C. 229.

(d) Prospective submissions.

7. If questions of difference are to be referred to the engineer of a particular corporation, the proper person is the one filling the office when the adjudication is called for. *Connor v. Simpson*, 7 Atlan. 161.

8. An arbitrator, whose award is to be conclusive, may, perhaps, correct an error appearing on the face of his finding, but he cannot reopen his award and take testimony upon an allegation of the defeated party that serious mistakes were made by him. *Robinson v. Mellon*, 139 P. S. 257.

9. Where a contract contains a stipulation that all questions in dispute shall be submitted to the final decision of an arbitrator, the award of the latter is final, and a mistake of one of the parties in not submitting to the arbitrator all the evidence as to payments, which he had in his possession, will not be permitted as a defence in a suit upon the award. *English v. Wümerding School District*, 165 P. S. 21.

10. Where parties to an executory contract agree that all disputes shall be first submitted to arbitration, they are bound by the terms of the submission and cannot

seek redress elsewhere until the arbitrators have been discharged by having made an award or otherwise; where one of the parties has been properly notified of the time and place of meeting of the arbitrators and fails to appear, he cannot afterwards in an action on the award raise questions which he might have presented to the arbitrators, or reopen questions upon which they were authorized to pass and did, in fact, determine in making up their award. *Gowen v. Pierson*, 166 P. S. 258.

11. Where it was a necessary part of the plaintiff's statement to aver that the matters in dispute had been submitted to an arbitrator agreed upon by the parties, and that the arbitrator had found in favor of the plaintiff; it was *held*, that an affidavit of defence was sufficient to prevent judgment which averred that the arbitrator would not go on in the case unless the terms of submission were changed, to which the defendant would not agree, and that the arbitrator went on without the defendant's agreement. *Crane Iron Co. v. Scranton Steel Co.*, 2 Lack. Jur. 293.

12. Where the value of extra work on a building was to be submitted to the architect, and the latter gave different valuations to each party, both valuations were properly submitted to the jury to decide which was correct. *Keystone Brewing Co. v. Walker*, 11 Atlan. 650; s. c. 10 Cent. 77.

13. A building contract providing for the settlement of disputes by the architect, his decision to be conclusive; the architect having practically settled the disputes, though he made no formal award, and he being dead, it was *held*, that the contractor could recover in a suit upon his contract. *Fayette County v. Laing*, 127 P. S. 119.

14. A building contract requiring the submission to arbitration of disputes as to construction of the contract, as to what is extra work and the value of any work omitted, does not require the submission of the question whether the work

was done in a workmanlike manner. *Galagher v. Sharpless*, 134 P. S. 134.

15. Where a building contract provided for the submission of any disputes as to quality or quantity to a superintendent, whose decision should be final; it was *held*, that the contractor was estopped from recovering a disputed claim which he refused to submit to the superintendent. *Fulton v. Peters*, 137 P. S. 613.

16. Where a building contract provided that no work should be considered extra unless an estimate of the same in writing was submitted to or signed by the architect or owner, and that any question of accounts should be submitted to the architect, whose decision should be final; it was *held* in a suit for extra work which had been approved by the architect, where the statement did not aver that any estimate had been submitted and signed, that the architect had no power to impose upon the owner, *ex post facto*, an obligation to pay for work not previously ordered or authorized. The contract provided further, that the contractor should pay five dollars per day for any delay after September 1st, unless further time was allowed by the architect and the statement not averring the allowance of additional time; it was *held*, that the architect's approval of plaintiff's bill could not be treated as excluding defendant's claim for damages for the delay. *Gillison v. Wanamaker*, 140 P. S. 358.

17. Where a building contract provided that any dispute between the parties should be submitted to the architect, whose decision should be final, and a sub-contract provided that the sub-contractor should be subject to all the terms and restrictions of the principal contract; it was *held*, that the sub-contractor could not maintain a suit at law upon the sub-contract to determine a dispute as to the character of his work; such a dispute between the contractor and sub-contractor was exclusively within the jurisdiction of the architect, though it related in part to

a claim of the sub-contractor that certain alleged defects were caused by the fault of the contractor, and the sub-contract reserved to the contractor the right to sue for any damages which could not be covered by recoupment. *Brown v. Decker*, 142 P. S. 640.

18. Where a building contract provided that the work was to be done to the satisfaction of the architect, and the architect certified that he had examined the work and accepted it as having been done in accordance with the plans and specifications; it was *held*, that the owner, in the absence of evidence of fraud and collusion, could not show that the work was not done in accordance with the contract. *Kennedy v. Poor*, 151 P. S. 472.

19. Where a building contract provided that the architect should decide all questions as to work omitted, and the architect retained a certain sum for rosin filling until it could be ascertained by whose fault the rosin was not properly put under the floors; it was *held*, in an action on the contract, that the question whether the fault was with the plaintiff or not, had not been decided by the architect, and it was properly submitted to the jury. *Huckestein v. Kelly*, 152 P. S. 629.

20. Where a building contract provided for tiles for fireplace fronts to be estimated at forty dollars each, and that the owner should have the privilege of selecting "within the above figure," and the plaintiffs who were sub-contractors proposed to put in the tiles, and the owner selected tiles of a less price than forty dollars, and the architect directed the plaintiffs to put in the tiles at the less price named, and to do it as part of the contract to the builders, reporting it to them; it was *held*, that the owner had the right to select tiles less in value than forty dollars, and that the decision of the architect acting as arbitrator was probably not within the latter's function, but evidence should have been received as to the action of the architect, leaving the consideration of it for the court upon all

the evidence. *Harrison v. Reeves*, 160 P. S. 134.

21. Where an architect sued for work in preparing the plans and drawings for a building and defendant sought to charge the plaintiff with loss occasioned by the heating plant being unsatisfactory, and it appeared that after the heating works were put in, the plaintiff gave to the plumber a certificate to show that the work was finished in accordance with the plans; it was *held*, that the mere fact of giving the certificate was not sufficient to charge the plaintiff with liability, but that the certificate itself must be produced in evidence or accounted for. *Brown v. Burr*, 160 P. S. 458.

22. Where a contract for building a reservoir provided that the chief engineer of the defendant should decide all questions, and that his estimate should be final, and in an action for the balance of the contract price, it appeared that the engineer after repeated requests neglected to sign the final estimate, but there was evidence of his presence while the work was progressing and the acceptance of the plant as a whole by the officers of the defendant; it was *held*, that it was a question for the jury upon the credibility and weight of the testimony, whether the engineer and the defendant had not in fact accepted the work. *Coon v. Citizens' Water Co.*, 152 P. S. 644.

23. Where work under a sub-contract for the construction of a railroad was to be estimated by the engineer in charge, his estimates, classifying the work under a supplemental parol contract, were conclusive upon the parties. *McCauley v. Keller*, 130 P. S. 53.

24. Where a railroad construction contract contained a stipulation that the decision of the chief engineer should be final and conclusive; it was *held*, that it was not necessary that the engineer's award as given to the contractor should be signed by the engineer where the original signed by the engineer was retained by the company. Where such a contract is essentially altered by parol,

and there is no stipulation that the engineer's decision shall be final as to matters of dispute arising under the contract as changed, his decision is not binding. *Malone v. Philadelphia & Reading R. R. Co.*, 157 P. S. 430.

25. Where the driver of an ice wagon entered security to the company for the prompt return of all moneys collected and the prompt settlement of all shortages, and in the event of a dispute as to the amount of moneys due, the settlement was to be made by the bookkeeper and the defendant refused to account for overdue ice bills, which he had been unable to collect, and the bookkeeper settled the account and charged the defendant with the bills; it was *held*, that as the dispute was in regard to the construction of the contract, its settlement was not committed to the bookkeeper, and further that the defendant was not liable for the unpaid bills. *Knickerbocker Ice Co. v. Smith*, 147 P. S. 248.

26. Where a contract for the sale of coal provided that the coal delivered should be subject to the inspection of the superintendent of the defendant's coal department, or such persons as he might employ for the purpose, whose decision should be final and conclusive; it was *held*, that the decision of the inspector was binding upon the parties in the absence of proof of collusion between the defendant and inspector. *Lucas Coal Co. v. Delaware & Hudson Canal Co.*, 148 P. S. 227.

27. Where a municipal contract permits the city engineer, upon written notice from the contractor, to make an extension of time in writing, a verbal extension for an indefinite period is insufficient to bind the city. *Malone v. Philadelphia*, 147 P. S. 416.

28. Where the parties to a paving contract agreed that the decision of the city engineer should be final and conclusive as to all matters in dispute; it was *held*, that in an action for the cost of the paving, it was not a sufficient affidavit of defence that the engineer was negligent

and careless, and made mistakes; the parties by their agreement waived the risk of negligence and mistake. *Bowman v. Stewart*, 165 P. S. 394.

29. A bill in equity lies to set aside an award of a prospective arbitration on the ground of fraud, but the plaintiff must aver and prove that the party benefited by the award participated in the fraud charged. Evidence that the arbitrator was partial and unfair and knowingly made an improper decision is insufficient. *Hartupee v. Pittsburgh*, 131 P. S. 535.

II. Revocation.

30. A submission to viewers not named, no matter of dispute having arisen, is revocable. *Norristown v. Norristown Pass. Railway Co.*, 9 C. C. 98; s. c. 6 Montg. 185; *Norristown v. Citizens' Pass. Railway Co.*, 9 C. C. 102; s. c. 6 Montg. 189.

31. Where a legal arbitrator was chosen under the acts 6 April 1870 and 25 March 1873, relating to Erie county, and those acts were declared unconstitutional; it was *held*, that the choosing of the arbitrator was simply a voluntary reference which might be revoked at any time before award made. *Farel v. Roberts*, 11 C. C. 58.

32. A submission to arbitration is irrevocable where it is a part of an agreement containing other terms to be performed by the parties; especially is this so if such terms have been executed in whole or in part. *McKenna v. Lyle*, 155 P. S. 599.

33. Where a submission of partnership disputes has been regularly revoked by one of the parties before the award is made or filed, the fact that the revoking party subsequently deposited certain moneys collected by him in a bank designated in the agreement for arbitration, does not show that he has abandoned his revocation of the submission. *McKenna v. Lyle*, 155 P. S. 599.

34. Upon a bill for an account between partners, where it is agreed to submit the matters in dispute to arbitration, and be-

fore the award was filed one of the parties revoked the submission, and after the revocation the award was filed but was subsequently stricken off and the parties proceeded under the bill before an examiner and master; it was *held*, that the parties had waived the submission and award, and that it was the duty of the master to decide the case on its merits. *McKenna v. Lyle*, 155 P. S. 599.

IV. Of the award.

35. Where a report of referees awards money to be paid by defendant and other things to be done by plaintiff, if the court cannot enforce both they will enforce neither. A justice has no jurisdiction of a suit for the money awarded; the remedy is by bill in equity. *Yates v. Demmer*, 9 C. C. 80; s. c. 4 Del. 324.

36. The court may, in an extreme case, open a judgment on an award of arbitrators. *Kase v. Danville, Hazelton & W. B. Railroad Co.*, 5 Kulp 537.

37. Inviting an arbitrator to a hotel and treating him by one of the parties, is good ground for setting the award aside. *Riding v. Burkert*, 8 C. C. 640.

38. An award of arbitrators cannot be set aside on the sole ground that the judge differs with them in their conclusion on the question they were called upon to decide. *James v. Sterrett*, 137 P. S. 234; s. c. 48 L. I. 48.

39. A plaintiff who does not object to the entertainment at dinner of arbitrators by the defendant, is estopped from moving to set aside the award on that account. *Bean v. Hunsberger*, 7 Montg. 17.

40. If a submission to arbitration allows a majority of the arbitrators to make the award, they may do so; otherwise, all must unite in making the award. If the award is to be made in a report under the hands and seal of the arbitrators, a report signed and sealed by two with proof that the third, while refusing to sign it, said it was all right, will not be sustained. *Weaver v. Powel*, 148 P. S. 372.

41. An award of arbitrators will not be set aside where it appears that the entry in the court of common pleas was a mere irregularity which did the defendant no harm. *Woelfel v. Hammer*, 159 P. S. 448. See s. c. 159 P. S. 446.

42. Where the parties to a dispute appeared before a justice and stated that they had agreed to refer all matters at variance between them to three men whom they named for their decision, and that they had fixed upon a time and place for the hearing and that the award should be final, and the justice wrote out the agreement on the docket and the arbitrators returned the award to the justice, who thereupon wrote upon his docket, "judgment publicly according to the above award"; it was held, that the justice had no jurisdiction over the award and that the agreement contained all the elements of a common law submission, and that the award was conclusive. *Climenson v. Climenson*, 163 P. S. 451.

43. A judgment upon an award will not be stricken off even though the award be informal, if the intent of the arbitrators can be gathered from the whole of their report. *Bubb v. Sanduskey*, 2 Dist. Rep. 379.

44. A verbal award is good unless the submission provides otherwise. *Heist v. Kohler*, 10 Lanc. 140.

45. Where parties agreed to submit to arbitrators mutually chosen, their decision will be upheld; and this, though the agreement to submit was not in writing and though they are mistaken as to the law but no corruption or partiality is shown. *Wentz v. Bealor*, 14 C. C. 337.

46. An award of no cause of action is an award against the plaintiff, and when entered by the prothonotary, it is a lien upon his real estate and so continues until reversed upon appeal or satisfied according to law. *Turner v. Whitson*, 15 C. C. 484.

47. An award of arbitrators which disposes of only part of the subject matter of the submission is void and is no bar to a subsequent action at law. *Thomas v. Heger*, 11 Montg. 106.

V. Actions on awards.

48. In an action upon an award it is a good defence that the arbiter and one of the parties were partners in the work let under the contracts, and concealed that fact from the defendant. *Connor v. Simpson*, 7 Atlan. 161.

49. In an action upon an award of arbitrators, an affidavit of defence is insufficient which sets out errors in the proceedings unless the affidavit indicates what errors will be shown by the arbitrators. *Plank v. Mizell*, 11 C. C. 670.

VI. Compensation of arbitrators.

50. The court has no power to issue an attachment against a defendant for the costs of meeting of a board of arbitrators. *Arnold v. Burr*, 4 Del. 158; s. c. 5 Kulp 407.

51. Arbitrators are entitled to two dollars per day under the act of 22 March 1877 (Brightly's Purdon 133) only when they consume five consecutive hours in a single hearing. *Corcoran v. Hetzel*, 9 C. C. 82; s. c. 1 Lack. Jur. 405.

52. Under the act of 22 March 1877 (Brightly's Purdon 133) arbitrators are entitled to their fees for the preliminary meeting for the purpose of organization. *Corcoran v. Hetzel*, 9 C. C. 82; s. c. 1 Lack. Jur. 405.

53. Under the act 22 March 1877 (Brightly's Purdon 133) arbitrators are only entitled to one dollar per day where no defence is made, and this, though they sit longer than five hours; so, if they sit less than five hours they are only entitled to one dollar per day although a defence be made. Where the defendant and his counsel appeared and cross-examined the plaintiff's witnesses but offered no testimony and made no argument; it was held not to be a defence within that act. *Johnson v. Graeff*, 1 York 14.

54. Under the act 8 April 1867, P. L. 918, providing for the condemnation of unsafe buildings in the city of Pittsburgh, an arbitrator chosen in accordance with

the provisions of the act is entitled to compensation from the city. *Malone v. Pittsburgh*, 14 C. C. 125.

VII. Compulsory arbitration.

(a) What causes may be arbitrated.

55. The act of 16 June 1836 (Brightly's Purdon 125) does not extend to suits in equity. *Murr v. Lindsay*, 7 Lanc. 299.

56. An execution attachment is not a civil suit or action within sec. 8 of the act 16 June 1836 (Brightly's Purdon 125), authorizing a rule of reference to arbitrators. *Stranahan v. Stranahan*, 146 P. S. 44.

57. An action of ejectment may be referred to arbitrators under the compulsory arbitration act of 16 June 1836 (Brightly's Purdon 125), and in such a case a rule of reference may be entered without filing a declaration; the *præcipe* is a sufficient compliance with sec. 9 of that act. *Reed v. Long*, 10 C. C. 253.

58. The compulsory arbitration act of 16 June 1836 was repealed as to Philadelphia by the act 1 May 1861, P. L. 521. *Wintz v. Fiscio*, 33 W. N. C. 220.

(b) Rule of reference.

59. A rule of reference entered by the defendant is suspended by a rule for judgment for want of a sufficient affidavit of defence; a choice of arbitrators thereunder will be stricken off. *Emory v. Heald*, 7 C. C. 329.

60. Death does not revoke the rule of reference in compulsory arbitration, but the arbitrators, on the death of the plaintiff, cannot make a valid award in his favor until the proper parties are substituted. *Meehan v. Karolin*, 1 Lack. Jur. 305.

61. Where service of a rule to arbitrate is made by copy, such copy must show that the seal of the court was affixed to the original certificate; all process must be authenticated by the seal of the court. *Stegman v. Willis*, 3 Dist. Rep. 252.

62. Under the act 23 March 1877

(Brightly's Purdon 127) the second rule of arbitration may be served on the attorney of record. *Orr v. Lowenstein*, 7 Kulp 35.

63. A rule for reference is in time when taken thirty days before a case could be actually set down for trial. *Anthony v. Unangst*, 4 Dist. Rep. 303.

(c) Notice.

64. Where the notice of the meeting of arbitrators contains a misnomer of the plaintiff, the court will strike off all the proceedings under the rule. *Welsh v. Schall*, 11 C. C. 30.

(d) Practice.

65. In the absence of one of the parties the other party cannot name two arbitrators in succession. *Richardson v. Barrowman*, 1 Lack. Jur. 116.

66. A party is not bound to attend and choose arbitrators on the 30th of May, Decoration Day, nor can a lawful choice be made in his absence. *Doles v. Powell*, 1 Lack. Jur. 429.

67. Where the defendant takes a rule for arbitrators and the plaintiff fails to appear at the time of the appointment of arbitrators, the prothonotary is not empowered to choose for the absent party in the absence of due proof of the service of the notice by the oath or affirmation of the party who made it. *Frey v. Heffner*, 1 York 201.

68. The choice of arbitrators being invalid, all subsequent proceedings fall with it. *Doles v. Powell*, 1 Lack. Jur. 429.

69. Upon appeal from a justice a transcript containing the essential elements of a declaration is sufficient under the compulsory arbitration act of 16 June 1836 (Brightly's Purdon 125). *Warren v. Hugo*, 7 C. C. 547.

70. Assisting in choosing arbitrators and agreeing to the time and place of meeting is a waiver of an objection that a narr. had not been filed. *Ibid.*

71. A participation in the choice of arbitrators is a waiver of a right to a plea

in abatement. *Stimmel v. Miller*, 8 C. C. 128.

72. An award under the act of 16 June 1836 may be referred back to the same referees under sec. 7 of that act (Brightly's Purdon 124) only for such plain mistakes as will be obvious to the referees themselves the moment they are pointed out. *Gunn v. Bowers*, 126 P. S. 552.

73. To escape liability for costs, a tender before arbitrators should be pleaded and the record should show it. *Vosburg v. Reynolds*, 5 Kulp 376.

74. Where both parties appear before arbitrators and a trial is had, it will be presumed upon a rule to strike off the award, that the choosing of the arbitrators and all the preliminary proceedings were regular, or if irregular, that the defect has been waived. *Moyer v. Yarosko-sky*, 6 Kulp 151.

75. Until arbitrators are actually chosen under a rule of reference, the cause is in court and is under its power and control. *Kunes v. McCloskey*, 10 C. C. 542.

(e) Proceedings before referees.

76. Under the act 16 June 1836, sec. 3 (Brightly's Purdon 124), all the referees must agree to an award unless the agreement of reference authorizes an award by a majority. *Walters v. Pettit*, 12 C. C. 431.

(h) Exceptions.

77. Upon exceptions to an award under the act of 16 June 1836 (Brightly's Purdon 125) the court has no power to make a new and different award; they have only the power to sustain it or set it aside as a whole. *Gunn v. Bowers*, 126 P. S. 552.

VIII. Appeals from awards.

(a) Right of appeal.

78. An appeal will not be allowed after twenty days except upon proof of fraud, accident or mistake. *Upland Borough v. New Chester Water Co.*, 4 Del. 241.

79. The entry of bail for stay of execution is a waiver of the right of appeal, even within the twenty days. *Ibid.*

80. A waiver of the right to appeal from the decision of arbitrators will be enforced. *Lovett v. Blackburn*, 4 Del. 162.

81. There is no appeal from the award of a legal arbitrator on a voluntary submission under the local act 6 April 1870, P. L. 948; the right to ask for the dismissal of such an appeal is not waived by asking for a continuance, cross-examining a witness before a commissioner or a delay of nine months. *Spratt v. Raymond*, 149 P. S. 258; *Cutler v. Hinds*, 151 P. S. 195.

82. Where the plaintiff in a suit has assigned all his interest to another, he cannot, after the case has been submitted to an arbitrator, take an appeal from the award. *Weiler v. Long*, 13 C. C. 632.

83. An appeal from the award of arbitrators will not be stricken off unless the record or pleadings in the case contain an averment of a waiver of the right to appeal; the plaintiff's affidavit and depositions form no part of the record for this purpose. *Wademan v. Whitmore*, 3 Lack. Jur. 42.

(b) Perfection of appeal.

84. The rule that an appeal from an award of arbitrators must be perfected in twenty days, applies to appeals *in forma pauperis*. *Finkle v. Rosback*, 10 C. C. 186.

(d) Recognizance.

85. An attorney who is a stockholder in an appellant corporation is not within the spirit of the rule of court which forbids an attorney to become bail upon an appeal without leave specially granted. *Wise v. Pennsylvania Hard-Vein Slate Co.*, 4 Northam. 204.

(e) Payment of costs.

86. Upon an appeal from an award of arbitrators the payment of the taxed

costs is a condition precedent. A rule to perfect will not aid the losing party. So, mere silence on the part of the other party is no waiver. *Tyler v. Bertolet*, 6 Montg. 79.

87. If the record show an actual payment of all the costs, on an appeal, a subsequent alteration of such record without notice will not affect appellant's rights. *Fisher v. Pennsylvania Railroad Co.*, 126 P. S. 293.

88. An appeal without payment of costs will not be allowed a plaintiff, who, before arbitrators, has recovered less than his original judgment before the justice. *Griest v. Hoopes*, 7 C. C. 161.

89. Upon an appeal from a legal arbitrator under the local acts of 6 April 1870 (P. L. 948) and 25 March 1873 (P. L. 396), payment of costs is not required. *Walbridge v. Barhite*, 7 C. C. 353.

90. In determining the amount of costs to be paid upon an appeal from an award, a judgment fee should not be included in the taxation. *Wise v. Pennsylvania Hard-Vein Slate Co.*, 4 Northam. 204.

91. A rule to arbitrate will not be stricken off because the costs ordered to be paid on a former rule have not been paid. *Grant v. People's Mutual Aid Society*, 2 York 164.

92. An appeal from an award will be stricken off if it appear that all the costs have not been paid, but the mere fact of the appellant's failure to file her bill of costs is no ground for inference that they have not been paid. *Glessner v. Patterson*, 6 York 17.

93. The act 13 April 1846 (Brightly's Purdon 130), allowing executors, administrators, guardians or trustees to appeal from an award without the payment of costs applies where an appeal is taken by the executor of a creditor of a decedent from an award in favor of another party against the decedent's estate. *Lagau v. Demarra*, 12 Lanc. 142.

94. An appeal from an award of arbitrators will not be stricken off because

the appellant refused to pay an item of cost for stenographer's services which was not properly taxable as costs. So an appeal will not be stricken off because the prothonotary failed to enter the facts on the continuance docket until the day after the time for appealing had gone by. *Flannery v. Susquehanna Mutual Fire Ins. Co.*, 15 C. C. 185.

95. An appeal from an award will be stricken off where it appears that the costs have not been paid in cash; filing receipts of witnesses and officers is not sufficient. *Lewis v. Signor*, 3 Dist. Rep. 455.

(g) Effect of appeal.

96. Where a controversy is voluntarily submitted to arbitrators and an appeal from the award is taken to the common pleas, the plaintiff must proceed to trial in the usual way; while such an appeal is pending a party is precluded from further proceedings under the arbitration act, and a rule of reference will be stricken off. *Church v. Finn*, 1 Lack. L. N. 113.

97. Where there is an award of no cause of action entered against three joint plaintiffs, and one of them takes an appeal, the court will permit all the plaintiffs to stand upon the appeal if they so desire. *Godfrey v. Moosic Mountain & Carbondale R. R. Co.*, 3 Lack. Jur. 121.

ARCHITECTS.

See ARBITRATION, I (d).

1. In a suit by an architect for services, it was *held*, that a statement was sufficiently specific where the items were charged in accordance with the general schedule adopted by the association of architects, and without a date for every particular act done or item charged for. *Albright v. Snyder*, 11 C. C. 255.

ARRAIGNMENT.

See CRIMINAL LAW, XII.

ARREST.

See BAIL: CRIMINAL LAW, V.

ARREST IN CIVIL CASES.

See BAIL.

I. Liability to arrest.**II. Practice.**

(a) Of the affidavit.

(b) Of the warrant.

(c) Hearing.

III. Appeal.**V. Arrest on final process.****I. Liability to arrest.**

1. A warrant of arrest may issue in a suit begun by attachment under the act of 17 March 1869 (Brightly's Purdon 70). *Grieb v. Kuttner*, 135 P. S. 281; s. c. 26 W. N. C. 323.

2. The fraudulent breach of the conditions of a contract, not originally tainted with fraud, will not convert the indebtedness into a debt fraudulently contracted within the meaning of the act of 12 July 1842 (Brightly's Purdon 67). *Hart v. Cooper*, 129 P. S. 297.

3. Money is not "property" within the act of 12 July 1842 (Brightly's Purdon 67), for the fraudulent concealment of which a warrant of arrest may issue. *Asbury v. Strickler*, 8 Lanc. 50; s. c. 1 Tr. & Haly's Pr. p. 190, note 2.

4. In an action against a joint stock company a warrant of arrest will not lie against the officers. *Fleshman v. Merrick-Price Co.*, 27 W. N. C. 312.

II. Practice.**(a) Of the affidavit.**

5. An affidavit is sufficient which avers the fraudulent sale of the business and property of the defendant for the purpose of placing it beyond the reach of defendant's creditors, that the goods thus sold had been bought by the defendant from the plaintiff, and that the note in suit was for the balance of the purchase

money due by defendant to deponent for the same goods. *Kohlhaas v. Veit*, 162 P. S. 108; reversing s. c. 14 C. C. 191.

(b) Of the warrant.

6. A warrant of arrest, under the act of 8 July 1885 (Brightly's Purdon 68), can only issue in the county where the crime has been committed. *Weber v. Goldenberg*, 10 C. C. 72; s. c. 27 W. N. C. 371; 48 L. I. 24; 2 Lack. Jur. 119.

(c) Hearing.

7. Under the act 12 July 1842 (Brightly's Purdon 68) a person arrested under a warrant of arrest must be brought before the judge who issues the warrant; no other judge has jurisdiction to hear and dispose of the case. *Morch v. Raubitschek*, 159 P. S. 559.

III. Appeal.

8. The plaintiff may review on *certiorari* the quashing of a warrant of arrest, but he is restricted to the regularity of the proceedings as they appear of record; the opinion of the judge may be used to show that there was no hearing on the merits. *Grieb v. Kuttner*, 135 P. S. 281; s. c. 26 W. N. C. 323.

9. Upon *certiorari* to the record of a warrant of arrest the supreme court will simply determine whether the affidavit is sufficient. They will not examine the subsequent proceedings. *Hart v. Cooper*, 129 P. S. 297.

10. An appeal lies from an order of the court of common pleas discharging from custody a person arrested under a warrant of arrest. *Morch v. Raubitschek*, 159 P. S. 559.

V. Arrest on final process.

11. The fine under the act of 16 March 1847 (P. L. 447. See Brightly's Purdon 491, n) for disturbing a religious society cannot be collected by process against the goods and chattels of the defendant.

The only execution is a *mittimus* to arrest the person. *Comm'th v. Sorber*, 5 Kulp 373.

12. If the committee of a lunatic guardian or other trustee confesses to using the trust-funds in his business, resulting in a loss to the estate, the court has no discretion but to attach his person for contempt. *Croop v. Freas*, 8 C. C. 107.

13. The right to enforce the payment of costs in a case of *divorce a vinculo matrimonii* by attachment, is more than doubtful. *Uhrich v. Uhrich*, 1 Northam. 59.

14. To entitle a defendant to privilege from arrest on a *capias ad respondendum*, he must have an estate clear of encumbrance; it is not sufficient that the estate, beyond the encumbrance, will satisfy the plaintiff's claim. *Unangst v. Fitzgerald*, 1 Northam. 132.

15. The court has no power to issue an attachment against a defendant for the costs of meeting of a board of arbitrators. *Arnold v. Burr*, 4 Del. 158; s. c. 5 Kulp 407.

16. A court of equity will not issue an attachment for failure to comply with a decree for the payment of money, where the answer of defendants avers their entire inability to pay, and shows that no fraud on their part had been found by the master. *McCarrell v. Mullins*, 141 P. S. 513.

17. A decree in equity that defendant was guilty of actual fraud and directing him to pay the costs, will be enforced by attachment. *Wilson v. Wilson*, 142 P. S. 247.

18. In a proceeding for divorce brought by the husband under the act 8 May 1854 for cruel and barbarous treatment, payment of alimony allowed the wife may be enforced by a *feri facias* or attachment; there is no act, however, which authorizes the employment of a *ca. sa.* for such purpose. *Elmer v. Elmer*, 150 P. S. 205; reversing s. c. 11 C. C. 623.

19. Where a defendant is committed to jail upon a *capias ad satisfaciendum*

issued on a judgment for a penalty for selling liquor on Sunday, in violation of the act 26 February 1855 (Brightly's Purdon 1230), the defendant can only be released under the insolvent laws. *Comm'th v. McAleese*, 12 C. C. 147.

20. A *feri facias* and attachment are the proper remedies to enforce an order of maintenance in desertion proceedings; a *capias ad satisfaciendum* cannot issue to enforce such an order. *Comm'th v. Steiger*, 12 C. C. 334.

21. Where a judgment has been entered for costs against a defendant in ejectment, the plaintiff may issue a *capias ad satisfaciendum* thereon. *Seldon v. Cozad*, 13 C. C. 303.

22. Where a bank made an assignment for creditors and it held money of a trust estate as a trustee; it was held, that upon the execution of the assignment the powers and duties of its officers over its property and effects passed to the assignee, and that an attachment would not be granted against such officers to compel the payment of such trust estate; nor against the assignee pending the audit of his account. *Palm's Estate*, 3 Dist. Rep. 456.

23. A *capias satisfaciendum* may issue upon a judgment for mesne profits recovered in ejectment. *Comm'th v. Bowman*, 3 Dist. Rep. 74. But such a defendant is entitled to be discharged in insolvent proceedings without undergoing imprisonment; and this, whether he gained possession of the land forcibly or otherwise. *Zeller's Petition*, 3 Dist. Rep. 520.

24. A defendant convicted under the oleomargarine act 21 May 1885 (Brightly's Purdon 1621), and ordered to pay a fine by a justice of the peace, is liable to imprisonment for non-payment of the fine, just as an offender sentenced to pay a fine in the quarter sessions. *Comm'th v. Kerr*, 42 P. L. J. 367.

ARREST OF JUDGMENT.

See CRIMINAL LAW, XIX.: PRACTICE, XXXI.

ARSON.

See CRIMINAL LAW, XXXVIII.

ASSAULT AND BATTERY.

See CRIMINAL LAW, XXIX.

ASSESSMENTS.

See MUNICIPAL ASSESSMENTS: TAXES,
IV.: TAX SALES, II.

ASSETS.

See DECEDENTS' ESTATES, II., III.:
ELECTION, V.: EXECUTION, XV.

ASSIGNMENT.

See BANKRUPTCY: BOND, III.: DEED:
LANDLORD AND TENANT, III.: LEGACY:
MORTGAGE: SALE.

- I. What things are assignable.
- II. Sufficiency of an assignment.
- III. What will amount to an assignment.
- IV. Rights and liabilities of assignees.

I. What things are assignable.

1. A married woman being a *cestui que trust* under a trust for separate use, can not assign the income in the hands of the trustee. *Shanty's Estate*, 7 C. C. 199.

2. The assignment of a contingent legacy will pass a good title where such assignment is made to a person who stands in no trust relation to the legatee and there is no evidence of oppression or bad faith. *Whelen v. Phillips*, 151 P. S. 312.

3. An assignment of an expectancy will be enforced as an executory agreement to convey where it is sustained by a sufficient consideration; the sum of \$625.00 was held to be a sufficient consideration for the assignment of an expectant interest amounting to \$771.00. *Fritz's Estate*, 160 P. S. 156.

4. An assignment of an expectant interest in the estate of a living parent

will be sustained in equity where such assignment has been made in good faith and for a valuable consideration. *Kuhn's Estate*, 163 P. S. 438.

5. The relation between a husband and the executor named in the will of his wife, executed before her marriage and revoked thereby, is not that of *cestui que trust* and trustee, and an assignment to the latter for a fixed sum of the husband's interest in his wife's estate for the purposes of the will, will be upheld. *Nagle's Appeal*, 1 Mona. 557.

6. Under the act 29 April 1874, sec. 43 (Brightly's Purdon 1293), it was held, that a general assignment of wages to be earned in the future without specifying the person or company from whom they were to be earned was invalid; but that an assignment of wages to be earned in the future in payment of a debt already due or to be incurred in the future was valid, provided the assignor was employed by the person to whom he directed the payment of his wages in payment of his indebtedness. See acts 20 May 1891 (Brightly's Purdon 2078) and 9 June 1891 (Brightly's Purdon 1385). *McManaman v. Hanover Coal Co.*, 6 Kulp 181. See *Evans v. Kingston Coal Co.*, 6 Kulp 351.

7. It is not entirely clear whether an assignment to a creditor by a debtor of a claim of money due to the latter by a third person for wages is within the act 10 May 1881 (Brightly's Purdon 221), requiring all acceptances to be in writing; whether it is or not, the objection that the assignment was not in writing can only be raised by the acceptor. *Ulrich v. Hower*, 156 P. S. 414; *Moeser v. Schneider*, 158 P. S. 412.

8. As to the assignability of future earnings, see brief authorities in note to *Edwards v. Peterson*, 14 Atlan. 938.

II. Sufficiency of an assignment.

9. An equitable assignment is an agreement in the nature of a declaration of trust, and a chancellor will never hesitate to execute it when it has been made

on a valuable or even a good consideration; the form of the assignment is immaterial, so that there be a clearly expressed intention of an immediate transfer of the right to the assignee. *Moeser v. Schneider*, 158 P. S. 412.

10. Where an order is drawn by one person upon another for the payment of money, the drawee is not liable upon the order unless he accepts it, and where the order is an equitable assignment of the fund, judgment will not be entered against the drawee for want of a sufficient affidavit of defence where he avers that the assignee is largely indebted to him. *Reilly v. Daly*, 159 P. S. 605.

11. An assignment by a solvent debtor of a portion of his property to pay certain debts is valid; other creditors have no right to participate in the distribution. *Sheble's Appeal*, 4 Cent. 667.

III. What will amount to an assignment.

12. If a check be drawn against the whole of a specific fund in bank which belongs to the payee, it operates as an assignment of the fund and passes a legal title thereto to the payee against the drawer and his attaching creditors. *Hemphill v. Yerkes*, 132 P. S. 545; s. c. 25 W. N. C. 417.

13. Where a check is drawn for the whole amount of the deposit and the drawer intends, by means of the check, to make a gift to another of the whole fund, the check will operate as an equitable assignment of the fund. *Taylor's Estate*, 154 P. S. 183.

14. An affidavit of defence setting up an equitable assignment to defendants by a third person of a particular fund in the hands of the plaintiff and due the assignor, is insufficient if it does not allege that such fund existed when suit was brought. *Heckscher v. American Tube and Iron Co.*, 137 P. S. 421; L. c. 26 W. N. C. 525.

15. Where land was in the process of partition, and one of the owners by power of attorney authorized his sister to take

possession of his real estate and sell and convey the same, and to collect the money that was owing to him and to keep a certain sum of money that he borrowed from her; it was *held*, that the power of attorney operated as an equitable assignment of sufficient to pay the indebtedness, and that the sister's right was not divested by the brother's death after the execution of the power of attorney. *Keys's Estate*, 137 P. S. 565; s. c. 38 P. L. J. 113.

16. Where the decedent had an open account with a firm upon which she was a creditor for six hundred and sixty-one dollars and fifty cents, and a debtor for one hundred and seventy-three dollars and sixty-one cents, and the claimant at the time was a member of the firm, and was an endorser on her note for four hundred and fifty dollars, and he agreed to endorse another note for her for two thousand dollars on her agreeing that four hundred and fifty dollars of her credit should be offset by the note for that amount, which he undertook that the firm should pay, and the claimant endorsed the second note and the firm paid the first note; it was *held*, that this was an equitable assignment of four hundred and fifty dollars of her claim on the firm to the claimant, and that it made no difference that the first note was paid after her death. *Spotts's Estate*, 156 P. S. 281.

17. Where a legatee to secure an indebtedness to J. and a further advance to be made by J. directed K., who was his agent, to collect a legacy and to pay the same when collected, to J.; it was *held*, that this amounted to an equitable assignment of the fund. *Moeser v. Schneider*, 158 P. S. 412.

18. Where the heir of the lessor of coal lands conveyed to a trustee all his undivided right, title estate and interest in his ancestor's estate and appointed an attorney in fact to convey to the trustee by proper description, his interest in said lands, tenements and hereditaments, and the conveyance was subject to the condition that if the grantor paid a certain

debt, the premises should be reconveyed to him, and subsequently the attorney in fact conveyed the land with all the right, title and interest of his principal in the coal lease; it was *held*, that although he had no estate in the coal which he could mortgage (his interest in the royalties being personalty), yet the instruments taken together operated as an assignment of his interest in the royalty. *Hancock's Estate*, 7 Kulp 36.

19. Where the plaintiff contracted to furnish material to the city and the contract stipulated that it should not be assigned or sub-let, and he gave to one E. a power of attorney to demand and receive "all moneys due and owing on account of said contract," on the faith of which E. advanced certain moneys to him; it was *held*, that the power of attorney did not amount to an assignment either of the contract or of the money due, and, in an action by the plaintiff, to the use of E., the city could set off damages arising after the date of the power from the breach by plaintiff of another contract. *Watson v. Philadelphia*, 142 P. S. 179.

20. Where a contractor to build a canal drew an order on his employer in favor of the plaintiff, which order was expressly payable out of his final estimate, and the contractor afterwards failed to complete; it was *held*, that he never became entitled to a final estimate and the plaintiff could not recover on his order. *Hazleton Mercantile Co. v. Union Improvement Co.*, 143 P. S. 573.

21. An ordinary bill of exchange or draft drawn generally and not upon any particular fund, does not, whether accepted or not by the drawee, operate as an equitable assignment. *Comm'th v. American Life Ins. Co.*, 162 P. S. 586.

IV. Rights and liabilities of assignees.

22. The assignee of a part of the contract price for building a canal can recover no more than his assignor; where such an order was not accepted

by the company, it was *held*, that the subsequent assignees of the contract, and substituted contractors, were not bound by it. *Hazleton Co. v. Union Improvement Co.*, 10 C. C. 161; s. c. 48 L. I. 14. See *Clement v. Philadelphia*, 137 P. S. 328; *Watson v. Philadelphia*, 142 Ibid. 179.

23. The right of a city to set off a debt due by its contractor is not affected by a previous assignment by the contractor to a third person, of the proceeds of his contract. *Clement v. Philadelphia*, 137 P. S. 328; s. c. 48 L. I. 26; *Watson v. Philadelphia*, 142 P. S. 179.

24. Where an auditor's report awarding a claim has been confirmed absolutely, an assignee of the claim has a standing in court to ask for an order on the executor to pay over. *Odenwelder's Estate*, 3 Northam. 12.

25. In a suit by an assignee of a claim against a township, the record need not show affirmatively that the assignment was proven. *Shea v. Plains Township*, 7 Kulp 554.

26. Where a debtor assigns property to another, who agrees to apply the income thereof to the assignor's debts, and the assignor at the same time sells and conveys to the assignee other property, the assignee to hold the purchase money and apply it to the same object, the assignee is liable to account, as trustee, for all the funds that come into his hands from the assignor's property. *Ahl's Appeal*, 129 P. S. 26.

27. Where a lease provides for forfeiture in certain cases, an assignee of the lease is bound on his peril to ascertain whether or not the lease has been forfeited. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

28. A lessor is not affected by a mere general rumor that the lease has been assigned by the lessee; such information must come from some person interested in the property and must be directly communicated to the lessor. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

29. Where the maker of a promissory note under seal has notice that the payee has assigned the note, he cannot purchase a note of the payee to be used as a set-off; but in an action by the assignee the burden is on him to show that the defendant had notice of the assignment before he purchased the payee's note. *Burford v. Fergus*, 165 P. S. 310.

30. The assignee of a bond takes it subject to all the equities of the obligor against the obligee, unless he first inquire of the obligor whether he has any defence or set-off against it and receive an answer in the negative. *Renoll v. Dubs*, 2 York 154.

ASSIGNMENT FOR CREDITORS.

See BANKRUPTCY: CORPORATION, XV.:
EQUITY, XXIII., XLVI.: INSOLVENCY.

- I. Who may make an assignment.
- II. Effect of an assignment.
- III. Formal requisites of an assignment.
 - (a) Delivery of deed.
 - (b) Recording.
- IV. Reservations.
- V. Preferences.
- VI. Inventory and appraisalment.
- VII. Assignments by partners.
- VIII. What passes by an assignment.
- IX. Title by assignment.
- X. Rights and remedies of assignees.
- XI. Liabilities of assignees.
- XII. Removal of assignees.
- XIII. Allowances to assignees.
- XIV. Assignees' sales.
- XV. Distribution.

I. Who may make an assignment.

1. The directors of a corporation have no power to make an assignment for the benefit of creditors. *Anderson v. Elton-head*, 26 W. N. C. 95.

2. An insolvent corporation may, unless restrained by its charter, make a valid assignment for the benefit of cred-

itors; and this, through its board of directors without the authority or consent of the stockholders. *Lehigh Iron Company's Estate*, 12 C. C. 257.

3. A foreign corporation may assign its property in this state for the benefit of its creditors, although an act of the state of its incorporation forbids such an assignment in said state. *Active Workers v. Sanders*, 28 W. N. C. 321.

4. Stockholders of a joint stock company may at a meeting duly called and held; direct the chairman and secretary to make an assignment for the benefit of creditors; such an assignment was held to be legal without a formal authorization by the board of managers; and this, although the by-laws provided that the board of managers should have entire control of the company's business. *Rodgers Printing Co. v. Santa Claus Co.*, 11 C. C. 529.

5. A trustee appointed under a will to carry on the business of the testator cannot, in the absence of express authority, make an assignment for the benefit of creditors; so, he cannot confess a judgment to a creditor of the trust estate so as to give such creditor a preference over other creditors in the distribution of the trust property; in such a case the other creditors may file a creditor's bill to compel the trustee and the preferred creditors to account. *Woddrop v. Weed*, 154 P. S. 307; *Young v. Weed*, 154 P. S. 316. See *Weed's Estate*, 163 P. S. 595, 600.

II. Effect of an assignment.

6. An assignment for the benefit of creditors of a corporation does not necessarily work a dissolution. *Conshohocken Worsted Mills*, 9 Montg. 23.

III. Formal requisites of an assignment.

(a) Delivery of deed.

7. The delivery of a deed of assignment for creditors is effective though made

to but one of the assignees mentioned in the deed. *Hodenpuhl v. Himes*, 160 P. S. 466.

(b) Recording.

8. Though an assignment of a chose in action be in words "for the benefit of my creditors," it is not such an assignment, under the act of 24 March 1818 (Brightly's Purdon 142), as to be void if not recorded, if the assignee be a purchaser for a consideration. *Boyd v. Smith*, 128 P. S. 205.

9. A deed of assignment should not only be recorded in the county in which the land described is situated, but also in the county in which the assignor resides; but a deed not recorded in the county in which the assignor resides is valid as to the assignor and assignee, and such creditors as do not attack it by proceeding to collect their claims, and also against a subsequent voluntary assignee. *Dettra v. Bollman*, 9 Lanc. 1.

10. A resident of a foreign state cannot by a writ of foreign attachment in this state, obtain a preference over an assignment for creditors of the estate of a citizen of another foreign state; failure to record the assignment in this state, as provided by the act 3 May 1855 (Brightly's Purdon 143), will not give priority to such foreign attachment, as that act was passed for the protection of domestic creditors alone. *Long v. Girdwood*, 150 P. S. 413; affirming s. c. 28 W. N. C. 299; *Wing v. Bradner*, 162 P. S. 72.

11. Under the act 17 April 1843 (Brightly's Purdon 139), where an assignment is made for certain creditors, it must be recorded within thirty days or it becomes void, and the property inures to the benefit of all the creditors. *Dickson's Estate*, 166 P. S. 134; affirming s. c. 40 P. L. J. 411.

12. An assignment by a debtor to a creditor of property as security for a debt is not such an assignment in trust as must be recorded within thirty days and is valid without record, at least so far as it

concerns personal property. *Handy's Estate*, 167 P. S. 552; s. c. 36 W. N. C. 265.

IV. Reservations.

13. The assignment containing a reservation of the exemption "in either real or personal property," a claim cannot be made therefor before an auditor, appointed to distribute the proceeds of real estate, without a previous demand for an appraisal and an election of property by the assignor. It is not the duty of the assignee to see that the appraisal is made. *Afterbach's Estate*, 7 C. C. 157.

14. If the deed reserves the right to claim exemption, the burden of proving due diligence cannot be placed upon the assignor. *Larkin's Estate*, 132 P. S. 554; affirming s. c. 4 Del. 133.

15. Notice of the claim of exemption at the time of appraisal can be established by the acts and declarations of the assignee. *Ibid*.

16. An assignor who equivocates or dissembles and denies the ownership of that which he cannot hide, forfeits his right to the exemption. *Kreider's Estate*, 26 W. N. C. 313.

17. An assignee who, without an order of court, pays over the exemption claimed by the assignor, does so at his own risk. *Ibid*.

18. Where a judgment-note recites that it is given for purchase money of real estate, the defendant is estopped from establishing his right to the exemption, by proof that part of it was given for an individual debt. *Hawbecker's Estate*, 6 C. C. 570.

19. The assignor for creditors is not entitled to his exemption in preference to mechanics' liens. *Muckel's Estate*, 8 Lanc. 89; s. c. 4 Del. 386.

20. Where A. made a deed of assignment for creditors which contained the usual exemption clause, but he neglected to make any claim for the same and his property was sold and an account filed and the balance distrib-

uted, and thirteen years afterwards the principal of a dower became payable, A. being one of the heirs, and he then claimed his exemption out of his share of the fund; it was *held*, that he was conclusively presumed to have waived his exemption. *Khor's Estate*, 5 York 183.

21. Where an assignment for creditors was made by husband and wife and the deed reserved the usual exemption, but before the wife would sign the deed she was promised by the husband that she would receive the three hundred dollars and there was no personal property, but the exemption was claimed out of the real estate by both husband and wife; it was *held*, that the auditor had jurisdiction to adjudicate the proper distribution of the fund, and the exemption was awarded to the wife as the equitable owner. *Conrad's Estate*, 9 Montg. 110.

22. An assignor for creditors who has reserved his exemption in the deed cannot claim it against a first judgment containing a waiver, but he may claim it against a second judgment containing no waiver. *Shade v. Magee*, 12 Lanc. 177.

23. An assignor for creditors who has reserved his three hundred dollar exemption in the deed, is not entitled to be paid a balance thereof out of the proceeds of the sale of the real estate although the appraisers of his exemption so returned, where it appears that he did not elect to take such balance out of the real estate and demand its appraisal therefrom by the appraisers. *Shade v. Magee*, 12 Lanc. 177.

24. The reservation in an assignment for creditors of the assignor's right to the exemption must be exercised at the time of the appraisal, and if it is not then claimed, it will not inure to the benefit of a subsequent execution creditor upon a judgment with a waiver of exemption. *Long v. Wilson*, 15. C. C. 68.

25. As to the validity of reservations, see note to *Muhr v. Pinover*, 10 Atlan. 290.

V. Preferences.

26. The payment by an insolvent savings bank to some of its depositors to the exclusion of others, of a dividend of ten per cent before assignment, is a lawful preference. *Coopersburg Bank*, 4 Del. 160.

27. Preferences in a deed of assignment for creditors do not render the deed ineffectual as a general assignment. *Hodenpohl v. Himes*, 160 P. S. 466.

28. In the distribution of an assigned estate, state, county, school and road taxes are not entitled to a preference out of the personal estate unless a distress or an attempt to distrain has been made by the collector, and the personalty relinquished in consequence of a promise made by the assignee to pay the taxes in case of distance. *Pollinger's Estate*, 1 York 197. See *Bressler's Appeal*, 2 York 57.

29. Where there is personal property on the premises assigned, more than sufficient to pay the taxes and the assignee pays them, such payment will be *held* to be a charge against the personal assets in the hands of the assignee for distribution. *Landis's Estate*, 10 Montg. 38.

30. Upon the distribution of an assigned estate, in order to entitle a person to a preference as a trust creditor, the trust money must be traced in some specific property or into some particular fund or account of the assignor, with which the latter has mingled it. *Freiberg v. Stoddard*, 161 P. S. 259; affirming s. c. 7 Kulp 157.

31. The act 26 May 1891 (Brightly's Purdon 140), that where a tenant makes an assignment, his landlord shall be entitled to receive one year's rent as a preferred claim out of the proceeds of sale of goods liable to distress on the premises, is not retroactive. *Glazier's Estate*, 33 W. N. C. 310.

32. Claims for wages against a firm rendered after an individual assignment by a member, are invalid as against the assigned estate of the latter. *Fox's Appeal*, 11 Atlan. 228.

33. A claim for wages is not entitled to preference unless the labor was in and about the business of the assignor, or the property from the sale of which the fund arises. *Childs's Estate*, 135 P. S. 214.

34. Upon an assignment for creditors in order to give preference to wages claims, it was held, under the acts 9 April 1872, 13 June 1883 and 3 June 1887 (since further amended by the act 12 May 1891, *Brightly's Purdon* 2074), that the claim filed must set forth the amount of wages due and preferred; the character of the services, and that the same were rendered in and about the business carried on; that the labor was done within six months; so the process must be sufficiently set out and described, and the claimant must set forth that his claim is a lien on the specific property levied on or assigned. As to such persons not engaged in the operations mentioned in the first section of the latter acts, the act 22 April 1854 (*Brightly's Purdon* 140), allowing the preference of one hundred dollars, is still in force. *Paul's Estate*, 148 P. S. 121.

35. Upon the distribution of the proceeds of real estate assigned for creditors, no claim for wages is entitled to preference unless it has been filed in the prothonotary's office within three months after the same became due and owing. This proviso was originally contained in the act 7 April 1872, but was repealed by the act 8 May 1874, and again re-enacted by the act 13 June 1883, which re-enactment was held to be in conflict with article III, sec. 6, of the constitution, and the act 3 June 1887 was held to repeal the act 8 May 1874 by implication. *Brown's Estate*, 152 P. S. 401. The proviso was again re-enacted by the act 12 May 1891 (*Brightly's Purdon* 2075).

36. Upon an assignment for creditors a preference for wages may be claimed out of the proceeds of any personal property, and not merely out of the proceeds of that connected with the manufactory; wages claimants are entitled to a dividend as common creditors upon the whole

amount of their claims without regard to their preference for wages. *Evans's Estate*, 1 York 176.

37. Under the act 22 April 1854 (*Brightly's Purdon* 140), it was held, that wages were subordinate to prior liens on real estate. *Pollinger's Estate*, 1 York 197. See *Bressler's Appeal*, 2 York 57.

38. A claim against an assigned estate for labor as a farm hand on the assignor's farm, is not entitled to a preference over the assignor's claim to his three hundred dollar exemption. *Jarrett's Estate*, 8 Lanc. 131.

39. Where a shoemaker employs from six to ten journeymen and his principal business is making shoes to order, the wages of his journeymen are preferred. *Allen's Estate*, 40 P. L. J. 81.

40. Upon a sale of personal property by an assignee for creditors, labor claimants are not required to give the assignee notice of their claim, they are simply required to prove their right to preference before the auditor appointed to distribute the fund. *McCleaster's Estate*, 15 C. C. 121.

VI. Inventory and appraisement.

41. Where the general inventory and the appraisement of the exemption both contain articles belonging to the separate estate of the wife which was reserved in the deed of assignment, the court will set aside the inventory and appraisement. *Helm's Estate*, 8 Lanc. 243.

42. Mining leaseholds and manufacturing plants should be appraised at the price which they would probably bring at a fair sale, and not at a value which they probably would have if operated with great skill and large capital. *Powell's Estate*, 163 P. S. 349.

VII. Assignments by partners.

43. One partner, during the temporary absence from the city of his co-partner, cannot make a valid assignment of the firm's property for the benefit of creditors.

The evidence of the other partner's ratification was insufficient. *Stockham v. Wells*, 25 W. N. C. 84.

44. The assignee for creditors of a firm, consisting of three members, is bound by a previous assignment and preference of certain book accounts to a creditor, signed but by two members of the firm. *Sweigart's Estate*, 6 Lanc. 185.

45. Where H. and C. not being insolvent formed a corporation to which they transferred all their property, and received therefor substantially all the corporate stock, and the business of the corporation was afterwards continued in the name of H. and C. and incurring a large indebtedness became insolvent, and the partners after securing certain creditors by assignments of stock made an assignment for creditors, and unpreferred creditors subsequently levied upon the property of the partnership; it was held, that the preference for their *bona fide* creditors was not unlawful, as to those not preferred, and the latter were without legal right to levy upon the corporate assets as the property of the partnership. *Coaldale Coal Co. v. National State Bank of Camden*, 142 P. S. 288.

46. Upon an assignment for creditors by a joint stock company, a member of the company may claim as a creditor, and is entitled to receive his *pro rata* share of the fund with the other creditors. *Globe Refining Co.'s Estate*, 151 P. S. 558.

47. One partner cannot make a valid assignment for creditors of all the firm property without the consent of the other member of the firm. *Cleaver v. Brenzel*, 1 York 156.

48. One member of a partnership cannot make an assignment for creditors without the authority or consent of the other member; but if such an assignment be made, it will be held good as against subsequent execution creditors of the firm unless the other partner dissents. *Hodenpuhl v. Himes*, 160 P. S. 466.

49. Upon the distribution of the assigned estate of a firm, where there are partnership and separate creditors and

partnership and separate assets, each class has priority upon its respective estate; where a person has a judgment against a partnership and also a separate judgment against the individual partners for the same debt, he is entitled to a dividend on each judgment out of its respective estate. *Jamison's Estate*, 163 P. S. 143; reversing s. c. 3 Dist. Rep. 217.

50. Where a firm of bankers made an assignment for creditors and they had on deposit a large amount of money belonging to a county, and prior to their assignment they had cashed for their customers a large number of warrants drawn upon the county treasurer, a number of which were delivered as collateral security for a debt due by the bank, which was subsequently paid by the sale of its real estate; it was held, that the county was entitled to have the warrants surrendered and a charge entered for their amount in the account of the county treasurer with the firm. *Crawford County v. Merchants' National Bank*, 164 P. S. 109.

51. Where a firm made an assignment for creditors and such assignment included only one tract of land, but one of the partners owned other land and the assignee filed a petition to sell the land free of liens under the act 17 February 1876 (*Brightly's Purdon* 140); it was held, that such an order would be made even though there was but one tract of land included in the assignment. *Wilt's Estate*, 42 P. L. J. 327.

VIII. What passes by an assignment.

52. An assignment for creditors here, passes title to personal property in another state, and a creditor who has subsequently issued a foreign attachment in another state will be enjoined from levying an execution thereon upon the assignor's property there. *MacDonald v. Furbush*, 26 W. N. C. 120.

53. A dower interest of the assignor was held not to pass by a general assignment, where it was shown that the

assignor signed the deed upon the faith of a parol contemporaneous agreement that it was not to be included in the assignment. *Wanner v. Landis*, 137 P. S. 61; s. c. 26 W. N. C. 529; 7 Lanc. 385.

54. Where A assigned to his brother B his share of his mother's dower charged upon the lands of his deceased father, but such assignment was not put on record, and B afterwards made an assignment for creditors, and the assignee sold B's interest in the dower at public sale and the transfer from A to B was found after the widow died; it was *held*, that A's share in the dower had not passed by the sale and should be awarded to the assignee. *Huber's Estate*, 9 Lanc. 153.

55. Where a married woman and one of several heirs joined with the other heirs in a conveyance to her husband of part of the real estate of her father, and took as consideration therefor a judgment note for the purchase money and her husband did not join in the deed; it was *held*, that the failure of the husband to join in the deed rendered it absolutely void and of no effect, and that her estate in the land remained in her, and no interest of hers having passed by the deed to her husband, it did not pass by his subsequent assignment for creditors, and she had no claim under the judgment note to any part of the proceeds of the sale of the land by her husband's assignee. *Ruby's Estate*, 5 York 149.

56. Where a bank made an assignment for creditors and it held money of a trust estate as a trustee; it was *held*, that upon the execution of the assignment the powers and duties of its officers over its property and effects passed to the assignee, and that an attachment would not be granted against such officers to compel the payment of such trust estate; nor against the assignee pending the audit of his account. *Palm's Estate*, 3 Dist. Rep. 456.

57. Where testatrix devised and bequeathed the residue of her property, real and personal, to her executor in trust to be divided among her children, giving

her executor the right to allow her husband and children the free use and disposal of the personal property, with the free use and occupation of the family residence until all her children should arrive at the age of twenty-one years, and directed her executor to pay to her husband all of the income until all her children had arrived at the age of twenty-one years, the said income to be disposed of by him at his own discretion, with the hope and belief that he would use the same in such a manner as would be advantageous to their children, and the husband subsequently made an assignment for creditors; it was *held*, that he took no beneficial interest in such income, and that the same did not pass to his assignee under the assignment. *Slemmon's Estate*, 42 P. L. J. 167.

58. Where an assignee for creditors leased land to a tenant on shares, and the land was afterwards sold under a judgment entered prior to the assignment, and on the day of the sheriff's sale, the tenant cut and gathered six-sevenths of a crop of corn which had been planted after the assignment, and afterwards cut the other seventh; it was *held*, that the sheriff's vendee was entitled to the whole crop of corn. *Hoover v. Hoover*, 10 C. C. 563.

59. The franchises of a manufacturing corporation do not pass under a general assignment for its creditors, and there is no authority in the court to order the assignee to sell its franchises with the other property of the corporation. *Lehigh Iron Co.'s Estate*, 12 C. C. 257.

60. Where a levy is made under an execution before an assignment for creditors, the goods levied upon are no part of the assigned estate, but are a satisfaction *pro tanto* of the judgment, and upon a distribution of the assigned estate, the judgment creditor is only entitled to a dividend on the balance of his judgment. *Wetzler's Estate*, 12 Lanc. 187; s. c. 6 Del. 151.

61. The delivery of a deed of assignment to the recorder of deeds gives prior title to the assignees as against an exe-

cution placed in the hands of the sheriff later in the same day. *Hodenpohl v. Himes*, 160 P. S. 466.

62. Where execution is issued and at a later hour on the same day an assignment for creditors is delivered to the assignee, the execution becomes a lien on all the personal property of the debtor until the following return day, but the lien then expires unless an actual levy is made in the interval. *Braden's Estate*, 165 P. S. 184.

63. A mere formal levy by a sheriff without having the property in his power or view, is void as against an assignment for the benefit of creditors. *McCleaster's Estate*, 15 C. C. 121.

64. Where an execution reaches the sheriff's hands after an assignment for creditors has been recorded, it is no lien on the goods covered by the assignment. *Plank's Estate*, 10 Lanc. 201.

65. Upon a contest between an execution creditor and the assignee for creditors of the defendant, the title to the property cannot be determined upon a rule to show cause why the execution should not be stayed. *Oswego River Pulp Co. v. Delaware Water Gap Pulp Co.*, 10 C. C. 312.

66. Where, at the time of the delivery of an assignment for creditors, the stock of the assignor had been levied on by virtue of several executions against the assignor, and the sheriff delivered the goods to the assignee, under an agreement, to be by him sold and the proceeds applied to the satisfaction of the several executions according to the order of priority of lien; it was *held*, that the prior right of the first execution creditor could not be defeated on the ground that his execution was prematurely issued; such an irregularity can only be taken advantage of by the defendant. *Hanika's Estate*, 138 P. S. 330.

67. Where the personal property assigned had been levied on prior to the assignment and by agreement with the execution creditors and sheriff, the assignee took charge of the goods and

made sale of the same as the sheriff's agent and accounted to the sheriff for the proceeds, which were insufficient to satisfy the execution; it was *held*, that unsecured creditors had no standing to except to the assignee's account for clerk hire and expenses in converting the goods into money; and the fact that an execution creditor whose execution was left unsatisfied issued an alias writ and levied on the real estate, was not to be treated as an abandonment of his right to receive payment out of the proceeds of the goods sold. *Mathews's Estate*, 144 P. S. 139.

68. Where an execution was issued the day before an assignment for creditors; it was *held*, that the sheriff might allow the assignee to take charge of and sell the personal property, the proceeds to be applied to the payment of the judgment; where the property was kept and used on the farm for eleven months before it was sold and the proceeds were not given to the sheriff but to the judgment creditor, but the assignee appraised it and charged himself with it, such charge and credit were both stricken off on a restatement of the account by the auditor. *Plank's Estate*, 10 Lanc. 201.

69. Where a judgment creditor issued an execution before the assignment and the sheriff allowed the assignee to sell, but such sale did not take place for eleven months; it was *held*, that the judgment creditor was not entitled to recover from the estate for the use of the property by the assignor during the eleven months. *Plank's Estate*, 10 Lanc. 201.

70. Where an execution has priority to an assignment for creditors, it may be agreed between the assignee, the execution creditors and the sheriff that the assignee shall sell the property levied upon and turn over the proceeds to the sheriff; in such a case the assignee becomes the agent of the sheriff and a notice by the landlord of the assignor, under the act 16 June 1836 (*Brightly's Purdon* 842), is equivalent to a notice

to the sheriff. *Leidich's Estate*, 161 P. S. 451.

IX. Title by assignment.

71. A reconveyance to the assignor by the assignee being *ultra vires*, title to assigned property remains in the assignee and his successor in office. *Golden v. Moogrove*, 3 East. 316.

72. Where proof of an assignment for creditors in a foreign state consisted of a certified copy of the act and warrant of confirmation of the trustee of the sequestered estate, showing that the trustee had power to recover the effects of the estate, and the certificate of the consul that the act and warrant was evidence of the title of the trustee to the property wherever situate, and such proof was admitted by agreement of counsel, it was not error to refuse to strike it out. *Long v. Girdwood*, 150 P. S. 413; affirming s. c. 28 W. N. C. 299.

73. Where the wife of one of the assignors for creditors joined in the deed of assignment upon the representation of her husband, that the debts of his firm amounted to only two hundred and fifty thousand dollars, whereas they in fact exceeded six hundred thousand dollars, and that if she joined in the deed she would save to her husband and her son the business, which in point of fact was untrue, the court enjoined the assignee from selling the wife's real estate. *Fleming v. Ogden*, 152 P. S. 419.

74. Where a bank has agreed to discount a note, and discovers before it has paid the money that the borrower is insolvent, it may tender back the note given for discount and refuse payment to the borrower; the latter's assignee for creditors has no superior rights to the borrower himself. *Warner v. Hare*, 154 P. S. 548.

75. If an assignment be clearly fraudulent and collusive, the assignee may be removed and the assignment itself vacated and declared void on a creditor's bill, but this can only be done by a bill

filed in the court having jurisdiction over the assignment. *Artman v. Giles*, 155 P. S. 409.

76. Where an executor renounces his right to commissions, his assignees for creditors cannot claim them, and it seems that such a right is not assignable for creditors, as against public policy. *Mulligan's Estate*, 157 P. S. 98. See s. c. 12 C. C. 166.

77. Where property is devised under a spendthrift trust in favor of a son, and the trust estate still remains in the possession of the trustee, a general assignment by the son for the benefit of his creditors will not pass his interest in the trust estate. *Barker's Estate*, 159 P. S. 518; affirming s. c. 13 C. C. 419.

78. Where the agent of a short term order had paid back money received for dues after he had notice that the order had made an assignment for creditors; it was held, that he might be compelled to pay the same amount to the assignee. *Active Workers v. Sanders*, 28 W. N. C. 321.

79. Where an assignee for creditors disclaims any title to the property in question, the creditors cannot use his name as plaintiff for their use in an action of ejectment without first establishing the title in the assignee. *Guarantee Trust Co. v. Powel*, 29 W. N. C. 571.

80. The failure of an assignee for creditors to include in his inventory a remainder interest of the assignor in the principal of a dower, was held not to operate as a waiver of his claim nor as a reinvestiture in the assignor, so as to enable a judgment creditor after the death of the widow to attach such interest in the hands of the owner of the land. *Bloom v. Miller*, 11 C. C. 620.

81. Where an assignee for creditors realizes on the original property, he is a trustee for the benefit of creditors, whose rights to the fund cannot be taken away by any subsequent legislation unless the act be made retroactive. *Allen's Estate*, 40 P. L. J. 81.

82. Where a creditor conducted pro-

ceedings for an account against an assignee and was held by his acts to be estopped from setting up or enforcing the assignment, it was held that he could not afterwards in another proceeding establish a trust between himself and the assignee as regards the same property. *Robb v. Van Horn*, 150 P. S. 508. See *Crans's Appeal*, 9 Atlan. 282.

X. Rights and remedies of assignees.

83. Equity has jurisdiction of a bill by the assignee of an insolvent bank against the president and others, charging that the defendants had withdrawn large sums and used them in gambling in oil, on the ground that the remedy at law, involving the consideration of a mass of complicated accounts, would be inadequate. *Warner v. McMullin*, 131 P. S. 370.

84. A bill by an assignee for creditors, for the sale of stocks and accounts, against one who had received certain notes from the assignor for speculation was properly disposed of by final decree after report of the master on its merits. *Evans v. Goodwin*, 132 P. S. 136; affirming s. c. 46 L. I. 168.

85. Upon the assignment by a corporation for the benefit of creditors, the statute of limitations begins to run upon a subscription to the stock thereof, from the date of such assignment; not from the time of a call. *Franklin Savings Bank v. Bridges*, 8 Atlan. 611.

86. In a suit by an assignee for creditors against a bank to recover the assignor's deposit, the defendant may set off commercial paper obtained by it as endorsee, whether for collection or as owner, before the assignment. *Penn Bank v. Farmers' Deposit Nat. Bank*, 130 P. S. 209.

87. The validity of a judgment held by the assignee against the assigned estate was sustained in *Fox's Appeal*, 11 Atlan. 228.

88. If it appears on the settlement of

the account of an assignee of a partnership for the benefit of creditors, that there is a balance due for debts paid in excess of the assets, the balance may be recovered by the assignee in assumpsit against the firm. *Bittner v. Hartman*, 139 P. S. 632; affirming s. c. 2 Northam. 248.

89. But such a suit will not lie if it appears that the excess of debts was actually paid by one of the partners, and that the suit was brought for his benefit. *Ibid.*

90. Upon the assignment of a watch company the court has no legal authority to empower the assignee to complete the watch works or movements then in process of manufacture. *Keystone Standard Watch Co.'s Estate*, 8 Lanc. 43.

91. An assignee is entitled to select his own counsel, and if other parties are not satisfied they must employ counsel for themselves. *Comm'th v. Order of Vesta*, 156 P. S. 531; reversing s. c. 12 C. C. 481.

92. An assignee for creditors has no standing to plead duress of his assignor for the purpose of setting aside an otherwise legitimate transfer of property made by the assignor to pay an honest debt. *Phillips v. Henry*, 160 P. S. 24; affirming s. c. 10 Montg. 9.

93. An assignee for creditors has no standing to file a bill to compel a reconveyance of property alleged to have been fraudulently conveyed by his assignor immediately before the assignment; he is a representative of the assignor and is bound by his acts. *Jordan v. Mosser*, 9 C. C. 325.

94. Where an assignment for creditors was made to a creditor, and at the sale of the assigned property the assignor purchased articles to the amount of \$202.08, and he was employed by the assignee to manage the estate and claimed \$298.24 as compensation for his services, and he presented his claim to the assignee, and they agreed in writing that the assignor's claim should not be objected to by the assignee before the auditor, but that the

assignee should retain \$202.08 in payment of himself as assignee, and pay the balance to the assignor; it was *held*, that such agreement did not estop the assignee from retaining the balance as part payment of his individual claim against the assignor. *Strickhouser's Estate*, 2 York 114.

95. An assignee for creditors may agree with his assignor that the latter shall remain on and conduct a farm covered by the assignment, the assignee to receive the proceeds and to pay the store and butcher bills of the assignor; the court refused to surcharge the assignee with the store and butcher bills so paid, although the proceeds of the farm did not equal the amount of the bills. *Plank's Estate*, 10 Lanc. 201.

96. An assignee for creditors has merely the rights of his debtor; a bill does not lie by him to avoid a previous fraudulent transfer of the debtor's property. *Horlacher v. Bertolet*, 12 Lanc. 17.

97. In a proceeding by foreign attachment, the assignee for creditors of the defendant will not be permitted to intervene and defend the suit; his rights may be worked out by means of a notice to the garnishees setting forth the particulars of his title. *Elberman v. Bloom*, 10 C. C. 413.

98. A bill by an assignee for the creditors of a corporation to enforce the individual liability of stockholders, is not a proceeding ancillary to the assignment, and in Philadelphia county should be docketed and treated as an original cause. *Smith v. Dull*, 34 W. N. C. 126.

99. Where an assignee charges himself with the proceeds of the sale of real estate, he will be allowed a credit for the payment of a city claim for paving done in front of the property before the execution of the assignment. *Schofield's Estate*, 167 P. S. 479; affirming s. c. 15 C. C. 70.

XI. Liabilities of assignees.

100. An assignee for creditors will not be charged with interest on the balance

in his hands, pending exceptions to the auditor's report on his account. *Comm'th v. Anstett*, 2 Northam. 192.

101. An assignee will be surcharged with moneys collected from the assignor by execution from a conditional judgment on which there was nothing due; the sale being suffered by the assignor under an agreement that the amount should be for his use. *Stark's Appeal*, 128 P. S. 545.

102. An assignee for the benefit of specific creditors, who pays a subsequent assignee of one of his assignors, money to release her title, is not entitled to a credit for the same in his account. *Howe v. Short*, 135 P. S. 379.

103. An assignee who sells the personality on credit and without taking personal security therefor, does so at his own risk and is not entitled to credit for a loss resulting therefrom. *McKesson's Estate*, 142 P. S. 538.

104. An assignee may permit the assignor to occupy a part of the premises until sale, without being surcharged with the rent or value of the crops. *Breneman's Estate*, 150 P. S. 494; affirming s. c. 9 Lanc. 129.

105. Where an assignee for creditors made certain payments and conveyances with the consent of all the creditors, and upon the filing of his account he was allowed credit for the same; it was *held*, on the filing of a second account that the assignee would not be surcharged with such payments and conveyances upon the application of a creditor who had been represented by counsel at the first audit, and had actively participated in the meeting of the creditors leading to the transfer of the property. *Powell's Estate*, 163 P. S. 349.

106. Suit should not be brought against an assignee for creditors except on an account settled and decree made; in such a suit, plaintiff is not entitled to judgment for want of an affidavit of defence. *Boyd v. Moir*, 7 Montg. 50; s. c. 4 Del. 403.

107. The court refused to compel an assignee for creditors of a corporation to

file an account, where it appeared that his accounts had been presented to a meeting of the stockholders and directors, by whom they had been approved "without filing in court or audit"; and it further appeared that he had paid all the debts and still had a balance in hand, and there was no charge of any improper conduct or mismanagement on the part of the assignee. *Conshohocken Worsted Mills*, 9 Montg. 23.

108. An assignee must pay the taxes against real estate assigned, whether assessed before or after the assignment. *Plank's Estate*, 10 Lanc. 201.

109. An assignee will not be surcharged for depreciation in value for mere delay in selling, where it appears that such delay was due to a reasonable hope of realizing a higher price. *Schofield's Estate*, 167 P. S. 479; affirming s. c. 15 C. C. 70.

110. After an assignee has been discharged or removed, the assignor cannot maintain an action against him for money in his hands; it is the duty of the court to ascertain what is in his hands, and by its decree to order him to pay over to his successor in the trust. *Hirst v. Freeman*, 15 C. C. 180; s. c. 35 W. N. C. 235.

XII. Removal of assignees.

111. Where an assigned estate has been greatly overvalued by the appraisers without the assignee being a party to the overvaluation, it is no ground for dismissing the assignee that he subsequently sold the property for what it was actually worth. *Powell's Estate*, 163 P. S. 349.

112. Under the act 14 June 1836, sec. 11 (Brightly's Purdon 2029), in a proceeding for the dismissal of an assignee for creditors, the court may appoint an examiner to take testimony, but has not authority to appoint a master to report upon the facts. *Powell's Estate*, 163 P. S. 349.

113. Where an auditor has filed a report upon the account of an assignee and has fully considered the question of

the latter's integrity, it seems that it is improper for the court to entertain a petition for the dismissal of the assignee before acting upon the exceptions to the auditor's report. *Powell's Estate*, 163 P. S. 349.

114. Upon a petition for the dismissal of an assignee, where the court finds that the averments in the petitions are not sustained, but also finds that they were not groundless, the costs will be imposed upon the assigned estate. *Powell's Estate*, 163 P. S. 349.

115. An officer of an insolvent corporation who has been intimately associated with the management alleged to be fraudulent, is not a proper person for assignee and will be replaced by a receiver; the equity powers of a court of equity extend to the removal of such an assignee. *Failey v. Stockwell*, 12 C. C. 403.

XIII. Allowances to assignees.

116. The compensation of an assignee depends upon the nature, character and extent of his services, rather than upon any rate per cent. The fees of counsels should be the ordinary fees allowed for similar services. *Fillman's Estate*, 4 Montg. 137.

117. If an assignee claims a greater rate of compensation than $2\frac{1}{2}$ per cent on the proceeds of real estate and 5 per cent on personalty, it is incumbent on him to show that the amount and nature of the services entitle him to the larger amount. The giving of a large bond is a legitimate matter for consideration in fixing the compensation. *Dunlap's Appeal*, 14 Atlan. 262; s. c. 12 Cent. 451.

118. An assignee purchasing at his own sale will not be allowed extra compensation or counsel fees for protecting himself as such purchaser before the auditor. *Rhoads's Estate*, 4 Montg. 167.

119. Where the personal estate was thirty-three hundred dollars and the real estate thirty thousand dollars, the assignee was allowed 5 per cent on the personalty and $2\frac{1}{2}$ on the realty. *Bren-*

man's Estate, 150 P. S. 494; affirming s. c. 9 Lanc. 129.

120. An assignee is not entitled to commissions upon an excessive overvaluation of the assigned estate, but only upon its real value. *Powell's Estate*, 163 P. S. 349.

121. Where duties usually performed by an assignee personally, have been delegated to lawyers and agents, and compensation has been allowed for their services, the assignee cannot again charge for such services as if rendered by himself. *Powell's Estate*, 163 P. S. 349.

122. Where an assignee claimed a credit in a second account for a certain sum because in the first account a credit to that amount had been taken for commissions and counsel fees in excess of cash on hand; it was *held*, that the correctness of such credits could be considered at the audit of the second account. *Powell's Estate*, 163 P. S. 349.

123. Where an assignee was unnecessarily impeded and annoyed by the creditors in settling the estate, he was allowed a commission of nearly seven per cent upon an estate of a little over five thousand dollars. *Plank's Estate*, 10 Lanc. 201.

124. Where an assignee gave his own obligation for judgments against the assignor, and had them assigned to him, and at the same time he had in his possession as assignee the money realized from the sale of real estate upon which the judgments had been liened and which liens were divested by such sale, but instead of paying himself, he assigned the judgments to C., whose attorney appeared before the auditor and claimed commissions thereon; it was *held*, that the commissions must be disallowed. *Schue's Estate*, 6 York 13.

XIV. Assignees' sales.

125. Under the act of 17 February 1876 (Brightly's Purdon 140) the court may order a sale of real estate discharged of liens and stay execution thereon, when-

ever it is difficult to determine whether the property can be sold for enough to pay all the liens; and this, though the same has been appraised at a valuation exceeding the amount of the liens against it. *Thompson's Appeal*, 126 P. S. 467.

126. A sale of assigned real estate discharged of liens, with the consent of lien creditors, but without an order of court, will be enjoined, and the court will order a resale. *Glenn v. Mickey*, 130 P. S. 586.

127. A sale of real estate by an assignee under the act of 17 February 1876 (Brightly's Purdon 140) discharges the lien of unpaid purchase money, which can be shown to have been unpaid, notwithstanding a receipt in full therefor, at the foot of the deed to the assignor. *Xander's Estate*, 7 C. C. 482; s. c. 2 Northam. 93.

128. A lien of owelty upon real estate will not be discharged by a sale, under order of court, by the assignee for the benefit of creditors of the recognizor, where the lien creditor had no notice of the intention to apply for the order of sale. *Dodson's Estate*, 6 C. C. 617.

129. A joint stock company having given a mortgage to secure an indebtedness and then made an assignment for creditors, the court refused to restrain the sale of the property under the mortgage at the suit of the assignee. *Fisher's Appeal*, 14 Atlan. 225; s. c. 12 Cent. 678.

130. The court refused to set aside a sale by the assignee of real estate, upon the petition of an unsecured creditor alleging that he would give \$500 more, when such additional bid would not cover prior liens. *Keller's Estate*, 11 Lanc. 185.

131. A defaulting purchaser at an assignee's sale, if the assignee elects to rescind and the premises are resold, can recover back the excess of the money paid by him over and above the deficiency in the price at the second sale. *Jacoby v. Stettler*, 2 Cent. 607.

132. It is improper for an assignee to sell property as a whole for a price less than the amount of the bids in parcels. *Glenn v. Mickey*, 130 P. S. 586.

133. A mere agreement to purchase at an assignee's sale and to hold in trust to convey the same, when paid the purchase money, to the assignor, does not constitute a resulting trust. *Fogel v. Schall*, 2 Cent. 530.

134. The sureties of an assignee for the benefit of creditors are liable for the faithful appropriation of proceeds of real estate; and this, though upon the sale of the real estate the assignee gave a new bond. The latter was merely cumulative. *Comm'th v. Anstett*, 2 Northam. 192.

135. The court refused to set aside the execution of a lien creditor and permit the real estate of the defendant to be sold by his assignee. *Evans's Estate*, 7 Lanc. 347.

136. The act 17 February 1876 (Brightly's Purdon 141), authorizing the court granting an order of sale of assigned real estate to stay execution on all liens that may be divested by such sales, covers executions on judgments as to which, since that act, stay of execution has been expressly waived. *Pauley's Estate*, 149 P. S. 196. See *Carl's Assignment*, 15 C. C. 143.

137. Under the act 17 February 1876 (Brightly's Purdon 140), the court may grant an order of sale of real estate though the aggregate of the liens somewhat exceeds the appraised value of the real estate; an order that one-third of the purchase money be paid in cash and the balance in two payments at six and twelve months to be secured by bond or mortgage at the discretion of the assignee, is not improper. *Pauley's Estate*, 149 P. S. 196.

138. Where the assignee put the property up at public sale without success, and he afterwards sold at private sale at less than the appraised value; it was held, that the fact that the purchaser resold at a profit afforded no ground for surcharging the assignee with a profit. *Breneman's Estate*, 150 P. S. 494; affirming s. c. 9 Lanc. 129.

139. The court will not order a sale of real estate under the act 17 February

1876 (Brightly's Purdon 140) by the assignee, where the order will merely substitute the assignee for sheriff without benefitting any one. *Kleckner's Estate*, 150 P. S. 519.

140. The purchaser of real estate at an assignee's sale may decline to take title under the act 17 February 1876, sec. 1 (Brightly's Purdon 140), where only fifteen days' notice of the sale was given; such a sale must be reported to and confirmed by the court, and until thus confirmed a purchaser is justified in declining to take the title. *Ramsay v. Hersker*, 153 P. S. 480.

141. Where a purchaser at the sale of real estate by an assignee for creditors defaults, he cannot be held liable for any difference between the price at which he bought and the price at a second sale, where the resale is not on the terms of the first sale. *Ramsay v. Hersker*, 153 P. S. 480.

142. Where, after the filing of a creditor's bill to declare a purchaser at an assignee's sale a trustee *ex maleficio* as to a portion of the purchase money, the purchaser paid over the difference with interest to the assignee, the bill was dismissed, but the record costs and master's fee were equally divided between the parties, while the costs of the parties were directed to be paid by the party who made them. *Kalle v. Heft*, 154 P. S. 470.

143. Where an assignee in good faith and under advice of counsel refuses to offer for sale as a whole the real estate of the assignor after a previous ineffectual attempt to sell it as a whole, he will not be surcharged for negligence. *Trevose Model Brick Manufacturing Co.'s Estate*, 159 P. S. 496.

144. A sale by an assignee will not, be set aside upon the application of a successful bidder, on the ground that to perfect his title, he will have to buy an outstanding interest, where it appears that he knew at the time of the sale that the title was not wholly in the assignor. *Leard's Estate*, 164 P. S. 435.

145. Upon a sale of real estate by an assignee under the act 17 February 1876 (Brightly's Purdon 140), if there be a waiver of exemption in any judgment discharged by the sale, such waiver inures to the benefit of all the judgments; it is unimportant that there was a reservation in the deed of assignment and a setting apart by appraisers. *Jameson's Estate*, 1 York 119.

146. An assignee's sale of real estate will not be confirmed where there is great discrepancy between the appraised value and the amount bid at the sale, and a creditor obligates herself to bid a twenty-five per cent advance. *Kast's Estate*, 7 York 93.

147. A sale of land by an assignee for creditors subject to a dower does not discharge the accrued interest on the dower. *Getz's Estate*, 8 Lanc. 150.

148. The act 17 February 1876, sec. 3 (Brightly's Purdon 141), enabling a purchaser of real estate from an assignee for creditors to gain possession of the same, applies not only to judicial sales but also to sales by the assignee under authority of the deed of assignment; in such a proceeding the court cannot pass upon the question of the legal title of the assignor, but can only examine into the regularity of the sale and the mere right to possession of the purchaser. *Kegerreis's Estate*, 12 Lanc. 194.

149. Where a judgment creditor allows the lien of his judgment to expire before the confirmation of the sale of real estate by an assignee for creditors, he not only loses his priority of lien, but he also loses all preference as a lien creditor, and can only take *pro rata* with the general creditors after the living liens have been satisfied. *Snively's Estate*, 9 C. C. 422.

150. Where land is bound by a mechanic's lien and it is part of an assigned estate, an auditor appointed to distribute the proceeds of sale has no power under the act 16 June 1836, sec. 9 (Brightly's Purdon 1308), to define the curtilage; under that section the cases in which the curtilage may be defined after the pro-

ceeds of sale are in court for distribution are confined to sales made on executions upon mortgages and judgments; in all other cases the proceedings are required to be under the prior provisions of that act, before sale made. *Mowrey's Estate*, 1 Dist. Rep. 326.

151. Under the act 17 February 1876, sec. 1 (Brightly's Purdon 140), an assignee is not entitled to credit for advertising a sale of real estate outside of the county unless he has obtained an order authorizing such advertising, or can show proof of its necessity. *Lane's Estate*, 3 Dist. Rep. 162.

152. Under the act 10 June 1881 (Brightly's Purdon 141), providing for a special return of sale when land is purchased by a lien creditor, the assignee before making such a special return is entitled to demand from the purchaser an allowance for his own services, a counsel fee in connection with the proceedings to sell, the prothonotary's costs, the auctioneer's services and the expenses of advertising the sale, of necessary surveying and of recording the deed of assignment; he cannot demand, however, the notary's fees for affidavits to the petitions, nor where the purchaser is entitled to the entire proceeds, can he demand a charge for filing his account. *Lane's Estate*, 3 Dist. Rep. 162.

153. Where lands have been assigned for creditors, the court has no power to stay an execution for their sale unless an order of sale has been granted under the act 17 February 1876 (Brightly's Purdon 140). *Athens Nat. Bank v. Frost*, 3 Dist. Rep. 601.

154. Before ordering a sale under the act 17 February 1876 (Brightly's Purdon 140), it is the duty of the court to ascertain and fix the priority of the liens which will be discharged by the sale; such an order will not be prevented by the fact that such a sale deprives a lien creditor of his right under the act 20 April 1846 (Brightly's Purdon 852), to use his lien as money in bidding at the sale. *Handy's Estate*, 167 P. S. 552; s. c. 36 W. N. C. 265.

155. Where an estate in which the debtor has an interest is composed of both real and personal property, and it is within the discretion of trustees to distribute the same either as personalty or realty or partly in each, the act 17 February 1876 (Brightly's Purdon 140) applies, and the court may make an order of sale under that act of the debtor's share. *Handy's Estate*, 167 P. S. 552; s. c. 36 W. N. C. 265.

156. Where a debtor owned an undivided interest in an estate which embraced several pieces of real property, and the assessed values showed a margin in the favor of the debtor after the payment of his debts, but his interest was not to be determined until after a life estate; it was held, that there was a sufficient element of uncertainty to justify an order of sale under the act 17 February 1876, (Brightly's Purdon 140) upon the petition of the assignee. *Handy's Estate*, 167 P. S. 552; s. c. 36 W. N. C. 265.

XV. Distribution.

157. A fund in the hands of an assignee may be distributed by an auditor, without being first paid into court. *Childs's Estate*, 135 P. S. 214.

158. The auditor of an assignee's account has no power to inquire into the validity of a judgment regular on its face, but he may receive evidence that a judgment given for one purpose has been fraudulently used for another purpose. *Stark's Appeal*, 128 P. S. 545.

159. Upon distribution of an assigned estate creditors cannot attack a judgment because it is a fraud on the debtor; but only when it has been fraudulently and collusively given for the purpose of hindering and delaying them. *Sponsler's Appeal*, 127 P. S. 410.

160. An assignor failing to surcharge the accountant with alleged trust moneys, should not be ordered to pay the counsel fee of accountant, incurred in resisting the attempt to establish the trust. *Stark's Appeal*, 128 P. S. 545.

161. In distributing among lien creditors the proceeds of a farm lying in two counties, it should be considered as a whole and valued at an equal sum per acre in both counties; and this, though the farm buildings be in one county only. *Gibble's Estate*, 134 P. S. 366; s. c. 26 W. N. C. 91. See *Oberholtzer's Appeal*, 124 P. S. 533.

162. Upon the distribution of an assigned estate, a judgment against a firm of which the deceased assignor was a member cannot be charged against his individual property, the record of the judgment not showing the names of the individual members of the firm. *Fox's Appeal*, 11 Atlan. 228.

163. Upon a sale by an assignee under the act of 17 February 1876 (Brightly's Purdon 140), interest due upon a mortgage is not payable out of the proceeds. *Rhoads's Estate*, 4 Montg. 167.

164. It is the duty of an assignee for creditors to pay borough taxes which were a lien on the real estate. *Fillman's Estate*, 4 Montg. 137.

165. A secured creditor who advises a general assignment, and stands by and suffers a settlement at 50 cents on the dollar, is estopped from asserting the balance of his claim against the assignee. *Crans's Appeal*, 9 Atlan. 282. See *Robb v. Van Horn*, 150 P. S. 508.

166. Upon the distribution of an assigned estate, the personal estate is the primary fund for the payment of debts; but this rule applies only to the distribution of an actual fund, not of a fictitious one. *Scott's Appeal*, 8 Atlan. 402.

167. The surety of a county treasurer having made good the latter's deficit, is entitled to be subrogated to the rights of the county on his official bond, and, without a formal order of substitution, is entitled to a dividend on the amount of the said deficit out of his assigned estate. *Boltz's Estate*, 133 P. S. 77.

168. The allowance and payment of a dividend out of an assigned estate does not toll the statute of limitations either as a promise to pay or an adjudication of

the debt. *Light's Estate*, 136 P. S. 211; s. c. 27 W. N. C. 21.

169. An assignee is bound to pay a distributive share to the real owner, if he has notice that it has been assigned by the person to whom it was awarded by the auditor; and this, though no exceptions were filed to the report. *Frey's Estate*, 2 Northam. 333.

170. Upon a general assignment by a mortgagor and the purchase of the premises by certain creditors subject to the mortgage, the mortgagee is entitled to a dividend, on the settlement of the assigned estate; and it was held, that the assignee was not entitled to subrogation so long as any part of the mortgagee's debt remained unpaid. *Graff's Estate*, 139 P. S. 69; s. c. 27 W. N. C. 228.

171. Where property in West Virginia and in Pennsylvania was assigned by a general assignment for creditors, the proceeds of a subsequent sale were distributed so that creditors secured by a trust deed of the West Virginia property were first paid thereout, and the proceeds of the Pennsylvania property were then distributed to the judgment creditors remaining in the order of their priority. *Moss's Estate*, 138 P. S. 646; s. c. 27 W. N. C. 300.

172. An assignee for creditors has no standing either in his own behalf or in the behalf of the creditors to appeal from a decree distributing the fund. *Graff's Estate*, 146 P. S. 415.

173. An assignee for creditors of a corporation was allowed a credit of one hundred thousand dollars paid by him out of the proceeds of sales of real estate in satisfaction of a judgment entered before the assignment, where it appeared that the judgment note had been given by the assignor to secure a prior indebtedness of over seventy thousand dollars, as well as thirty thousand cash advanced in accordance with a resolution of the board of directors, who afterwards ratified the giving of the judgment note. *Reading Iron Works Estate*, 149 P. S. 268.

174. An assigned estate cannot be dis-

tributed by the process of foreign attachment by a court which has no jurisdiction over the accounts of the assignee; a claim for wages must be presented to the assignee or the auditor appointed to make distribution of the assigned estate, such a lien cannot be enforced by foreign attachment against the employer. *Taylor v. Guarantee Trust & S. D. Co.*, 149 P. S. 409.

175. Where a prospective landlord, at the request of a prospective tenant, purchased a lot and erected a building under an agreement that the tenant should lease the premises for a term of years, and such lease was executed and the tenant made an assignment for creditors prior to the termination of the lease and the assignee abandoned the premises; it was held, that the landlord had a present cause of action for failure to compensate him under the agreement, and as to the same, was entitled to share in the distribution of the assigned estate. *Reading Iron Works Estate*, 150 P. S. 369.

176. Upon the distribution of an assigned estate a judgment confessed by the assignor to his wife for a debt due to the wife, and also for debts of the husband assumed by her, may be allowed. *Breneman's Estate*, 150 P. S. 494; affirming s. c. 9 Lanc. 129.

177. Upon the distribution of an assigned estate, a subsequent lien creditor whose lien is not reached in the distribution of the real estate fund is entitled to be subrogated to the rights of the prior lien creditors to a dividend out of the personal fund. *Breneman's Estate*, 150 P. S. 494; affirming s. c. 9 Lanc. 129.

178. Upon the adjudication of the account of an assignee for creditors of a corporation, the payment of the debts due directors will not be refused where the evidence does not establish that the total debts of the company were in excess of the capital stock. *Trevose Model Brick Manufacturing Co.'s Estate*, 159 P. S. 496.

179. Where the certificates of a beneficial association ran twenty-eight years,

and at the end of each period of three and one-half years, a member was entitled to receive a sum not exceeding one-eighth of the amount of the certificate; it was *held*, upon the adjudication of the account of its assignee for creditors, that members whose certificates were more than three and one-half years old had no preference on distribution over the other certificate holders. *Fraternal Guardians' Assigned Estate*, 159 P. S. 594.

180. Where a broker with whom stock has been deposited as collateral for purchases, converts the stock and afterwards makes an assignment, the owners of the stock are not entitled to a dividend upon its entire value without deduction for the unpaid balance due by them to the broker. *Jamison's Estate*, 163 P. S. 143; affirming s. c. 3 Dist. Rep. 217.

181. Where stock in the hands of an insolvent banker is converted prior to the assignment, although on the same day, and such conversion is made by creditors with whom he has pledged it, the owner of the stock is not entitled to payment in full on the ground that the conversion was a breach of trust which entitled him to follow the proceeds specifically. *Jamison's Estate*, 163 P. S. 143; reversing s. c. 3 Dist. Rep. 217.

182. In the distribution of an assigned estate, creditors are entitled to payment in the proportion of their debts at the time of the assignment; a subsequent enlargement of the claim by judgment, including interest or penalties, cannot increase such share. *Jamison's Estate*, 163 P. S. 143; reversing s. c. 3 Dist. Rep. 217.

183. Where litigation is instituted by the general creditors of an insolvent trust estate, to set aside conveyances made and judgments confessed by the trustee for the purpose of giving a preference to other creditors, and such litigation is successful, the counsel fees of the contesting creditors should be paid out of the trust estate. *Weed's Estate*, 163 P. S. 595. See *Weed's Estate*, 163 P. S. 600.

184. Upon the distribution of an assigned estate, a claim for rent which had not accrued at the time of the assignment will not be allowed in the absence of clear and satisfactory evidence of an express agreement by the assignee to hold the lease for the benefit and at the expense of the estate, or conduct on the part of the assignee from which there is a plain and necessary implication that he elected to so hold it. *Weinmann's Estate*, 164 P. S. 405.

185. Where a paper enumerating certain bank stock to be levied upon was placed in the hands of the sheriff at the time a writ of execution was issued, and the sheriff made the levy but left the stock in the possession of the debtor and the list of stock was lost; it was *held*, upon the distribution of the assigned estate of the debtor, that parol evidence was admissible to prove the contents of the paper which was lost. *Braden's Estate*, 165 P. S. 184.

186. Upon the distribution of an assigned estate, a building association will not be allowed penalties and fines imposed by it after the date of the assignment, but only simple interest. *Boyer's Estate*, 1 York 193.

187. Upon the distribution of an assigned estate, an attachment execution issued upon a judgment waiving the exemption, attaching the interest of the assignor in the real estate fund, by virtue of his claim under the exemption laws will be postponed to the liens of judgment creditors binding the real estate, which also contain a waiver of the exemption. *Pollinger's Estate*, 1 York 197. See *Bressler's Appeal*, 2 York 57.

188. Upon the distribution of an assigned estate where a claimant proved that he was to receive twelve dollars and a half per month from the assignor for his services, but he admitted that he lived in the assignor's house without paying rent therefor, and also that he practised dentistry to some extent; it was *held*, that the presumption was against free rent, and that the claim was

properly disallowed. *Bressler's Appeal*, 2 York 57.

189. An auditor to distribute an assigned estate has power to pass upon a claim against the assignor which has been decided by arbitrators in favor of the plaintiff and appealed from. *Schue's Estate*, 6 York 13.

190. Where the claimant rented a heeling machine to certain parties at a certain rental upon a contract that the machine was to become the property of the lessees when the rental paid should amount to a certain sum, and it appeared that the lessees, with the lessor's consent, transferred the machine to the assignor company, the lessees agreeing to protect the company from the payment of any money that might be due or become due for or on account of the purchase of any machinery by said company; it was *held*, that such agreement did not amount to an assumption on the part of the assignor company to pay the rental for said machines, and that the claimant was not entitled to such rental upon a distribution of the assigned estate. *Gray & Kege Shoe Co.'s Estate*, 8 York 85.

191. Where an assignee had two funds in his hands, one realized from the sale of personal property subject to execution, and the other from the collection of the book accounts; it was *held*, that he must apportion to each fund its proper share of the expenses and fees. *Dickson's Estate*, 166 P. S. 134; affirming s. c. 40 P. L. J. 411.

192. Upon an assignment of a farm for the benefit of creditors, the proceeds of grain growing belong to the general creditors, and not to the mortgage creditor, but the proceeds of crops put out by the assignee belong to the lien creditors. *Landis's Estate*, 10 Montg. 38.

193. Where an assignor for creditors had, before the assignment, paid off certain instalments of an amount charged against his real estate, and his wife claimed to be subrogated to the lien for said instalments upon the allegation that they had been paid with her money; it

was *held*, that the evidence not being sufficient to establish a resulting trust in her favor, she was a mere volunteer and not entitled to subrogation; and it was further *held*, that she, having declared to a subsequent lien creditor before he advanced his money that the land was unincumbered, was estopped upon distribution of the assigned estate from asserting to the contrary. *Miller's Estate*, 8 Lanc. 145.

194. Where a creditor was deceived as to the date of holding the audit by a mistake in the published audit notice, and consequently failed to present his claim, the court revoked the decree confirming the report, and allowed him to be heard before the auditor on notice to the other creditors. *Strohm's Estate*, 8 Lanc. 273.

195. Where the father of the assignor devised to him one of his farms subject to a dower and an assignment for creditors was subsequently executed, soon after which the assignor's mother died; it was *held*, that the assignor's share of the dower charged against the farm devised to him was distributable as realty, but that his share of the dower charges against the other farms which had belonged to his father was distributable as personalty. *Plank's Estate*, 10 Lanc. 201.

196. Where a mortgagee held a fire policy as a collateral security, but the proceeds of the sale of the land was sufficient to satisfy the debt; it was *held*, upon a distribution of the assigned estate of the mortgagor, that a fund derived from the policy in payment of a fire loss was distributable as personalty among all the creditors, and that subsequent lien creditors had no standing to demand a preference. *Hatfield's Estate*, 12 C. C. 251.

ASSISTANCE (WRIT OF).

See EQUITY, XLIV.

ASSUMPSIT.

I. General principles.

- (a) When assumpsit lies.
- (b) Implied promises.
- (d) Promise to a third person.
- (g) Indebitatus assumpsit.

III. Money paid, laid out and expended.

IV. Money had and received.

- (b) When the action lies.
- (c) Voluntary payments.
- (e) Money paid by mistake.

V. Money lent.

VI. Work, labor and services.

- (a) Of the action in general.
- (b) When a promise to pay will be implied.
- (c) When a promise to pay will not be implied.

VII. Goods sold and delivered.

VIII. Defences.

I. General principles.

(a) When assumpsit lies.

1. If a contract under seal be changed or added to by a subsequent parol agreement, the whole becomes parol and the remedy for a breach was held to be assumpsit, and not covenant. *Stoddard v. Emery*, 128 P. S. 436.

2. Where a contract provides for the payment of the consideration "at any time within ten years," a right of action does not accrue until the period of ten years has elapsed. *Shotte v. Meredith*, 138 P. S. 165.

3. Upon an agreement between two firms that one should take a contract and each should do portions of the work and to share the profits equally; it was held, that upon its breach the plaintiff might maintain assumpsit for damages, and was not compelled to resort to account render or to a bill in equity for an accounting under a partnership relation. *Canfield v. Johnson*, 144 P. S. 61.

4. Assumpsit lies for the balance of an account where the only work for the jury is to add the debit and credit

sides of the account and strike the balance; in such a case it is not necessary to bring account render or to file a bill in equity. *Richey v. Hathaway*, 149 P. S. 207.

5. A contract to procure options for coal lands and to divide profits upon reselling them at a profit, is not within the statute of frauds; under such a parol agreement of partnership, such profits realized in a single transaction can be recovered in assumpsit by one partner against the other. *Howell v. Kelly*, 149 P. S. 473.

6. An action of assumpsit cannot be maintained to recover a municipal assessment for paving a street, *Philadelphia v. Merkle*, 159 P. S. 515; or one for the construction of a sewer. *Philadelphia v. Bradfield*, 159 P. S. 517.

7. Assumpsit will lie in the common pleas upon the judgment of a justice of the peace in this state. *Alexander v. Arters*, 11 C. C. 211.

8. Where money is borrowed and personal property delivered as security for the loan, and the loan is tendered back and the lender declines to receive the money and refuses to return the property, assumpsit does not lie for the value of the property unless the defendant has sold the article and received the money or otherwise made some profit out of it. *Lodge v. Supplee*, 11 Montg. 92.

(b) Implied promises.

9. Where a township clerk promised to appear before the auditors and produce the township books, and failed to appear at the time appointed, whereupon the auditors issued a subpoena which he refused to obey, and he was subsequently committed upon an attachment, and it was then agreed that he should produce the books and that the proceedings against him should be dropped; it was held, that a promise could not be implied on the part of the clerk to reimburse the township for the services of the auditors in endeavoring to procure the books or the

costs of executing the process of attachment. *McIntyre Township v. Walsh*, 137 P. S. 302.

(d) **Promise to a third person.**

10. A vendee of real estate is liable in assumpsit for a judgment against the vendor, which for a valuable consideration he, at the time of the purchase, agreed to assume. *Gregg v. Allen*, 130 P. S. 611. See *Allen v. Gregg*, 22 W. N. C. 520.

(g) **Indebitatus assumpsit.**

11. Where a manufacturing company is supplied with natural gas, under contract for use as fuel only, and uses the gas also for illuminating purposes, it is liable for the reasonable value of the gas so consumed at the usual market rate. *Philadelphia Company v. Park*, 138 P. S. 346.

12. In assumpsit for goods of the plaintiff unlawfully appropriated by the defendant, who had been in the habit of purchasing goods from the plaintiff; it was *held*, that the defendant by his wrong doing having prevented the plaintiff from accurately estimating the value of the goods taken, the highest value in kind might be charged against him, and the burden was upon him to show what it was that he actually took. *McCown v. Quigley*, 147 P. S. 307.

13. In an action to recover a balance alleged to be due under a settlement of mutual accounts between the plaintiff's assignor and the defendant, where the defendant denied the alleged settlement and offered evidence that after the assignment he had made a settlement with the assignee and that a balance was found due to the defendant; it was *held*, that the case was for the jury. *Felty v. Deaven*, 166 P. S. 640.

III. **Money paid, laid out and expended.**

14. Where two sisters of equal means formed one family but one sister paid all

the expenses, her frequent demands for contribution being refused on the alleged ground of poverty, the former may recover from the estate of the other a proportion of such expenses. *Cridland's Estate*, 132 P. S. 479; affirming s. c. 8 C. C. 6.

15. Where a borough has been compelled to pay a judgment recovered against it for personal injuries caused by a defect in a sidewalk, it may recover the amount of the judgment from a property owner whose negligence to repair was the occasion of the injury. *Brookville v. Arthurs*, 152 P. S. 334.

16. Where money which is due to a person is paid to him without fraud, he may retain it although he could not have recovered it at law. Where the sheriff paid to the plaintiff in an execution, the amount due to him as disclosed by the searches, and it was afterwards discovered that a city claim was a prior lien and the sheriff was compelled to pay such lien; it was *held*, that the sheriff could not recover the amount of the claim from the plaintiff in the execution. *Krumbhaar v. Yewdall*, 153 P. S. 476.

17. Where the defendant's property was destroyed by fire from the sparks of a locomotive, and he collected from the plaintiff a portion of a fire policy on the property, and after the money was paid to him the defendant collected a large amount from the railroad company, for the damage caused by the fire, and it appeared that the defendant had requested the plaintiff to join in the litigation against the railroad company, but plaintiff had refused to do so and assured the defendant that he was welcome to all he could collect; it was *held*, that the plaintiff could not recover back the money paid on the policy. *Etna Ins. Co. v. Confer*, 158 P. S. 598.

18. Under the act 5 April 1849 (Brightly's Purdon 1733), the mere acceptance or payment of forged paper is no longer of itself a bar to the recovery of the money by the party paying it, but the statute does not dispense with the necessity of care and diligence on the

part of the payer nor exempt him from the consequences of his own negligence, if thereby loss would accrue to the other party. Where the plaintiff, a bank, received a check on December 19th, paid it to the defendant and entered it on its books and then dismissed it from further attention, and five days afterwards it was discovered that the drawer's name had been forged, and in the meantime the defendant had paid the money out; it was *held*, that the plaintiff had been guilty of want of due diligence, and was not entitled to recover back the money. *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 P. S. 46.

19. Under the act 13 April 1854, P. L. 352, the county of Lancaster may proceed to recover money from the city of Lancaster for opening streets, either by assumpsit or bill in equity, but the remedy by mandamus is inappropriate. That act contemplates yearly statements, and the striking of a balance every twelve months, and if the county has not kept the account directed by the act, the court will state an account and will not allow recovery for any items which had accrued six years prior to the date of the suit. *Lancaster County v. Lancaster City*, 160 P. S. 411; affirming s. c. 10 Lanc. 65. See s. c. 12 Lanc. 81.

20. Where a natural gas company is compelled to pay damages for personal injuries caused by the leakage of gas from a defective pipe, it may recover from a street railway company whose negligent excavation in the street caused the pipe to break; and where the gas company compromised with the injured parties, pending an appeal, for an amount less than the judgment recovered; it was *held*, that such compromise would not prevent the gas company from recovering from the railway company the sums paid, which were admitted to be reasonable and were uncontested in amount. *Philadelphia Company v. Central Traction Co.*, 165 P. S. 456.

21. Where a municipal assessment for water pipe in the city of Philadelphia

was not entered of record so as to preserve its lien, and it appeared that the defendant bought the property at sheriff's sale and sold it to the plaintiff, who paid the claim; it was *held*, that such claim was not an encumbrance, and that the defendant's covenant implied by the words "grant, bargain and sell" in his deed did not include such a claim. *Stutt v. Building Ass'n*, 12 C. C. 344.

22. Where a supervisor pays the taxes of a person which he is entitled to collect, he can, after the expiration of his term of office, recover the amount of such tax so paid by him. *West Calm Township v. Gibbs*, 4 Dist. Rep. 149.

IV. Money had and received.

(b) When the action lies.

23. The real owner of stolen money may maintain assumpsit against the person with whom it was deposited by the thief, and who had refused to give it up on proof of ownership. *Hindmarch v. Hoffman*, 127 P. S. 284.

24. One who receives from an executor the interest of the plaintiff in a decedent's estate, and who induced such release by a fraudulent suppression of the truth, is liable for the amount of the distributory share which came into his hands by reason of such release. *Brooks v. First Presbyterian Church*, 128 P. S. 408. See s. c. 135 Ibid. 137.

25. Two persons receiving jointly money to the use of another, are liable jointly for the whole; their liability is not changed by the fact that they had separate interests acquired at different times. *Speck v. Hettinger*, 4 Atlan. 168.

26. One of three executors may recover from the others in assumpsit his share of the commissions awarded by the orphans' court for settling up the estate of the decedent. *Shaw v. Betts*, 4 Atlan. 731.

27. Assumpsit lies for money had and received by defendant from plaintiff's guardian for plaintiff's use and appropriated to defendant's own use. *Pugh v. Powell*, 11 Atlan. 570.

28. Assumpsit will not lie by one heir against another, until the amount of the share to which the plaintiff is entitled is in some way judicially ascertained. *Schall v. Fogel*, 16 Atl. 820.

29. A vendee of land who pays a certain sum to his vendor to be paid by him to a certain judgment creditor, cannot recover from the latter the usury on his judgment received by him from the vendor. *Gulinger v. Zahniser*, 5 Cent. 303.

30. Where plaintiff trustees declared for a balance of amounts collected and received by the defendant for the use of the plaintiffs; it was *held*, that the defendant was not liable for money fraudulently and secretly misappropriated by his fellow-servant, none of which defendant handled; he was not rendered responsible by his neglect to note and examine the entries in the books made by his assistant, as the duty of such supervision did not rest upon him but upon the plaintiffs. *Sergeant v. Emlen*, 141 P. S. 580.

31. Where a decedent in his lifetime made a bank deposit to the credit of himself as "trustee for Polly McKim," and at the time of his death the deposit so stood; it was *held*, that Polly McKim was entitled to the fund; and this, though the pass-book might not have been delivered to her; and the bank having paid the money to the executor, the beneficiary was entitled to recover the fund on presenting a claim therefor on distribution in the orphans' court. *Gaffney's Estate*, 146 P. S. 49.

32. A suit for money deposited with defendant to pay building association dues, will not be sustained in the absence of evidence that the sum was deposited for such purpose. *King v. Russell*, 149 P. S. 361.

33. Where the plaintiff was ordered to erect a tombstone by a third party, who placed the money in the hands of the defendant; it was *held*, that the defendant was liable to the plaintiff for the money in his hands if the jury found that the

person who had put it there had set it aside for the payment of the tombstone. *Benner v. Weeks*, 159 P. S. 504.

34. Where the plaintiff represented a life tenant in litigation with remaindermen, and a compromise was reached by which the life tenant was to convey all her interest to the remaindermen in consideration of their paying to her eleven thousand dollars and to her attorney, the plaintiff, one thousand dollars, and the whole sum of twelve thousand dollars was paid to the life tenant, who refused to pay the plaintiff and alleged that she had not employed him and denied the settlement as testified to by him; it was *held*, that the case was for the jury. *Smith v. Eyre*, 161 P. S. 115.

35. Where real estate in the possession of a guardian is attached in foreign attachment as the property of a person other than the minor, and pending the attachment the guardian sells the property under an agreement with the purchaser and the attaching creditor, that the purchase money shall be deposited with a stakeholder to hold until the attaching creditor shall recover a judgment and establish that the premises are subject to his judgment, and if he shall fail to establish it, then to pay the fund to the guardian; it was *held*, that the guardian could not sue the stakeholder in assumpsit until the attachment proceedings were terminated; and this, although the attaching creditor allowed thirteen years to elapse before taking any further action; where the agreement provided that the guardian might intervene in the attachment proceedings; it was his duty either to do so or to compel the attaching creditor by bill in equity to proceed to judgment. *Fidelity Insurance, Trust and Safe Deposit Co. v. Commonwealth Title Insurance Co.*, 166 P. S. 558.

36. Where one son of a decedent confessed judgment in favor of his father during his lifetime, and the same was marked collateral, and execution was issued thereon and a certain sum realized which was received by another son

who represented his father as his attorney in fact, and such money was applied by the latter to the payment of debts of his brother upon which he was surety, and not to any collateral indebtedness of the father; it was *held*, that the son who received the money was liable to his father's estate for the proceeds of the execution. *Leas's Estate*, 6 York 74.

37. A common carrier may be compelled in an action for money had and received, to repay an excess over the freight which lawfully may be charged, but to entitle him to recover for discrimination under the act 4 June 1883 (*Brightly's Purdon* 1815), it must appear that the discrimination was made for like service and under like conditions in all material respects, and the burden of proof is upon the plaintiff. *Paine v. Pennsylvania R. R. Co.*, 14 C. C. 38.

(c) Voluntary payments.

38. A defaulting purchaser at an assignee's sale, if the assignee elects to rescind and the premises are resold, can recover back the excess of the money paid by him over and above the deficiency in the price at the second sale. *Jacoby v. Stettler*, 2 Cent. 607.

39. If the owner of a patent agree for a specific sum to assign an interest in it, and subsequently, having received the larger part of the consideration, he, in consequence of the non-payment of the balance, assigns the entire patent to other parties; that is a rescission of the first contract and the purchaser may recover back the consideration paid by him. *Bellis v. Henwood*, 2 Mona. 68; affirming s. c. 6 C. C. 78.

40. The voluntary payment of a note by the payee and endorser, with knowledge that his liability has been discharged by the neglect of an agent of the discounting bank to present it for payment, gives him no right of action against such agent. *Oil Well Supply Co. v. Exchange Nat. Bank*, 131 P. S. 100; *Harvey v. Bank*, 119 Ibid. 212.

41. A defeated claimant in a sheriff's

interpleader, who, pending an appeal, is sued on his bond and pays the creditor's claim, taking an assignment of the latter's judgment, cannot, on reversal of the judgment in the interpleader, recover back the money so paid. *Ditman v. Rawle*, 134 P. S. 480.

42. Where taxes were improperly assessed to the lessee of coal lands, and were paid by the lessee to the proper collector on demand; it was *held*, that the lessee could retain the amount out of royalties otherwise due, and that such payment was not voluntary. *Miles v. Delaware & Hudson Canal Co.*, 140 P. S. 623.

43. Where a real estate broker was employed by the vendor to effect a sale, and acted as the agent of the purchaser; it was *held*, that the vendor could recover back from the broker a commission paid to him in ignorance of that fact. *Cannell v. Smith*, 142 P. S. 25.

44. Where the lessor is guilty of deceit in inducing the lessee to accept the lease, the latter may stand to the bargain and recover damages without tendering a reconveyance of the lease, or he may rescind the contract and recover back the money paid. *Guffey v. Clever*, 146 P. S. 548.

45. In an action to recover back moneys paid for an interest in alleged valuable banking concessions from the Chinese government; it was *held* to be a good defence, that the concessions were in actual existence at the time of the plaintiff's purchase, that the plaintiff personally examined and read the concessions, that a special trust was formed with the plaintiff's consent, and that certificates of the plaintiff's interest were issued by the trust, and were always ready for delivery to him, that after the trust was created, the concessions were revoked by the Chinese government, that plaintiff's money had been applied to expenses, and that defendant made no misrepresentations concerning the transaction. *Frishmuth v. Barker*, 159 P. S. 549.

46. Where a party has a deposit in an

insolvent bank when it suspends, and the bank holds a note against him which matures about a month later, and which he voluntarily pays, he cannot recover back such voluntary payment from the receivers; and this, though he paid the note in ignorance of his legal right of set-off. *Westfield v. Dill*, 12 C. C. 30.

47. Where a defendant was improperly convicted of peddling before a justice who refused to take bail, and the defendant then paid the fine under protest and in order to save himself from going to jail; it was *held*, that such payment was under duress and did not estop the defendant from contesting the proceedings on *certiorari*. *Comm'th v. Horn*, 12 C. C. 284.

48. Where a tax-payer has made a voluntary payment of a tax without a protest, he cannot afterwards complain and ask that the money so paid shall be refunded. *Birmingham Township v. Brandywine Summit Kaolin Co.*, 5 Del. 378.

49. The supreme court in *Comm'th v. McGroarty*, 148 P. S. 606, having decided that a license granted for the sale of liquor for one year from the first day of April in a borough, the city charter of which would go into effect on April 4th, was chargeable simply with the fee to be paid for a borough license, and the plaintiff having paid under protest the city license fee; it was *held*, that he was entitled to recover back from the county the excess. *Doolittle v. Luzerne County*, 6 Kulp 495. See *Hazleton v. McGroarty*, 6 Kulp 533.

50. Where the defendant in a judgment obtained a rule to open it and an order staying execution on condition that the sheriff be secured in his levy, and instead of giving security, he paid the amount of the execution; it was *held*, that such payment was voluntary, and that he was not entitled to have the judgment opened in order to lay grounds for an action or an order of restitution. *Murphy v. Cawley*, 7 Kulp 128.

51. Where a party was arrested for violating a borough ordinance and the

burgess threatened to fine him and to imprison him for non-payment of costs and fines at once, and he paid the fine on the promise by the burgess that it would be refunded if the ordinance should be declared invalid; it was *held*, that the payment was not voluntary, and where the ordinance was declared illegal in another suit, the fine might be recovered back in an action against the borough. *Pace v. Plymouth Borough*, 7 Kulp 239. See *Sayre v. Phillips*, 148 P. S. 482; *Cohen v. Plymouth Borough*, 7 Kulp 101.

52. If a person, who agrees to repair an article for a stipulated price, demands more, a payment under protest is not a voluntary payment and may be recovered back. *Grammes v. Erney*, 7 Lanc. 85.

53. Where judgment was entered by default in favor of the plaintiff and the defendant asked to have the judgment opened, which was refused, and he thereupon appealed to the supreme court, who opened the judgment, and it appeared that the appeal not being a *supersedeas*, the plaintiff in the judgment had issued an execution and sold the defendant's land and received from the sheriff the whole amount of her claim, and on a trial of the issue the plaintiff's judgment was reduced; it was *held*, that the payment of the plaintiff's claim was not a voluntary one, and that the defendant could bring assumpsit for the difference. *O'Donnell v. Fisher*, 12 Lanc. 78. See *O'Donnell v. Rorer*, 12 Lanc. 79.

54. Money paid under a claim of right cannot be recovered back unless the payment was made under compulsion, actual, present and potential, and under process available for instant seizure of person or property, when the party so saying gave notice of the illegality of the demand and of his involuntary payment; the threat of legal process is not such a duress. *Peters v. Kraft*, 7 Montg. 201; s. c. 4 Del. 577.

55. Where, upon a contract to sell real estate, the vendee took possession and paid part of the purchase money, but the vendor had not acquired title but had

merely entered into an agreement to purchase, and upon a bill to compel specific performance by his vendor, a decree was refused; it was *held*, that the last vendee could recover back the down money; and this, although he had not tendered the balance of the purchase money. *Shultz v. Wunderlich*, 9 Montg. 137.

56. Money voluntarily paid by an agent acting in the scope of his authority, to a creditor claiming it as due from the principal, cannot be recovered back. *Mattes v. Jameson*, 1 Northam. 280.

57. One who agrees to bid at an orphan's court sale and pays part of the proposed bid cannot, on electing to rescind the contract, recover back the money paid on account. *Hill's Estate*, 37 P. L. J. 10.

58. The payment of a bonus on new stock by a stockholder under protest, though illegally demanded, cannot be recovered back where the facts show no duress but simply the denial of a right. *De la Cuesta v. Insurance Co. of North America*, 136 P. S. 62, 658; s. c. 26 W. N. C. 377.

59. A purchaser at a tax sale, who at the instance of the authorities redeems the property from a subsequent sale, can recover his money back, when it appears that the property was doubly assessed, and that the taxes had been regularly paid by the real owners. *Clapp v. Pinegrove Township*, 138 P. S. 35; s. c. 27 W. N. C. 102; 38 P. L. J. 155.

60. As to what constitutes a voluntary payment, see note to *Baltimore v. Hussey*, 9 Atlan. 21.

(e) Money paid by mistake.

61. Where land was sold by the acre, equity will relieve against a deficiency of six acres out of fifty-six acres sold, and the vendee can recover in assumpsit the excess of purchase money paid by mistake. *Hoover v. Senseman*, 3 Cent. 540.

62. A settlement upon the measurement of cut timber, which measurement was found to be a mistake, was *held* not to bar an action to recover for the price

in excess of the original measurement. *Horton v. Harbridge*, 127 P. S. 11.

63. Where a contract is entered into in a mutual mistake as to an essential which formed the inducement to it, and it is impossible to restore the *status quo* by reason of something done before the mistake was discovered, the injured party may set up compensation in damages as an equitable defence to an action on the contract, or he may recover damages by suit. *Blygh v. Samson*, 137 P. S. 368.

64. In an action to recover back a sum paid by plaintiff to defendant in consequence of an alleged mutual mistake in carrying into effect an amicable partition of land, a verdict for the plaintiff was sustained where the trial judge, satisfied as a chancellor of the sufficiency of the evidence, had properly submitted the question of mistake to the jury. *Reed v. Horn*, 143 P. S. 323.

V. Money lent.

65. In an action for money loaned to a corporation, where the defendant claimed that it was a gift and the receipt for the money stated no time for repayment, and the president of the company testified that no agreement for repayment was made; it was *held* not to be error for the judge in commenting upon the evidence to say that "perhaps he meant that no time for repayment was set." *Halfman v. Pennsylvania Boiler Inspection Co.*, 160 P. S. 202.

VI. Work, labor and services.

(a) Of the action in general.

66. A claim for services against a decedent's estate must be sustained by proof of services actually rendered. Evidence that decedent had said that claimant had done a great many things for him, that he owed him \$5000 for the services he had done, and was going to give it to him, is not sufficient to establish the claim. If services be rendered on the promise of a legacy the promisee

takes his chances. *Miller's Estate*, 136 P. S. 239; s. c. 26 W. N. C. 416.

67. Where a coal company employed miners who employed laborers, and the miners turned into the company monthly statements of wages earned, and the company paid such wages on its regular pay-days out of moneys in its hands due the miners; it was *held*, that such a turning in was an order on the company to pay to the laborer, who could not maintain an action for his wages against the company prior to the pay-day on which the moneys due the miner became due; and this, though the laborer may have quit the service of the miner twenty days before such pay-day. *Fairfield v. Wyoming Valley Coal Co.*, 142 P. S. 397.

68. Where, by an agreement in writing between the members of a firm it was provided that subject to the control of the majority in questions relating to the business a certain member should have special charge of the mills and manufacturing; it was *held*, that such agreement created a term of employment for the life of the firm that could not be terminated by a vote of the majority in number and value of interests; and that the superintendent, though he tendered his resignation but withdrew it before it was accepted, was entitled to the salary until the dissolution of the firm; but in an action to restrain the superintendent from acting as such and for damages; it was *held*, that he could not recover in addition to his salary, the costs, counsel fees and expenses incurred by him in independent litigation with the plaintiffs. *Jennings v. Beale*, 146 P. S. 125. See *Jenning's Case*, 157 P. S. 630.

69. Where an employee is shown to have accepted wages from week to week for a period of months at a rate in accordance with his own returns of time, the jury should not be permitted to disregard the necessary conclusion that he was to be paid according to time; the books and accounts between the employer and the employee are usually

the best evidence obtainable of the contract. *Webb v. Lees*, 149 P. S. 15; s. c. 153 P. S. 436.

70. Where a minor lived at the house of his aunt under an agreement with his guardian to pay her seven dollars per week for his board, and during the boy's last illness the guardian agreed to pay the aunt's daughter fifteen dollars additional per week for nursing him; it was *held*, that the orphans' court improperly allowed a further claim of the aunt of three dollars per week for nursing during the whole period of the minor's stay, and fifty dollars for the use of her house during the funeral. *McHugh's Estate*, 152 P. S. 442; reversing s. c. 11 C. C. 205.

71. Where property is transferred in consideration of care and attention which are honestly bestowed to the end of life, the courts will not be astute in weighing the profit or loss of the bargain. *Fidelity Title & Trust Co. v. Weitzel*, 152 P. S. 498.

72. Where land was devised to one son and a charge was made upon the land of twenty-five hundred dollars, the interest of which, at six per cent, was to be used for the boarding, washing and mending and clothing of an invalid daughter of the testator, and it was further provided, that after the death of the daughter and the payment of all expenses, the remainder should be divided among testator's other children; and the daughter was an idiot without power of speech, but three years and a half before her death she became totally helpless and blind; it was *held*, that a brother who had cared for her and buried her was entitled first to receive out of the principal, three dollars a week for one hundred and eighty-two weeks for nursing and personal attendance, in addition to the sums expended by him for burial and medical attendance. *Shubart's Estate*, 154 P. S. 230.

73. Where plaintiffs agreed in writing to place a dredge at defendants' "Philadelphia work," and to do the dredging

for a certain sum per cubic yard, and they also agreed to permit the defendants to use a particular dredge at League Island, for which the defendants were to pay a certain sum per day, which dredge was used at League Island but no work was done by plaintiffs at Smith's or Windmill Islands, and defendants claimed that they should only be charged for the actual amount of the material removed; it was *held*, that the court properly left it to the jury to say what was the meaning of the parties as to the words "Philadelphia work." *National Dredging Co. v. Mundy*, 155 P. S. 233.

74. Under an express contract to board and furnish washing to the decedent for fifty dollars a year, it was *held*, that no further allowance could be made for such services, although the compensation was clearly inadequate. *Brose's Estate*, 155 P. S. 619; affirming s. c. 6 York 6.

75. Under a contract for drilling wells, where the contractor is prevented by the other party from performing his work, he is not entitled to recover the whole contract price, but only damages for the breach of the agreement, and where the plaintiff's statement claims damages for the whole contract price, the court will not enter judgment although the affidavit of defence may be insufficient. *Emig v. Spatz*, 155 P. S. 642.

76. Where a claim for boarding and nursing was presented against a decedent's estate, and it appeared that the claimant had purchased a farm from the decedent giving a judgment for the greater part of the purchase money, the remainder to be paid in cash if decedent ever needed it; it was *held*, that decedent's right to demand such balance continued until her death, and that the one debt should be applied to the payment of the other. *Colgan's Estate*, 160 P. S. 140.

77. Where an architect sued for work in preparing the plans and drawings for a building, and defendant sought to charge the plaintiff with loss occasioned by the heating plant being unsatisfactory, and it appeared that after the heating works were

put in, the plaintiff gave to the plumber a certificate to show that the work was finished in accordance with the plans; it was *held*, that the mere fact of giving the certificate was not sufficient to charge the plaintiff with liability, but that the certificate itself must be produced in evidence or accounted for. *Brown v. Burr*, 160 P. S. 458.

78. Where the plaintiff claimed that he was employed to farm sixty acres of land for one year and claimed extra work on twenty-five acres additional purchased by the defendant during the year, and the defendant claimed that the plaintiff was employed to work for him as a farm laborer for one year; it was *held*, that the right of the plaintiff to recover for extra work was for the jury. *Delaney v. Grove*, 162 P. S. 138.

79. Upon an appeal from a justice, where the transcript showed that plaintiff claimed on an order drawn upon defendants, and the plaintiff in one clause of his statement claimed on the order, and in the second clause claimed the same amount for work done, and the plaintiff testified to having done the work and said nothing as to the order; it was *held*, that the case was properly submitted to the jury. *White v. Blanchard*, 164 P. S. 345.

80. An agreement to do work in consideration of compounding a felony is void, and where the work has been done, the plaintiff cannot recover for the work and labor done. *Connell v. Walton*, 6 Kulp 451.

81. Where wages for manual labor were declared for and proof showed work and labor done in pursuance of a special contract; it was *held*, that a non-suit was properly entered. *Henry v. Fisher*, 2 Lack. Jur. 337.

82. Where a fund was bequeathed for the support and maintenance of a brother-in-law, and during the life of the widow there were no funds that could be used for the trust, and upon her death the sum with interest was awarded to his trustee, and it appeared that the petitioner had

furnished board for the *cestui que trust*; it was *held*, that she was entitled to be paid for this service out of the fund and was also entitled to interest thereon. *Miller's Estate*, 7 Montg. 122. See *Miller's Estate*, 7 Montg. 62.

83. A promise to pay for services by means of a bequest does not bar a demand for payment, if the services be preceded by a request of performance. *Cridland's Estate*, 132 P. S. 479; affirming s. c. 8 C. C. 6.

84. The evidence to establish a parol contract of a decedent to devise his estate in consideration of services rendered, must be clear and satisfactory. The measure of damages for the breach of such a contract is the value of the services, not the value of the estate. *McEvilla's Estate*, 5 Montg. 191.

85. Upon a claim against a decedent's estate for attendance and fuel; it was *held*, that to relieve the claimant from the bar of the statute of limitations, the evidence of a special contract to compensate by will should be definite as to the time when the alleged contract was made, and precise as to the character and duration of the services to be rendered. *Cook's Estate*, 12 C. C. 621; s. c. 32 W. N. C. 231.

86. Claims for services against a decedent's estate not presented as a legal demand until after the death of the alleged debtor, will have every intendment and presumption made against them. The declarations of the decedent amount to nothing when confronted by the due bills of the claimant found in the hands of the decedent. *Koecker's Estate*, 47 L. I. 505.

87. Wages for domestic service are presumed to be paid at the period customary at the time and in the neighborhood; claims for wages for an unusual length of time, and especially when made after the claimant has left the service, must be supported by affirmative proof that they have not been paid. *Carpenter v. Hays*, 153 P. S. 432; *Webb v. Lees*, 153 P. S. 436. See *Paul v. Miller*, 1 Lack. L. N. 151.

88. Upon a claim for domestic services for three and one half years' service, against a decedent's estate, there is a presumption of periodical payment; such presumption is not overcome by the testimony of the claimant's daughter, that the claimant only received one hundred dollars from the decedent for her work, and that she had no other means of support. *Coulston's Estate*, 161 P. S. 151; affirming s. c. 14 C. C. 243.

89. The presumption which arises of the payment of wages, by reason of delay in bringing suit, may be rebutted by proof that the defendant stated often during the whole course of service, that plaintiff would be well paid. *Carpenter v. Ulmer*, 29 W. N. C. 551.

90. A claim for services and board against a decedent's estate will be rejected where it appears that the services were rendered during a series of years, and that no claim was made until the alleged debtor's death, and there is no evidence of a demand for payment or of an express contract. *Conaughton's Estate*, 12 C. C. 590. See *Sayer's Estate*, 8 C. C. 32.

91. Where a claim was made against a decedent's estate for services in taking charge of realty, and there was no proof of the value of the services or of an express contract to pay, the claim was refused where it appeared that the claimant and the decedent were friends in constant communication with each other, and that no such claim was made in the decedent's lifetime. *West's Estate*, 13 C. C. 93.

92. The act 8 May 1876 (Brightly's Purdon 2077) does not give a new process for the commencement of an action; an attachment cannot issue as an original process to collect a debt for boarding. *Carden v. Scott*, 1 Kulp 196; *McGinley v. McDonough*, 3 Lanc. 202; *Thatcher v. Beam*, 14 C. C. 109; *McCarty v. Dougherty*, 16 C. C. 86; *Dillon v. Treverton*, 16 C. C. 89; *Contra, Smith v. Dingus*, 12 C. C. 299; *Thomas v. Glasgow*, 13 C. C. 167.

(b) When a promise to pay will be implied.

93. No such relation exists between an aunt and nephew as to create a presumption of intention on the part of the latter to support the former gratuitously. *Barry's Appeal*, 2 Cent. 291.

94. The relationship of brother and sister does not involve a duty to support, and an express contract to pay board need not be proven. *Mayfaith's Appeal*, 2 Atlan. 28.

95. If one enters his brother's family paying board and then is taken ill and cared for, the presumption is that his liability to pay continues. *Keller's Estate*, 2 Northam. 221. See *Griffith's Estate*, 147 P. S. 274; affirming s. c. 10 C. C. 307; 27 W. N. C. 488; 48 L. I. 24.

96. If a sister goes to a brother's house in failing health, not at his invitation, he may recover for his services against her estate. *Lillich's Estate*, 9 C. C. 25.

97. In a claim by the wife of a grandson for wages, the claimant having lived with the deceased as a servant before her marriage, the question of contract was properly left to the jury. *Neale v. Engle*, 7 Atlan. 60. See note on page 61.

98. A trustee to collect and maintain, is entitled to credit for the *cestui que trust's* maintenance at the house of his half-brother, and for the expense of a nurse whose services were absolutely necessary. Right of the trustee to use the *corpus* of the estate for maintenance. *Griffith's Estate*, 147 P. S. 274; affirming s. c. 10 C. C. 307; 27 W. N. C. 488; 48 L. I. 24.

99. Where a minor has a separate estate, a grandmother, if in humble circumstances, will be allowed a periodical sum for the past support of the minor in the absence of evidence that she took and maintained the minor *in loco parentis*. *Lafferty's Estate*, 147 P. S. 283.

100. Where a testator gave to his daughter such wages for her work and labor as might be recovered against his estate by due course of law; it was held,

that no further proof of a contract relation was necessary, and that the gift was a legacy the amount of which was to be ascertained by a judicial proceeding, interest to begin one year from the date of testator's death. *Knauss's Estate*, 148 P. S. 265; reversing s. c. 9 C. C. 621.

101. Upon a claim for nursing a decedent a recovery may be had upon a *quantum meruit*; so a contract to pay may be established by the declaration of the decedent, proved by a disinterested witness, that "Betsey is very kind to me. I have promised her that she shall be paid by my executors when I am gone, for waiting on me." *Harrington v. Hickman*, 148 P. S. 401.

102. The rule that as between parent and child there can be no recovery for services and boarding, in the absence of an express contract to pay, does not apply to a son-in-law who boards his father-in-law; in such a case, in a suit for board, a promise to pay may be established by the declarations of the father-in-law that he had agreed to pay his board, and a recovery may be had although no sum was mentioned between the parties. *Perkins v. Hasbrouck*, 155 P. S. 494.

103. In an action by a son-in-law against his mother-in-law's estate for board, where one of the witnesses testifies that the decedent had told her that she had promised to pay her son-in-law for board, the case must be submitted to the jury. *Gerz v. Demarra*, 162 P. S. 530.

104. Where a daughter brings suit against her father to recover wages under an express contract, and the plaintiff testifies, "he said if I would pay my rent of five dollars a month, and if I worked any, he would pay me every cent I worked for him. He told my husband so more than a dozen times, and me too, double as much as any one else," the case must be submitted to the jury. *Glone v. Arleth*, 162 P. S. 550.

105. Where board is given upon an assumption by the boarder to pay for it at a reasonable compensation therefor,

it should be allowed out of his estate. *Ryan's Estate*, 2 Lack. Jur. 191.

106. A claim by a son against his father's estate for boarding and washing was allowed, where an express promise to pay was established by the evidence. *Gibbon's Estate*, 8 Lanc. 305.

107. A son-in-law was permitted to recover on an implied contract from the estate of his mother-in-law for board and for an extra servant hired for her use; but it was *held*, that he could not recover for services performed by his wife while his mother-in-law was living at his home. *Hollis's Estate*, 10 Lanc. 179.

108. A daughter is entitled to recover from her father's estate upon a finding by the auditor that she did work about the house, nursed her father and her father promised to pay her. *Schaubel's Estate*, 12 Lanc. 166.

109. The relation of uncle and nephew is not such a relation as will preclude the latter from recovering board upon the presumption of a gratuitous performance of services. *Schenck's Estate*, 5 York 167.

110. For authorities as to the duty of support and necessity of proof of an express contract, see notes to *Sawyer v. Hebard*, 3 Atlan. 531, and *Moyer's Appeal*, *Ibid.* 813.

(c) When a promise to pay will not be implied.

111. To establish a claim by a son for personal services to a father, there must be proof of an actual contract; something more than loose declarations of gratitude or of an intention to compensate made in the last sickness; and this, though the son be not a member of his father's family. *Zimmerman v. Zimmerman*, 129 P. S. 229.

112. In assumpsit by a son against his father's estate upon an express contract to compensate the plaintiff for his services either in money or land, and in any event to give him one-half the farm at his death; it was *held*, that the plain-

tiff could not recover unless he had established the existence of the contract by clear, direct, positive, express and unambiguous evidence; and it was further *held*, that the measure of damages was not the value of the land but only the value of the services rendered, and in no event to exceed the value of the land at the death of the father, with interest from that date. *McLaughlin v. McLaughlin*, 145 P. S. 582.

113. Where it appeared that the decedent, an aged woman, had for many years divided her time between her son and daughter, the wife of the claimant, and there was no agreement to pay for her board; it was *held*, that her son-in-law could not recover for her care and nursing and for his personal services during her last illness. *Young's Estate*, 148 P. S. 575.

114. Upon a claim by a son-in-law against the estate of his mother-in-law for board and nursing, where no proof is made of a contract to pay, the presumption is strongly against the existence of any such relation as will justify the inference of an implied contract. *Gerz v. Weber*, 151 P. S. 396.

115. A daughter's claim against her father's estate to recover for domestic services cannot be established by mere declarations by the father that he appreciated his daughter's services and that she would be well paid, as she would get his property at his death. *Murphy v. Corrigan*, 161 P. S. 59.

116. Where a sister sued her brother for board and the plaintiff's evidence tended to show that the plaintiff and defendant lived with their sisters in a house left by their parents as a common home, and it was understood among all parties that an agreement for board as to defendant would be fully complied with by the performance of services about the house, and that he fully performed the services; it was *held*, that the case was for the jury and that a verdict and judgment for the defendant would be sustained. *Stafford v. Devereux*, 166 P. S. 277.

117. The decedent's wife's sister, who after his wife's death took charge of his home and served five years, is not entitled to compensation from his estate, in the absence of proof of a contract to pay. *Cooper's Estate*, 7 C. C. 365; s. c. 24 W. N. C. 384.

118. If services were originally rendered from motives of kindness, the presumption is that they so continued, in absence of proof to the contrary. *Sayer's Estate*, 8 C. C. 32.

119. Upon a claim for services where no claim was made in the lifetime of the decedent, it is presumed either that the wages were paid at regular intervals, or that the services were rendered upon the understanding that they were not to be paid for. *Ibid*.

120. Where the evidence established a family relation between the decedent and his step-son; it was *held*, that a liability for the step-son's services could not be established by evidence of loose declarations of the decedent of his intention to pay for them. *Willdonger's Estate*, 12 C. C. 616.

121. A niece will not be allowed for services as nurse and housekeeper of her uncle in the absence of evidence of a demand during the latter's lifetime, and evidence that the parties contemplated payment at the time the services were rendered. *Lafferty's Estate*, 13 C. C. 82.

122. Where a father lived for many years in his son's family without paying board, and after his son's death he continued to live for several months with his son's widow without paying board; it was *held*, that there was no implied contract on his part to pay board to his son's widow. *Porter's Estate*, 15 C. C. 607.

123. Where a niece claims upon an implied contract for services as nurse and housekeeper for her uncle, her claim must be supported by satisfactory proof that compensation was contemplated at the time the services were rendered and accepted. *Lafferty's Estate*, 2 Dist. Rep. 205.

124. A claim against a decedent's estate

for nursing and care by a member of the family must be supported by some evidence of a contract relation. *Thomas's Estate*, 5 Kulp 213.

125. A promise by a decedent to his son, that he should be well paid for his services, is void, unless made before the services were rendered. *Walter's Estate*, 7 Lanc. 75; s. c. 1 Northam. 313.

126. To entitle a son to recover for boarding his parents there must be evidence of an express promise to pay; an agreement as to price, however, is not necessary. *Webb's Estate*, 7 Lanc. 105.

127. Where the claimant against a decedent's estate studied medicine in the decedent's office, and after his graduation he helped the decedent with his practice, and the decedent paid his board and supplied him with office room and books up to about three years before his death, when the claimant started to practise for himself, and there was no express contract or demand in the lifetime of the decedent; it was *held*, that the claimant could recover nothing from the estate. *Rohrer's Estate*, 8 Lanc. 161.

128. A child cannot recover from his parents' estate for maintenance and services without clear proof of an express contract to pay. *Good's Estate*, 11 Lanc. 17.

129. Upon a claim for board against the estate of a decedent, where it appeared that the decedent had originally acted as housekeeper for the claimant; it was *held*, that no recovery could be had in the absence of sufficient evidence that the relations between the parties had changed before the decedent's death. *Long's Estate*, 11 Lanc. 196.

130. Where a son-in-law made a claim against his mother-in-law's estate for maintenance and nursing and there was no express contract to pay; it was *held*, that he could not recover where it appeared by the evidence that the children of the decedent had agreed that she should live with them without charge. *Root's Estate*, 11 Lanc. 225.

131. In order to recover for services

rendered by a grand-daughter to her grandmother, the claimant must show by clear and satisfactory proof that there was a contract to pay. *Reed's Estate*, 8 Montg. 98.

132. Where it appeared that the relation between a decedent and the claimant, his step-son, was a family one; it was *held*, that the claim for services for nursing would not be allowed upon loose declarations of an intention to pay. *Wildonger's Estate*, 32 W. N. C. 184.

133. Upon a claim by a child for boarding, attendance, and other services rendered to the parent, an express contract must be clearly and explicitly proven, and this rule applies as well to the case where the parent lives separate and apart from the child as where they are members of the same family circle; a claim for the rent of a house is governed by the same principle. *Albright's Estate*, 1 York 121.

134. Where the claimant was a nephew of the decedent and was received into the latter's family when five years old; it was *held*, upon a claim for services, that the relation between the decedent and the claimant was such as to forbid any implied promise to pay for the services rendered. *Haney's Estate*, 2 York 105.

135. Where the claimant and her sister lived with the decedent, and the claimant was his housekeeper and her sister an invalid, and they derived their entire support from the decedent; it was *held*, that the presumption was, that the claimant's services were compensated for by the maintenance of herself and invalid sister. *Hildebrand's Estate*, 3 York 191.

136. Where the brother of the decedent was sick and feeble and had to be waited on as a child, and for over twenty years before his death he lived with his daughter, and during the decedent's lifetime she told the daughter that if the latter would keep her brother, she would pay her for her trouble, and she also promised to fix it in her will, and the decedent died three years after her brother; it was *held*, that the daughter's

claim for services rendered to her father could not be sustained in the absence of proof that the services were rendered, not because he was her father, but because the decedent had promised to pay therefor, and it was further *held*, that there was a presumption against the claim arising from the want of a demand for payment from the decedent in her lifetime. *Keyworth's Estate*, 6 York 93 s. c. 5 Del. 175.

VII. Goods sold and delivered.

137. In assumpsit against a partnership a sealed agreement executed by one of the partners is admissible for the purpose of showing what the defendant had agreed to pay for the goods. *Gallagher v. Strobbridge Lithographing Co.*, 9 Atlan. 487.

138. The purchaser of goods is liable for the price, unless sold under an agreement that the purchaser should not be liable; that another person has made himself responsible therefor will not, simply of itself, relieve the purchaser. *Brewer v. Warner*, 126 P. S. 151.

139. A purchaser having full knowledge of the quantity and value of the goods purchased, cannot, in an action on a note given for the purchase money, set up that the goods were old and not worth the amount. *Shirley v. Keagy*, 126 P. S. 282.

140. In an action for the price of coal, where the contract of sale provided a method of determining the price; it was *held*, that such method must be followed; the plaintiff would not be permitted to give evidence of the market value of the coal. *Lucas Coal Co. v. Delaware & Hudson Canal Co.*, 148 P. S. 227.

141. In an action for the price of iron ore sold by plaintiffs to defendants to be shipped from Spain to Baltimore, where the buyers under the contract were to furnish the steamers on a basis of nine shillings per ton, any variation to be for the buyer's account and the sellers were to attend to the chartering, and the rate

of freight fixed in the charter party was eight shillings per ton; it was *held*, that the buyer was entitled to a credit of one shilling per ton only, and not to allowances to the charterers for services for dispatch money and other allowances earned by expedition in loading and unloading the cargo and speeding the ship's release from service. *Ennis v. Pennsylvania Steel Co.*, 154 P. S. 138. See *Ascherson v. Bethlehem Iron Co.*, 161 P. S. 63; affirming s. c. 13 C. C. 568.

142. In an action for the price of goods which were delivered on board of a vessel but lost at sea, where it appeared that the course of dealing between the parties was for the shipper to insure when ordered to do so by the buyer, but not to insure unless ordered, and it further appeared that, upon the shipment in suit, the plaintiffs were directed to insure but neglected it for twenty-five days, and when they attempted to do so, they found that they could not insure because the vessel had gone ashore; it was *held*, that the plaintiff could not recover the price of the goods. *New York Tartar Co. v. French*, 154 P. S. 273; reversing s. c. 12 C. C. 186.

143. Where the defendant alleged that the goods were sold to his son and not to himself; it was *held*, that the jury might take into consideration the circumstances that the sons were young men who had never been in business, and were irresponsible, as alleged by defendant's counsel in his address to the jury; and this, although there was no evidence of such circumstances given on the trial. *Goldstrohn v. Stinner*, 155 P. S. 28.

144. Where goods are not ordered but the consignee takes the goods from the railroad company and hauls them to his own place of business, he is liable for their price unless he notifies the consignors that he does not intend to accept them. *Indiana Mfg. Co. v. Hayes*, 155 P. S. 160.

145. In assumpsit for goods sold and delivered, where there is no evidence of delivery, it is error to give binding in-

structions for plaintiff. *Schrimpton v. Bertolet*, 155 P. S. 638; reversing s. c. 10 Lanc. 139.

146. Where a person who has been in the habit of dealing at a store notifies the proprietor not to trust his family, but he subsequently permits members of his family to procure from the store goods suitable for family use which are so used in his family, he will be held to be responsible for the payment of their value. *Graff v. Callahan*, 158 P. S. 380.

147. Where one partner sells his interest in the firm to the other partner, he may maintain an action of assumpsit against him for the purchase money. *Draucker v. Arick*, 161 P. S. 357.

148. Where a person sells his business to another, who continues the business at the same stand and with the same employees, the vendor will be held liable for goods bought on his credit and delivered to his successor in the absence of actual notice by him to persons who had previous dealings with him. *Shaunce v. McCrystal*, 162 P. S. 457.

149. Where the plaintiff agreed to furnish to the defendant all his milk for a year at a certain price per gallon, but no specific amount of milk was mentioned; it was *held*, that the contract was severable and that the plaintiff could recover for milk furnished during a portion of the year, although he failed to comply with his contract during the rest of the year. *McLaughlin v. Hess*, 164 P. S. 570.

VIII. Defences.

150. Where a rule of court provided that material averments in the statement which were not denied by affidavit should be taken as admitted; it was *held*, in an action for the price of chattels where the affidavit of defence did not deny the sale, delivery or price of chattels as averred, that it was error to refuse the plaintiff's offer of the statement and affidavit as evidence of such sale, delivery and price. *Neely v. Bair*, 144 P. S. 250. See s. c. 157 P. S. 417.

151. In an action for a foundry furnace, an affidavit of defence that the appliance, contrary to instructions, was made of improper material, and that it was entirely unfit for its intended purpose and acceptance of it was refused, was *held* to be sufficient to prevent summary judgment. *Leechburgh Foundry & Machine Co. v. Jennings*, 145 P. S. 559.

152. In an action for goods sold and delivered, an averment in an affidavit of defence that the goods charged were excessive in amount, is too vague; the defendant should specify the excess, so that the plaintiff could have judgment for the amount admitted to be due. *Jenkinson v. Hilands*, 146 P. S. 380.

153. In an action for goods sold and delivered, where the affidavit of defence averred that a prior judgment for the plaintiff before an alderman for the same cause of action was reversed on *certiorari*, and a judgment for the defendant for costs therein was unsatisfied; it was *held*, that the averment as to the prior judgment raised no bar to the second action. *Jenkinson v. Hilands*, 146 P. S. 380.

154. In an action for goods sold and delivered, where it appears from the affidavit of defence that the defendants are indebted to the plaintiffs for at least a portion of their claim, the affidavit is insufficient if it does not say how much is due, in order that the plaintiffs may have judgment for that sum if they see proper to accept it. *Ettinger v. Miller*, 153 P. S. 457.

155. In an action for goods sold and delivered, it is a good defence that the goods were furnished the defendants not as purchasers, but as managers of a business entered upon for the benefit of both parties and as plaintiff's contribution to the stock, and that such stipulation had been omitted by mistake from the written agreement. *Lee v. Taylor*, 154 P. S. 95.

156. In an action for the price of doors, blinds and mouldings, it is a sufficient affidavit of defence that the goods were sold under the express warranty

that they were in size and dimensions like others being used in a building operation and were to be used therein, and defendant had no opportunity of examining the goods, that they were unsuitable for the purposes ordered and not as represented, and that defendant was compelled to sell them at a loss. *Bacon v. Scott*, 154 P. S. 250.

157. In an action for the price of melons sold to defendant's agent on the authority of a telegram directing the agent to buy two cars if the stock were of good size and cheap, it was not a good affidavit of defence that the agent was not authorized to buy other melons than those mentioned in the telegram, that those forwarded were small and of inferior quality, and that the defendants had refused to receive them, and upon plaintiff's refusal to order a return, the defendants sold them for sixty dollars less than the sum claimed by plaintiffs. *Williams v. Sawyers*, 155 P. S. 129.

158. Where a person becomes possessed of property under a bill of sale, and the title to the property is claimed by another, and the vendee is induced to part with the possession of the property at the instance of the claimant in consideration of a note endorsed by him; it was *held*, that the latter will be estopped from asserting a defence in an action on the note, that it was a trick or artifice by which the vendee was deceived into parting with his property. *McClain v. Smith*, 158 P. S. 49.

159. In an action on a promissory note given in payment of a medical practice and drug store; it was *held*, to be a good defence that the plaintiff showed to defendant false and fraudulent statements and accounts, that the store was almost destitute of drugs, that the bottles were filled with colored water, that the prescriptions were fraudulently numbered, and that just before possession of the store was given to the defendant, the plaintiff removed all the costly and useful drugs. *Goodwin v. Schott*, 159 P. S. 552.

160. In an action for a designated quantity of electricity at a fixed price per lamp-hour, an affidavit of defence is sufficient which avers that the measurement of current used was incorrect, that the meter was out of order and did not register correctly, that the meter was the property of the plaintiffs and under their sole control, that it was removed by plaintiffs, and that defendant had no opportunity to test by a new and correct meter and that in consequence he could not tell in what sum he was indebted to plaintiffs for electricity actually consumed. *Edison Electric Light Co. v. McCorkell*, 161 P. S. 227.

161. Where a contract to supply coal for a number of years provided for monthly settlements on a certain day; it was *held*, in an action for coal delivered, that it was not a good defence that certain coal delivered earlier in the running of the contract was poor and worthless, and that the defendant had paid for it under protest and because he could not procure coal elsewhere, and had notified the seller that he would deduct the price of it from the price of coal subsequently delivered. *Armstrong v. Latimer*, 165 P. S. 398.

162. In an action against the defendant and twenty-eight other persons doing business as the Central Coal Dealers' Association, to recover the price of coal; it was *held*, that an affidavit of defence was sufficient which averred that the defendant was not a member of the association during the period within which the coal was sold and delivered, and that this fact was known to one of the plaintiffs. *Rhoads v. Fitzpatrick*, 166 P. S. 294.

163. In an action to recover the price of flour, it was *held*, that an affidavit of defence was insufficient which averred that the flour was of bad quality, that a small portion was returned to the defendant by his customers, and that the defendant's direct loss amounted to a certain sum. *Marshall v. Aber*, 11 C. C. 570.

164. In an action for goods sold and delivered, it was *held*, that an affidavit of defence was insufficient which simply denied that the defendant bought or received the goods, but did not deny the execution of a contract of purchase and a delivery or an attempt to deliver in pursuance of such contract. *National Cash Register Co. v. Flaherty*, 12 C. C. 475.

165. In an action for goods sold and delivered, where the plaintiff has filed an itemized statement of his claim, an affidavit of defence which alleges that some of the articles were damaged and returned, is insufficient to prevent judgment where such affidavit fails to state exactly which of the articles the defendant refers to, or to set forth the circumstances with all possible accuracy. *Kress Stationary Co. v. Hallock*, 7 Kulp 313.

166. Where a vendor of timber assured the vendee before the contract was signed, that the lines on the ground included the whole of a certain specified tract of timber, and it was afterwards discovered that the lines did not include such timber, the vendee was *held* to be entitled to make defence against a proportionate part of the purchase money. *Blygh v. Samson*, 137 P. S. 368.

167. In an action for wages the employer may prove the loss suffered by reason of the negligent and unskilful manner in which the work was performed, and such defence is available not only as to the wages of the particular days upon which the negligence occurred, but also as to the wages earned upon other days. *Glennon v. Lebanon Mfg. Co.*, 140 P. S. 594.

168. In an action by heirs against an administratrix for rents collected without their authority, she is not entitled to setoff for services rendered to the intestate during his lifetime; such a claim must be enforced in the regular and orderly way. *Dakes v. Reese*, 150 P. S. 44.

169. In assumpsit by the commonwealth against a county to recover the amount of a tax settlement, the county

will be permitted to prove any facts going to show that the commonwealth ought not in equity and good conscience, recover the whole or any part of the claim; and this, though no appeal was taken from the settlement. *Comm'th v. Philadelphia County*, 157 P. S. 531.

170. In an action for money deposited with defendant by plaintiff's testator, where the defendant proved that she had returned the money to the plaintiff's testator, and that when she asked for the papers he said he had torn them up, and that defendant's husband then drew a receipt which was signed and alleged to have been lost, but it was proven to have been seen by one or two witnesses; it was held, that the testimony was sufficient to sustain a verdict for defendant. *Fullam v. Rose*, 160 P. S. 47.

171. In an action for the price of horseshoeing, an affidavit of defence is insufficient which avers that the horses were crippled and injured, but does not aver that they were permanently injured or were rendered less valuable. *Weston v. Killeen*, 11 C. C. 412.

172. In an action by the heirs of a decedent to recover rents collected by the defendant, an affidavit of defence is not sufficient which sets forth that the rents were collected, but that they are not sufficient to pay the defendant's bill against the decedent for boarding him. *Baker v. Reece*, 9 Lanc. 108.

ATTACHMENT.

See ARREST, V.: DECEDENTS' ESTATES, VI.: JUSTICES, COURTS, II., X.: SHIPPING.

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I. Foreign attachment.

(a) Liability to foreign attachment.

1. A debtor does not become subject to foreign attachment by leaving the state to seek a new residence in another state; he must first acquire a new residence there with an intention of remaining in it. *Kafferty v. Knight*, 2 Lack. Jur. 12.

2. Where a foreign attachment is issued against a defendant, and it is shown that he was within the jurisdiction of the court at the time the writ was issued, the attachment will be quashed; and this, though the return be "*non est inventus*"

as to such defendant. *Kauffman v. Musin*, 9 C. C. 414.

3. Where the defendant left his wife and home in Philadelphia and went to Canada, but it appeared by the evidence that he had a fixed intention to return; it was *held*, that a foreign attachment against him would be dissolved; a person's property is not subject to foreign attachment until he has actually acquired a new residence. *Labe v. Brauss*, 12 C. C. 255.

4. Where a debtor has left the state for the purpose and with the intention of taking up a new domicile previously determined upon, a foreign attachment may issue against his property although he has not yet arrived at his new domicile. *Whitehill v. Eicherly*, 15 C. C. 593.

5. A foreign attachment may issue against the property of a corporation, although it is doing business in this state and the treasurer resides here. *Beal v. Toby Valley Supply Co.*, 13 C. C. 273.

6. A foreign corporation is not exempted from the process of foreign attachment by the act 17 March 1856 (Brightly's Purdon 428), relating to the service of process on corporations. *Beal v. Toby Valley Supply Co.*, 13 C. C. 273.

7. A citizen of another state has a right to come into this state and sue out a writ of foreign attachment against a foreign corporation. *Clark Co. v. Toby Valley R. R. Co.*, 14 C. C. 344.

8. A foreign attachment will lie against an insurance company, incorporated under the laws of Connecticut and doing business in this state, for a debt due to a citizen of New Jersey. *Datz v. Chambers*, 14 C. C. 643.

9. A foreign attachment will lie in this state at the suit of a citizen of another state. *Clafin v. Weiss*, 12 Lanc. 169.

10. A foreign corporation duly registered in this state and empowered to do business here is not exempt from process by foreign attachment. *Pierce v. McLaughlin Electric Co.*, 28 W. N. C. 311.

11. An assignment for creditors here,

passes title to personal property in another state, and a creditor who has subsequently issued a foreign attachment in another state will be enjoined from levying an execution thereon upon the assignor's property there. *MacDonald v. Furbush*, 26 W. N. C. 120.

12. An assigned estate cannot be distributed by the process of foreign attachment by a court which has no jurisdiction over the accounts of the assignee; a claim for wages must be presented to the assignee or the auditor appointed to make distribution of the assigned estate, such a lien cannot be enforced by foreign attachment against the employer. *Taylor v. Guarantee Trust & S. D. Co.*, 149 P. S. 409.

13. A resident of a foreign state cannot, by a writ of foreign attachment in this state, obtain a preference over an assignment for creditors of the estate of a citizen of another foreign state; failure to record the assignment in this state, as provided by the act 3 May 1855 (Brightly's Purdon 143), will not give priority to such foreign attachment, as that act was passed for the protection of domestic creditors alone. *Long v. Girdwood*, 150 P. S. 413; affirming s. c. 28 W. N. C. 299; *Wing v. Bradner*, 162 P. S. 72.

14. Where the plaintiffs were citizens of Illinois and the defendants were citizens of Michigan, and a foreign attachment was issued to garnishees in this state; it was *held*, that the attachment should be dissolved where it appeared that the defendants had previous to the attachment assigned in Michigan to a third party their claim against the garnishees, and it further appeared that the attachment was issued in an attempt to avoid the effect which said assignment would have in the state of Michigan. *Cross v. Smith*, 14 C. C. 36.

15. An agent in this state employed by the receiver of a foreign corporation appointed by the courts of another state, cannot proceed by foreign attachment to recover a claim against such receiver. *Lett v. Kirkpatrick*, 15 C. C. 212.

16. A writ of foreign attachment lies at the suit of a salesman, a resident of this state, against a foreign corporation for a debt due him by the corporation; and this, though the property attached be in the hands of receivers appointed by the court of another state after the creation of the debt. Our courts will not recognize the claims of a foreign receiver where such claims conflict with the rights of citizens of this state. *Lett v. Thurber Whyland Co.*, 15 C. C. 666; s. c. 4 Northam. 335.

(b) For what cause of action an attachment lies.

17. A foreign attachment lies on a claim by a purchaser against a seller for loss occasioned by reason of the defendant's neglect to deliver, the damages being the difference between the contract price and that at which the plaintiff was subsequently obliged to purchase. *Bru-baker v. Bryan*, 6 Lanc. 201.

18. Unliquidated, speculative damages for the breach of a contract of sale are not the subject of foreign attachment. *International Oil Works v. Wells*, 7 C. C. 271.

19. A foreign attachment will be quashed unless cause of action be shown in the legal plaintiff; it is not sufficient to show it in the use plaintiff. *Green v. Abdill*, 6 C. C. 666.

20. A writ of foreign attachment may issue in an action of account render. *Philadelphia & Reading R. R. Co. v. Snowdon*, 166 P. S. 236.

21. A foreign attachment will lie to recover the costs of a divorce suit awarded to the libellant therein. *Harter v. Harter*, 4 Dist. Rep. 211.

(c) Attachment in equity.

22. Under the act of 23 May 1887 (Brightly's Purdon 930) allowing a writ of foreign attachment in equity proceedings, the attachment will not be dissolved on the filing by the defendant of a formal

answer. *Stewart v. Parnell*, 8 C. C. 604; s. c. 46 L. I. 128.

23. Where a proceeding in account render was begun by foreign attachment, the court made absolute a rule permitting an amendment of the form of action and allowing the plaintiff to file a bill in equity with the same effect as if the original proceeding had been begun in equity. *Crowe v. Davis*, 33 W. N. C. 552.

(d) What may be attached.

24. A foreign attachment will lie to attach a legacy to a married woman; the proviso contained in the act 27 July 1842, sec. 1 (Brightly's Purdon 931), was repealed by the act 11 April 1848, P. L. 536. *Edelman v. Bechtel*, 10 Montg. 165; following *Evans v. Cleary*, 125 P. S. 204.

25. Where a testator directed one-fourth of the residue of his estate to be retained in trust, and the interest to be paid to his daughter during her life, and at her death the principal to be paid "to all and every of the children then living of my said daughter Anna and the lawful issue *per stirpes* of any of them then dead, their heirs and assigns," and a son of the daughter died in her lifetime and after the testator, leaving two children; it was *held*, that the latter had a vested interest in the fund after their grandmother's death, and that their shares were subject to foreign attachment. *Fulweiler v. Mus-selman*, 10 Lanc. 313; s. c. 5 Del. 327.

26. Where the estate of a wife had been settled up for upwards of twenty years, and she was entitled to an interest in the principal of her mother's dower; it was *held*, that such interest was subject, on the death of the mother, to a foreign attachment against her husband as defendant, and the owners of the land charged with said dower as garnishees. While an interest in a dower fund is personalty, and passes to personal representatives, this principle has never been extended to cases where the estate has long been adjudicated, but the practice has been to pay over the fund to the

heirs of the deceased party if six years have elapsed since his death. *Haller v. Regar*, 11 Lanc. 77.

27. Under the act 15 April 1845 (Brightly's Purdon 2077) an attachment does not lie against commissions due from an employer to his travelling salesman; it seems, however, that a factor's or broker's commissions are not exempt under that act. *Hamberger v. Marcus*, 157 P. S. 133.

(e) Of the affidavit.

28. A foreign attachment will be dissolved if the affidavit fail to mention the name of the defendant, and has a material unnoted interlineation. It cannot be amended. *Jacobs v. Tichenor*, 27 W. N. C. 35.

29. An insufficient affidavit in foreign attachment cannot be amended; the attachment must be dissolved. *Shumway v. Webster*, 24 W. N. C. 336.

30. An affidavit for a foreign attachment should contain a perspicuous statement of the contract and its terms; it should give details. *International Oil Works v. Wells*, 7 C. C. 271.

31. If the affidavit be ambiguous and dependent upon conjecture and inference to complete a good cause of action, the attachment will be dissolved. *Graham v. Canton & Waynesburg Railroad Co.*, 25 W. N. C. 65. See s. c. 26 Ibid. 203.

(g) Service.

32. In serving a writ of foreign attachment the sheriff must go to the garnishee and declare in the presence of one or more creditable persons of the neighborhood that he attaches the goods. *Welter v. Stull*, 5 Kulp 224.

33. Where the garnishee in a foreign attachment is a domestic corporation with its principal office outside the county in which the writ issued, the court will set aside the sheriff's return of service upon a local agent of the corporation within the county, where it appears that the company has no office or place

of business in the county. *Smith v. Morse Wool-Scouring Co.*, 10 C. C. 624; *National Starch Co. v. Morse Wool-Scouring Co.*, 11 C. C. 192.

(h) Dissolution of the attachment.

34. A rule to dissolve a foreign attachment cannot be taken by a defendant who has not appeared. *Crowe v. Davis*, 33 W. N. C. 103.

35. A foreign attachment will not be dissolved on the allegation that a third party is entitled to the fund attached. *Brubaker v. Bryan*, 6 Lanc. 201.

36. A rule of court that if a *scire facias* be not issued against the garnishee within six months after judgment the attachment will be dissolved, will not be enforced where the delay was caused by the drafting of the plaintiff's counsel. *Barton v. Hensel*, 5 Kulp 415.

37. If, after the dissolution of a first attachment, a second be issued without leave, it will be dissolved and writ quashed; it is *res adjudicata*. *Graham v. Canton & Waynesburg Railroad Co.*, 26 W. N. C. 203. See s. c. 25 Ibid. 65.

38. Upon a motion to dissolve a foreign attachment the burden of proving the non-residence of the defendant is on the attaching creditor; the mere fact that a man resides in a different place from that in which he has been domiciled does not of necessity show that he has elected that place as his permanent home. *Steinman v. Erisman*, 8 Lanc. 177; s. c. 4 Del. 434.

39. Upon a rule to dissolve a foreign attachment the court cannot determine whether or not the debt is due, or whether a conveyance to a third party before the attachment was without consideration and fraudulent. *Clafin v. Weiss*, 12 Lanc. 169.

40. Where a foreign attachment is dissolved by the defendant's appearance and giving bail to the action as provided by the acts 13 June 1836 and 20 March 1845 (Brightly's Purdon 935), the effect is to dissolve a previous judgment by default

obtained against the defendant, together with the attachment and all other proceedings. *Borden v. American Surety Co.*, 159 P. S. 465; affirming s. c. 13 C. C. 627.

41. Upon a motion to dissolve a foreign attachment where it appeared that suit had been brought by the plaintiffs against the defendants in New York, and that in said suit only one of the defendants was served and only one appeared, but judgment was entered against both; it was held, that the plaintiffs had a right to sue the defendant not served, and that the attachment would not be dissolved. *Victor v. Abrams*, 13 C. C. 298.

(f) Of the attached property.

42. An order may be made for the sale of attached property before judgment where the affidavit shows that the debt is just, that a true and accurate inventory is attached, and that the property is perishable. *Baker v. Baker*, 28 W. N. C. 300.

43. Where goods in the hands of a bailee are seized under foreign attachment, the property represented by the bills of lading is in the custody of the law and cannot lawfully be sold without an order of court, but after the attachment is dissolved, the rights and powers of the pledgee of the bill of lading are the same as before the seizure, subject only to the duty of retention imposed by the bond given on the dissolution of the attachment. *Richardson v. Nathan*, 167 P. S. 513; s. c. 36 W. N. C. 242.

44. Where the question is whether property, which had previously been assigned for creditors, was attachable, evidence is admissible as to fraud on the attaching creditor in the inception of the debt. *Long v. Girdwood*, 150 P. S. 413; affirming s. c. 28 W. N. C. 299.

(g) Of the defendant.

45. Where a defendant in foreign attachment has entered an appearance to the attachment and he wishes to raise

the question that the writ was issued for the same cause of action for which a former suit is pending, he should rule the plaintiff to file a declaration and then plead in abatement that the former action was for the same indebtedness. *Schall v. Rutledge*, 1 York 33.

46. Where judgment has been entered in foreign attachment against the defendant for want of a sufficient affidavit of defence, the proper remedy of the defendant is by appeal and not by motion to strike off the judgment. No appeal lies, however, from the refusal of the court below to set aside the return to a writ of foreign attachment and to quash the writ. *Philadelphia & Reading R. R. Co. v. Snowdon*, 161 P. S. 201. See *Philadelphia & Reading R. R. Co. v. Snowdon*, 166 P. S. 236.

47. In a proceeding by foreign attachment, the assignee of creditors of the defendant will not be permitted to intervene and defend the suit; his rights may be worked out by means of a notice to the garnishees setting forth the particulars of his title. *Elberman v. Bloom*, 10 C. C. 413.

(h) Of the garnishee.

48. Where it is admitted on the trial that the defendant was actually within the county at the time the attachment was issued and served, the garnishee has the same right as the defendant to have the proceedings quashed for want of jurisdiction. *Webb v. Kellogg Opera Co.*, 15 C. C. 481.

49. The garnishee in a foreign attachment cannot set off notes given to him by the defendant before the attachment, such notes not being due at the time the writ of attachment issued; the fact that the defendant is insolvent will not enable the garnishee to claim such a set-off unless something has been done before the attachment to show an application by the garnishee of the undue demand to the debt. *Crall v. Ford*, 28 W. N. C. 366.

50. Where the plaintiff refused to

proceed, although over a year had elapsed since the impetration of the writ and no appearance had been entered for the defendant; it was *held*, that the court at the instance of the garnishee would order the plaintiff to proceed to judgment against the defendant, and to issue a *scire facias* and interrogatories to the garnishee, or a non pros. would be entered. *Boyd v. Davis*, 30 W. N. C. 259; s. c. 9 Lanc. 253.

(m) Counsel fees.

51. The act 29 April 1891 (Brightly's Purdon 839) providing that a garnishee shall be taken to be a party in the cause and allowing him a counsel fee of ten dollars upon discontinuance or other final disposition prior to answer filed, was *held* to apply to pending cases. *Boyd v. Davis*, 30 W. N. C. 259; s. c. 9 Lanc. 253.

52. Where the garnishees in good faith and under the advice of counsel made a defence, but the jury and court decided against them; it was *held*, that the costs would not be imposed upon them, but they were allowed fifty dollars out of the fund as counsel fees. *Haller v. Regar*, 11 Lanc. 145; s. c. 5 Del. 453.

53. Where a foreign attachment was dissolved because the plaintiff failed to file an affidavit showing his cause of action, and the suit was then discontinued and the costs other than the counsel fees of the garnishee were paid; it was *held*, that a second attachment against the same property would be stayed until the garnishee's fees in the first attachment were paid. *Jackson v. Thomson*, 9 Montg. 28.

54. Where the amount admitted by the garnishee is substantially greater than the amount of the plaintiff's claim, the court will not tax a garnishee's counsel fee. *Getz v. Smith*, 29 W. N. C. 459; *Johnson v. Smith*, 29 W. N. C. 477.

(n) Judgment.

55. A judgment for want of an appearance the same day the declaration was

filed, and more than three terms after suit brought, will be set aside. *Welter v. Stull*, 5 Kulp 224.

56. The act of 10 May 1889 (Brightly's Purdon 933), permitting judgment for want of an appearance in foreign attachment at or after the third term, if a declaration has been filed fifteen days before the entry of judgment, is applicable to actions pending at the passage of the act and is constitutional. *Lane v. White*, 140 P. S. 99; affirming s. c. 24 W. N. C. 380.

57. After a proceeding by foreign attachment has been converted into an action of assumpsit by a general appearance for the defendant, it seems to be a grave question whether an affidavit of defence may not be required. *Philadelphia & Reading R. R. Co. v. Snowdon*, 161 P. S. 201. See *Philadelphia & Reading R. R. Co. v. Snowdon*, 166 P. S. 236.

58. Under the act 25 May 1887 (Brightly's Purdon 1728) an affidavit of defence is required in an action of assumpsit commenced by foreign attachment where the defendant has entered a general appearance. *Wing v. Bradner*, 162 P. S. 72.

59. In an action of assumpsit begun by foreign attachment, where a general appearance has been entered by the defendant, judgment may be taken against him for want of an affidavit of defence. *Philadelphia & Reading R. R. Co. v. Snowdon*, 166 P. S. 236; *Hubbard v. Dorman*, 7 C. C. 384; *Smith v. Eyre*, 26 W. N. C. 314; s. c. 149 P. S. 272; *Praun v. Miller*, 42 P. L. J. 28.

60. Where a defendant in foreign attachment appeared specially for the purpose of demanding the release of his property; it was *held*, that this was not such an appearance as would entitle the plaintiff to a judgment against the defendant upon the plaintiff filing his statement in assumpsit and serving the copy on the attorneys who had thus specially appeared for the defendant. *Warren Savings Bank v. Silverstein*, 15 C. C. 584.

61. Where a rule to show cause of

action is taken before the plaintiff has declared, no judgment can be asked for until a disclosure of the demand sued on is made. *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 167 P. S. 589; s. c. 36 W. N. C. 254.

62. Where the answers of the garnishee are so deficient as to entitle the plaintiff to move for an attachment for contempt, the plaintiff is entitled to a rule on the garnishee for judgment for not making more specific answer; the plaintiff is entitled to an attachment for contempt, but he is not confined to that remedy. *Henwood v. American Legion of Honor*, 2 Lack. Jur. 339.

63. In foreign attachment the mere fact that the garnishees are receivers appointed by a Federal court will not prevent a judgment against them for the amount admitted; and this, although they may have been summoned as garnishees without leave of the Federal court having been first obtained. *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 167 P. S. 589; s. c. 36 W. N. C. 254.

64. Judgment will not be entered on the answers of the garnishees unless by fair interpretation they admit an indebtedness due to the defendant for some specific amount, or at least for a sum sufficient to cover the plaintiff's demand; where the garnishees who are stakeholders allege that the fund is claimed by others than the defendant, it is not necessary that the answers should show that the claimant has a good title to the money, but judgment on the answers should be refused and the case sent to a jury. *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 167 P. S. 592; s. c. 36 W. N. C. 256.

65. A judgment in foreign attachment is good as a personal judgment where the record shows a general appearance by attorneys for the defendant, though he was not personally served. *Donoghue v. Hanley*, 7 Cent. 604.

66. Where a judgment in foreign attachment was stricken off under the rule laid down in *Melloy v. Burtis*, 124 P. S.

161, and a new judgment subsequently entered in compliance with the act of 10 May 1889 (Brightly's Purdon 933), it was held that the lien of the attachment was not postponed to a subsequent one. *Edison Electric Light Co. v. American Manufacturing Co.*, 26 W. N. C. 119.

67. Where, by a suit in foreign attachment, a judgment in another court in favor of the defendant against the garnishee has been attached, and subsequently such judgment is opened and it appears that an attaching creditor who opposed this action was paid the amount of his claim and a verdict and judgment is obtained for the defendant, and it appears further that this was in pursuance of a fraudulent agreement between plaintiff and defendant, a case is made out, which, if unexplained, would justify the jury, upon the trial of the foreign attachment, that there was collusion and fraud; in such case the verdict and judgment for defendant would not be conclusive upon the plaintiff in the foreign attachment, and the burden would be on the garnishee to show that there was nothing really due on the judgment attached. *Palmer v. Gilmore*, 148 P. S. 48. See *Sommer v. Gilmore*, 160 P. S. 129.

(o) Effect of the attachment.

68. A judgment entered for want of an appearance in a suit commenced by foreign attachment, binds only the property attached; process for its collection does not extend to other property; so, unsuccessful efforts to open or set aside such a judgment do not convert it into a judgment *in personam*. *Smith v. Eyre*, 149 P. S. 272.

69. Where the holder of a bill of lading has a lien for advances, his title is not affected by a foreign attachment issued at the suit of the shipper's creditors. *Harrison v. Mora*, 150 P. S. 481.

70. Where a purchaser of goods levies upon them by foreign attachment in a suit against the seller, such levy operates as a disclaimer of title in himself. *Central National Bank v. Gallagher*, 163 P. S. 456.

71. Where real estate in the possession of a guardian is attached in foreign attachment as the property of a person other than the minor, and pending the attachment the guardian sells the property under an agreement with the purchaser and the attaching creditor, that the purchase money shall be deposited with a stakeholder to hold until the attaching creditor shall recover a judgment and establish that the premises are subject to his judgment, and if he shall fail to establish it, then to pay the fund to the guardian; it was *held*, that the guardian could not sue the stakeholder in assumpsit until the attachment proceedings were terminated; and this, although the attaching creditor allowed thirteen years to elapse before taking any further action; where the agreement provided that the guardian might intervene in the attachment proceedings, it was his duty either to do so or to compel the attaching creditor by bill in equity to proceed to judgment. *Fidelity Insurance, Trust & Safe Deposit Co. v. Commonwealth Title Insurance Co.*, 166 P. S. 558.

72. Where real estate was attached on 20 October 1891, in the possession of the tenant as garnishee; it was *held*, that as to rent due by the garnishee, the attachment had priority over a subsequent levy by a delinquent tax collector for city taxes for the year 1891 under the act 19 April 1883, sec. 3 (Brightly's Purdon 1472); in such a case, where the real estate was sold under a mortgage after the tax levy, and was purchased by the mortgagee, who, on the refusal of the sheriff to deliver to him the deed unless he paid said taxes, paid the same; it was *held*, that such payment was voluntary, and did not entitle him to be subrogated to the city's lien or to preserve the lien of the levy for his benefit. *Fletcher v. Evans*, 12 C. C. 440.

73. In an action brought by a defendant in an attachment against the garnishee, the pending attachment cannot be pleaded in abatement or in bar of the action; but the court will mould the

judgment and control the execution so that the garnishee's rights shall be protected. *Datz v. Chambers*, 14 C. C. 643.

74. Upon a *scire facias sur mortgage* it is no defence by the mortgagor, that a foreign attachment has been issued against the plaintiff and that the defendant has been summoned as garnishee; such facts, however, will be considered by the court in controlling the judgment and protecting the garnishee from harm by reason of the multiplicity of processes. *Atkinson v. Mackey*, 3 Dist. Rep. 634.

75. Where a writ of foreign attachment has been executed as directed by the act 13 June 1836, sec. 49 (Brightly's Purdon 931), the real estate on which it is executed is bound from the time of the execution, and the failure of the prothonotary to enter upon the judgment docket the names of the parties with the date of the execution of the writ and the amount of bail required as directed by sec. 51 of that act (Brightly's Purdon 932), will not destroy the lien as against a subsequent mortgagee without notice. *McLaughlin v. Phillips*, 10 C. C. 382.

76. It is the duty of a judgment creditor to see that his judgment is rightly entered in the judgment docket; in foreign attachment, where the description of the property was not filed in the prothonotary's office, nor did the prothonotary enter upon the judgment docket the names of the parties with the date of the execution of the writ and the amount of bail required, and the property was subsequently sold to *bona fide* purchasers, who had no actual notice of the attachment; it was *held*, that an execution in the attachment proceedings could not prevail against such subsequent purchasers. *Schall v. Rutledge*, 1 York 33.

II. Domestic attachment.

77. Sufficiency of a justice's record in domestic attachment under the act of 22 August 1752 (Brightly's Purdon 700). *Moore's Appeal*, 3 Cent. 586.

78. Where a minor contracted for

goods which were not necessities, and a domestic attachment was issued for the goods, and the minor, through his guardian *ad litem*, pleaded his infancy; it was *held*, that the attachment must be dissolved; where an attachment against the defendant cannot be sustained, the proceedings against the garnishee must end. *Kraft v. Landis*, 4 York 133.

79. Where a trustee in domestic attachment in good faith deposited the funds in a bank of good standing and repute, subject to his check; it was *held*, that he was not responsible for a loss occasioned by the unexpected failure of the bank before the final confirmation of his account. *Breneman v. Mylin*, 12 C. C. 324.

III. Attachment against fraudulent debtors.

(a) When an attachment may issue.

80. The act of 17 March 1869 (Brightly's Purdon 70), against fraudulent debtors, does not embrace claims for unadjudicated damages arising from the cutting of timber from lands in dispute. The plaintiff cannot waive the trespass and proceed in assumpsit. *Walker v. Beury*, 7 C. C. 258.

81. The prior recovery of a final judgment in another proceeding between the same parties is a bar to a recovery in a proceeding by attachment, under the act of 17 March 1869 (Brightly's Purdon 70); and this, though the defendant filed no bond under section 3 of that act. *Miller v. Rohrer*, 127 P. S. 384.

82. A principal is not liable for a fraudulent representation made by an agent beyond the scope of his real or apparent authority. *Megargee v. Protheroe*, 1 Lack. Jur. 125.

83. An attachment will not be sustained where the alleged fraudulent misrepresentations were made four years prior to the time the debt was contracted. *Meyers v. Rauch*, 4 Northam. 350.

84. The act 17 March 1869 (Brightly's Purdon 70) does not apply to the fraud-

ulent assignment or disposition of real estate. *Kline v. O'Donnell*, 11 C. C. 38.

85. A fraudulent confession of judgment followed by an execution is a disposition of property within the meaning of the act 17 March 1869 (Brightly's Purdon 70), and upon a motion to dissolve an attachment issued for that reason, the execution creditor must satisfactorily show the consideration on which his judgment is founded; otherwise it will be inferred that the judgment was without consideration and fraudulent. *Ditchburn v. Jermyn & Glenwood Co-operative Ass'n*, 13 C. C. 1. See *Ross v. Roth*, 13 C. C. 14.

86. A fraudulent assignment and disposition of property effected by means of a sheriff's sale upon a fraudulent judgment is within the act. *Simon v. Johnson*, 7 Kulp 166.

87. Where a wife, upon a judgment confessed by the husband for money received from the wife, levied upon the goods in a millinery establishment; it was *held*, that the proceeding was not in fraud of creditors because the evidence failed to show that the business belonged to the wife; and an attachment issued by a subsequent creditor was dissolved. *Bowen v. Prizer*, 7 Montg. 65.

88. A judgment confessed without consideration and an execution thereon is a fraudulent disposal of property within the act 17 March 1869. *Meyers v. Rauch*, 4 Northam. 350. Not following *Lennig v. Senior*, 21 W. N. C. 379. *Wright v. Ewen*, 24 W. N. C. 111.

89. Where fraud is discovered, a contract giving credit may be rescinded, and attachment under the act of 17 March 1869 (Brightly's Purdon 70) issued without waiting for the time given to expire. *Schack v. Loucheim*, 1 Cent. 329.

90. A fraudulently contracted debt, not yet due, may be at once demanded and an attachment issue under the act of 17 March 1869 (Brightly's Purdon 70). *Herman v. Saller*, 25 W. N. C. 408.

91. An attachment does not lie under the act 17 March 1869 for the recovery of

a debt not yet due. *Jones v. Brown*, 167 P. S. 395; affirming s. c. 15 C. C. 202.

92. An attachment cannot issue upon a debt not due unless there has been such fraudulent misrepresentation made by the debtor when the debt was contracted as would enable the creditor after delivery to rescind the contract. *Meyers v. Rauch*, 4 Northam. 350.

(b) Of the writ and service.

93. The sheriff's return must show that an inventory of the property attached was delivered to the defendant. *Cleland v. Cassell*, 1 Lack. Jur. 261.

94. The service of an attachment issued by a justice under the act 12 July 1842 (Brightly's Purdon 1135) was held to be void because the goods were capable of manual seizure, but the return did not show that the officer took them into his possession as required by the act 17 March 1869 (Brightly's Purdon 71). *Curwensville Mfg. Co. v. Bloom*, 10 C. C. 295.

95. Where a rule of court provided that all writs for the commencement of actions might be made returnable on the first Monday of the next term or on the fourth Monday of any intermediate month; it was held, under the act 24 May 1878 (Brightly's Purdon 62), that a writ of attachment might be made returnable to the first Monday of the next term instead of the fourth Monday of an intermediate month. *Starbird v. Koonse*, 10 C. C. 449.

96. Where the sheriff returned that he produced the writ to the defendant and made the contents known; that he levied and attached certain goods then in his hands by virtue of a previous levy under a writ of *feri facias*; that as soon as possible he caused a copy of the writ and inventory to be made and endeavored to serve them upon the defendant but could not find him in the county; that he tried to leave the same at the defendant's residence but found it unoccupied and no person with whom

they could be left, and that the goods were subsequently sold under a writ of *feri facias* and delivered to the purchasers; it was held, that there was a substantial compliance with the law. *Simon v. Johnson*, 7 Kulp 166.

(c) What may be attached.

97. An attachment, it seems, will lie against property in the custody of the law while under execution process in the hands of the sheriff. *Meyers v. Rauch*, 4 Northam. 350.

98. Where a life insurance was payable to executors, administrators or assigns of the insured, and it was presently exchangeable for a full-paid policy, a demand for which had been made upon the company; it was held, that the policy, having a fixed and definite value, was subject to attachment in the hands of the insurance company. *Tradesmen's Nat. Bank v. Cresson*, 10 C. C. 57.

(d) Of the plaintiff's bond.

99. The bond, if executed by the plaintiff's attorney, must show his apparent authority, to execute the same. *Harrisburg Boot & Shoe Co. v. Johnson*, 3 Dist. Rep. 433.

100. The bond in an attachment under the act 17 March 1869 (Brightly's Purdon 71), may be executed by one member of the plaintiff firm under seal in the name of the firm so as to bind the firm. *Wilson v. Shapiro*, 12 C. C. 466.

101. The bond is sufficient if signed by the firm name, by one member of the firm with one surety; it need not name the parties for whose use it is given. *Hall v. Kintz*, 13 C. C. 24.

102. The bond ought to be free from interlineations and erasures, but where it has been fully approved the court will not quash the attachment, but if asked to do so, the court will require the plaintiff to file a new bond. *Simon v. Johnson*, 7 Kulp 166.

103. An attachment will not be dissolved because the words "unto the com-

monwealth of Pennsylvania" in the bond are not followed by the words "for the use of the parties interested." *Wilson v. Shapiro*, 12 C. C. 466.

104. The bond need not set forth that it is for the use of the parties interested, or state their names. *Simon v. Johnson*, 7 Kulp 166.

105. An attachment will not be quashed because the words "for the use of the parties interested" are not inserted in the bond. *Hall v. Walter*, 3 Northam. 17.

106. Under the act 24 May 1887 (Brightly's Purdon 70), the plaintiff's bond must be conditioned to prosecute the attachment with effect; where it is conditioned to prosecute the action with effect, the attachment will be dissolved. *Starbird v. Koonse*, 10 C. C. 449.

107. A bond is insufficient under the supplement of 24 May 1887 (Brightly's Purdon 70), which is conditioned "to prosecute their action with effect and recover a judgment"; so it is insufficient unless approved by the court. *Harrisburg Boot & Shoe Co. v. Johnson*, 3 Dist. Rep. 433.

108. Where the condition of the bond was that in case of breach, the obligors would pay to the defendant all legal costs, attorney fee and damages; it was held, that while the form of the bond was not to be commended, it was not fatally defective. *Simon v. Johnson*, 7 Kulp 166.

109. Where the bond was conditioned that "if the said plaintiff shall fail to prosecute their said action with effect, or in case attachment be quashed, dissolved or ended," etc., such condition was held to cover every possible contingency against which the statute intended to secure the defendant. *Simon v. Johnson*, 7 Kulp 166.

110. Where the bond was conditioned that if the plaintiff should fail to prosecute his action with effect and receive a judgment against the defendant, he, the said plaintiff, would pay to the said defendant all legal costs and damages which the said defendant might sustain by said attachment, the attachment was dissolved

on the ground that the bond was not in compliance with the act 24 May 1887 (Brightly's Purdon 70). *Kraft v. Osman*, 5 York 70.

111. An attachment should not be quashed because the bond is defective or insufficient. *Hall v. Kintz*, 12 C. C. 90.

112. In an action upon a bond given under the act 17 March 1869, as amended by the act 24 May 1887 (Brightly's Purdon 70), the measure of damages is the pecuniary loss ordinarily and naturally resulting from the seizure of the goods, such as loss of sales, interruption of business and expenses necessarily incurred; it does not include a loss that is indirect or consequential, or punitive damages recoverable for the malicious use of process. *Comm'th v. Magnolia Villa Land and Improvement Co.*, 163 P. S. 99.

113. An action lies on the bond where there has been a failure to prosecute the attachment with effect, or the attachment has been quashed, dissolved or ended, but a recovery is limited to legal costs, fees and damages sustained by reason of the attachment. *Berwald v. Ray*, 165 P. S. 192.

114. Where an attachment was issued against two persons, and a rule for judgment for want of a sufficient affidavit of defence was made absolute as to one for a part of the claim and discharged as to the other, and the goods were levied upon under an execution against the first defendant, and the second defendant notified the sheriff that the goods were his, but the sheriff sold them on being indemnified, and the attachment proceedings were subsequently discontinued; it was held, that an action of trespass would lie against the sheriff by the second defendant, who was not confined to his action upon the bond. *Berwald v. Ray*, 165 P. S. 192.

(e) Of the defendant's bond.

115. In an action on a bond given by the defendant, the measure of damages is the value of the property released by the

bond with interest, and the proper practice is to take judgment for the amount of the damages without reference to the penalty except as to limitation. *Keeler v. Ricker*, 3 Northam. 48.

(g) Of the affidavit.

116. An affidavit in the words of the statute is sufficient to found the jurisdiction; it need not set forth the facts upon which the fraud is based. The omission of the place where the goods were purchased is not fatal, although it is good practice to insert it. *Hall v. Kintz*, 13 C. C. 24.

117. An affidavit which does not charge the alleged fraud in the language of the act, nor set forth facts from which the fraud may be inferred, is insufficient. *Harrisburg Boot & Shoe Co. v. Johnson*, 3 Dist. Rep. 433.

118. An affidavit to support an attachment is sufficient if it sets forth the alleged fraudulent acts in the words of the statute. *Hall v. Walter*, 3 Northam. 17.

119. Where the affidavit charges that the debt was fraudulently contracted, it need not set forth specifically the fraudulent acts of the defendant. *Rubinsky v. Ullman*, 4 Dist. Rep. 126.

120. An affidavit sufficiently states the nature and character of the indebtedness, if it avers that the debt is upon a book account for clothing sold and delivered between two designated dates. *Wilson v. Shapiro*, 12 C. C. 466.

121. Where the affidavit merely averred the insolvency of the defendant at the time of purchasing the goods, and that he had confessed judgment to other creditors, and did not set out any evidence that the goods were obtained by artifice or false pretences, the attachment was dissolved. *Miller v. Shapiro*, 12 C. C. 526.

122. An action at law does not lie by a receiver of a partnership against a member thereof to recover a proportionate part of the money required to pay the firm's indebtedness, when it does not

appear that the partnership accounts have been settled or that the receiver has not assets in his hands sufficient to pay the debts; where the receiver issued an attachment under the act 17 March 1869, upon an affidavit averring that the firm owed debts to a certain amount, that the defendant's proportionate share was a specified sum, and that he refused to pay the same to the receiver; it was held, that, as the affidavit did not aver that the assets in the hands of the receiver were insufficient to pay the debts, it did not set forth sufficient facts in regard to the nature and amount of the indebtedness, and was not sufficient to sustain the attachment. *May v. Pagett*, 2 Dist. Rep. 276.

123. Where the affidavit refers to the caption of the same, the matter contained in the caption will be considered as a part of the affidavit. *Rubinsky v. Ullman*, 4 Dist. Rep. 126.

124. It is a sufficient allegation of an intended fraudulent disposition of property to aver that the debtor is about to dispose of his property by means of a fraudulently confessed judgment and an execution thereon. *Rubinsky v. Ullman*, 4 Dist. Rep. 126.

125. Where the officer who administered the oath omitted by a mere oversight to sign the jurat to the affidavit upon which the attachment issued, the court permitted him to sign it *nunc pro tunc*. *Hart v. Jones*, 6 Kulp 326.

126. Where the affidavit was made before the deputy prothonotary, who omitted to sign the jurat, the court permitted the officer to sign it *nunc pro tunc*. *Simon v. Johnson*, 7 Kulp 166.

127. The amount of the defendant's indebtedness to the plaintiff should be set out specifically in the affidavit for the attachment. *Wells v. Hogan*, 6 Kulp 475.

128. The affidavit may be made by the plaintiff's attorney or by one who signs the bond as attorney in fact for the plaintiff, and whose power of attorney is filed in the case. *Simon v. Johnson*, 7 Kulp 166.

129. Several acts of fraud may be averred in the affidavit conjunctively or cumulatively, but not disjunctively or in the alternative. *Simon v. Johnson*, 7 Kulp 166.

130. An affidavit is insufficient which sets forth that the defendant is indebted to the plaintiff in a certain sum, no part of which has been paid; an averment of fraud may be in the alternative, but not in the disjunctive. *Nesbett v. Tamler*, 2 Lack. Jur. 139; s. c. 4 Del. 523.

131. Where, from the facts alleged in the affidavit, it follows, as a necessary legal result, that the defendant is justly indebted to the plaintiff, the omission of the word "justly" from the affidavit is not fatal. *Simon v. Johnson*, 7 Kulp 166.

132. Where the affidavit is made on information and belief, the plaintiff must state the sources of his information or the facts on which his belief rests, or at least he must state that he expects to be able to prove that which he believes to exist. *Simon v. Johnson*, 7 Kulp 166.

133. An affidavit which avers that the debt is a sum certain or "thereabouts" is fatally defective, unless it be averred that the amount cannot be stated with greater certainty. *Simon v. Johnson*, 7 Kulp 166.

(h) Dissolution.

134. An attachment will not be dissolved because the goods have since been sold under other process against the same defendant; nor because the goods did not belong to the defendant. *Williamson v. Bokropis*, 7 C. C. 270.

135. The defendant may decline to submit to an examination on the ground that he might subject himself to a criminal prosecution. *Brannon v. Ruddy*, 8 C. C. 176.

136. An attachment will be dissolved where the alleged fraudulent misrepresentations were not made with the intention of influencing or inducing the plaintiff to part with his property, and it appears that they were not made by the

defendants or by their authority or with their knowledge. *Lodge v. Rose Valley Mills*, 11 C. C. 667.

137. Where an attachment was issued and the affidavit charged fraud generally and the defendant denied the charge and took a rule to dissolve, the court on application and without affidavit ordered the defendant to produce his books and papers and testify as upon cross-examination upon the call of the plaintiffs for defendant's depositions upon the rule to dissolve, and such deposition need not be taken before a commissioner. *Schwartz v. Atkin*, 12 C. C. 373.

138. An attachment will not be quashed because the inventory of the goods, being a stock of men's and boys' clothing, was not furnished until four days after the service of the writ. *Wilson v. Shapiro*, 12 C. C. 466.

139. Where a motion is made to dissolve the attachment and the affidavit is in the words of the act, the plaintiff will be permitted to take depositions to explain any uncertain or doubtful expressions he may have used in his affidavit. *Harris v. Wood*, 1 Dist. Rep. 83.

140. In Philadelphia county one court will dissolve an attachment which has been issued upon the same allegations as a prior attachment dissolved by another court. *Merritt v. Quigley*, 1 Dist. Rep. 505.

141. The defendant is not estopped from moving to dissolve an attachment by reason of his having filed an answer denying the allegations of fraud. *Harrisburg Boot & Shoe Co. v. Johnson*, 3 Dist. Rep. 433.

142. Where the plaintiff's affidavit is general and the defendant positively denies the averments of fraud, the plaintiff, upon a rule to dissolve, must show by depositions, specific acts of fraud or the fraudulent intent of the defendant. *Wells v. Hogan*, 6 Kulp 475; *Strobel & Wilkens Co. v. Lowenstein*, 6 Kulp 476.

143. Where fraud is alleged, the true rule upon a rule to dissolve is not to take up each item of evidence separately and

determine whether it is of itself sufficient to sustain the charge, but to determine what is the combined effect of all the facts and circumstances. *Simon v. Johnson*, 7 Kulp 166.

144. An attachment will be dissolved where the only proof of fraud is, that the defendant's minor son without the defendant's knowledge made a false statement to gain credit for the defendant. *Hooven Mercantile Co. v. Backley*, 7 Kulp 552.

145. Where the defendant denies by affidavit the allegations of fraud, the burden of proving his case is thrown upon the plaintiff upon a rule to dissolve. *Bailey v. Parker*, 2 Lack. Jur. 73.

146. An attachment will be dissolved unless a clear case of fraud is shown; a few suspicious circumstances are insufficient to prevent the dissolution of the attachment. *Blackburn v. Stoner*, 11 Lanc. 241.

147. Whether another action is pending either at law or in equity is pleadable only in bar or abatement of the suit; the merits of such a plea cannot be determined upon a motion to dissolve an attachment under the act 17 March 1869, in advance of trial. *Meyers v. Rauch*, 4 Northam. 350.

148. Upon a motion to dissolve an attachment the question of fraud is for the court, and the standard for the court is to determine whether, if an issue were framed, there would be sufficient evidence to submit to a jury upon that sole issue. *Meyers v. Rauch*, 4 Northam. 350.

149. Upon a motion to dissolve an attachment, where the confession of an alleged fraudulent judgment by the defendant is one of the acts complained of, the plaintiff has a right to call for examination the defendant and the person in whose favor the alleged fraudulent judgment was confessed. *Sullivan v. Wallace*, 32 W. N. C. 440.

(4) Effect of dissolution.

150. An order dissolving an attachment under the act of 17 March 1869

(Brightly's Purdon 70), is not reviewable by the supreme court in the absence of anything to show an abuse of the discretion of the court below. *Hoppes v. Houtz*, 133 P. S. 34. See *Black v. Oblender*, 15 Atlan. 708.

151. A *certiorari* to the setting aside of an attachment under the act of 17 March 1869 (Brightly's Purdon 70) does not bring up the evidence, and the supreme court cannot pass judgment on the reasons which influenced such a decision. *Black v. Oblender*, 15 Atlan. 708. See *Hoppes v. Houtz*, 133 P. S. 34.

(k) Subsequent proceedings.

152. A warrant of arrest may issue in a suit begun by attachment under the act of 17 March 1869 (Brightly's Purdon 70). *Grieb v. Kuttner*, 135 P. S. 281; s. c. 26 W. N. C. 323.

153. If the defendant take no steps to dissolve the attachment, he cannot, for the first time upon the trial, be permitted to prove that the debt was honestly incurred. *Herman v. Saller*, 25 W. N. C. 408.

154. If an attaching creditor under the act of 17 March 1869 (Brightly's Purdon 70) can show that a previous sheriff's sale of the debtor's property was in fraud of creditors, the court will order the payment of the proceeds of such sale into court for distribution. *Stanley v. Ritter*, 26 W. N. C. 188.

155. Where the plaintiff issued an attachment and the defendant obtained a rule to dissolve, all proceedings to stay, and pending this rule judgment was entered for want of an affidavit of defence, the court refused to strike it off, although the defendant averred that he had a good defence. *Kriebel v. High*, 1 Dist. Rep. 385.

IV. Attachment execution.

(a) When an attachment may issue.

156. A *fiery facias* pending is no bar to the issuance of an attachment execution. *Landis v. Wettig*, 7 Lanc. 283.

157. An attachment execution cannot issue upon the transcript of a justice's judgment more than five years old, without a revival. *Pysher v. Pysher*, 2 Northam. 233.

158. An attachment execution may, under the act 9 May 1889 (Brightly's Purdon 1144), be issued on a justice's transcript of a judgment for one hundred dollars or upwards, although the same be not filed in the common pleas until ten years after the judgment was rendered, and no return of *nulla bona* has been made to the justice. *Miller v. Stone*, 14 C. C. 352.

159. An attachment execution will not lie against a foreign corporation having no legal existence, property or place of business in this state; and this, although the officers may have their private residence here. *Sheehan v. Frederick*, 2 York 10.

160. The act 24 April 1857 (amended by the act 13 May 1889, Brightly's Purdon 1059) does not authorize an attachment execution against an insurance company to be issued from a county other than that in which it has its corporate residence and principal place of business. *Shipton v. Fees*, 10 C. C. 583.

161. An attachment execution cannot be issued against the property of a corporation in the hands of its officers while held by them as such officers merely. *First National Bank of Johnson v. Bristol Iron & Steel Co.*, 12 C. C. 176; s. c. 31 W. N. C. 503.

(b) What may be attached.

162. Goods in a storage warehouse are not subject to attachment execution. The proper proceeding is by *feri facias*. *Cherry v. Nolan*, 25 W. N. C. 132.

163. A creditor who is not present at a meeting of creditors is not bound by an agreement between those present not to bring suit. He can attach a sum of money deposited by the debtor in accordance with such agreement. *Bausman v. Burger*, 135 P. S. 499; s. c. 26 W. N. C. 355.

164. Where a building contract provided that retained percentages should not be paid until the contract should be completed according to the specifications, and before the contract was completed, the contractors abandoned the work and the owners paid all the subsequent wages and supply bill under the supervision of one of the contractors; it was held, that an attachment execution would not lie on the part of a judgment creditor of the contractors to recover from the owners the retained percentages. *American Forcite Powder Mfg. Co. v. Malone*, 166 P. S. 289.

165. Where a stipulation assented to by a member of a beneficial society provides that benefits shall be paid to beneficiaries, only upon execution by them of a release of all claims against a contributor to the benefit fund, the execution of such release becomes a condition precedent to payment, and where such condition is to be performed by a defendant personally it cannot be performed by a judgment creditor of such defendant who has attached the sum which would be payable to the defendant upon his performance of the condition. *Kinsloe v. Davis*, 167 P. S. 519; s. c. 36 W. N. C. 258.

166. The distribution of a decedent's estate among creditors belongs exclusively to the orphans' court; a creditor cannot by an attachment execution on a judgment obtained after the death of a decedent, appropriate to the payment of his debts a chose in action due to the estate of the decedent. *Strouse v. Lawrence*, 160 P. S. 421; reversing s. c. 13 C. C. 131.

167. A legacy is not attachable in the hands of an executor, where it is given on the express condition that it shall not be attached or seized for the debts of the legatee. *Beck's Estate*, 133 P. S. 51; s. c. 25 W. N. C. 440; *Goe's Estate*, 146 P. S. 431.

168. Income ordered by the orphans' court to be paid for the maintenance of the defendant "so as the same should not be assignable, anticipated, nor liable to his debts, contracts or liabilities," is not

subject to attachment in the hands of the trustee, by a creditor of the defendant. *Prentice v. Pleasonton*, 8 Atlan. 842.

169. Where the interest of a grandson was directed to be paid to him semi-annually, by the will of his grandfather; it was *held*, that such interest could be attached for the grandson's debts. *Gruver v. Edinger*, 13 C. C. 307.

170. Where a will directed the executors to invest a balance and pay the interest semi-annually for life to the testator's son, and after his death to divide the principal among all the testator's children; it was *held*, that such interest was liable to attachment by creditors of the son, and that the son could not claim the three hundred dollar exemption out of each payment of less than three hundred dollars as it accrued. *Bremer v. Mohn*, 169 P. S. 91; affirming s. c. 12 Lanc. 98.

171. The income of a separate use trust in the hands of the trustee is not subject to an attachment execution where such income arises during the coverture. *Crowe v. Lippincott*, 38 P. L. J. 433.

172. A conveyance by a grantor of his whole estate upon a spendthrift trust with power of appointment, and in default of appointment with remainder to the grantor's heirs, is fraudulent and void as to creditors, including those who become such subsequent to the conveyance, and the principal and income of the trust are liable to attachment in the hands of the trustee. *Catherwood's Estate*, 29 W. N. C. 344.

173. While a perpetual fire policy remains in full force and effect its withdrawal value in case of cancellation is not attachable in an execution upon a judgment against the holder. *Building Association v. Laib*, 13 C. C. 658; s. c. 2 Dist. Rep. 473.

174. The mortgage papers deposited as security for a debt cannot be attached by the judgment creditors of the mortgagee in the hands of the person with whom the papers have been deposited; the mortgage can only be attached by bringing in

the mortgagor as garnishee. *Taylor v. Huey*, 166 P. S. 518.

175. Where the affairs of a partnership have been settled and an admitted balance is due from one partner to another, such balance is subject to an attachment execution. *Ryon v. Wynkoop*, 148 P. S. 188.

176. An attachment execution will not lie against the proceeds of a pension check which a pensioner deposited with a bank for collection, and which the bank, after collection, placed to the credit of the pensioner. *Reiff v. Mack*, 160 P. S. 265.

177. Money in the hands of a government officer and due the defendant by the United States is not subject to attachment execution. *Raub v. Seaman*, 5 Kulp 398.

178. The claim of a contractor against a city cannot be attached, and this rule prevents the subjection and appropriation of the claim to the claims of creditors of the contractor in a suit in equity; where an insolvent firm of municipal contractors had pledged to secure loans, certain certificates received under a municipal contract, and warrants were about to be issued to pay the certificates; it was *held*, that another creditor could not, by a bill in equity, require that the balance of warrants after the payment of the loan should be paid over to a receiver. *Philadelphia Granite & Blue Stone Co. v. Douglass*, 14 C. C. 234.

179. Stock assigned as collateral cannot be sold under execution against the assignor, and it can only be attached by filing an affidavit and recognizance and summoning the person in whose name it is held as garnishee. *Evans v. Browncombe*, 8 C. C. 456; s. c. 5 Kulp 518.

180. A fund in the hands of a master appointed to make partition is not attachable by a judgment creditor of one of the defendants in the partition suit; and this, though the master has set apart a fund as the property of such defendant. *Hayes v. Mantua Hall & Market Co.*, 35 W. N. C. 198.

181. Where property of a judgment

debtor has been sold in partition by a master, an attachment execution cannot issue against the proceeds of the property in the hands of the master. *Mantua Hall & Market Co. v. Brooks*, 15 C. C. 601.

182. A claim for wages is not attachable even upon a judgment based on a claim for wages. *Frutchev v. Lutz*, 167 P. S. 337.

183. The wages of a non-resident debtor are not liable to attachment execution. *Mattson v. Bryan*, 26 W. N. C. 248; s. c. 8 C. C. 355.

184. Under the act 8 May 1876 (Brightly's Purdon 2077) an attachment execution cannot issue against wages upon a judgment for board, unless it appear that plaintiff was the keeper of a hotel, boarding-house or lodging-house. *McCourt v. Brenaman*, 11 C. C. 645.

185. Under the act 8 May 1876 (Brightly's Purdon 2077); allowing wages to be attached for four weeks' board, a judgment for board cannot be split up and two separate executions issued for four weeks' board. *Hawk v. Rock*, 14 C. C. 490.

186. Under the act 4 March 1887 (Brightly's Purdon 834) an attachment execution founded upon a judgment for wages of labor may issue against wages in the hands of the defendant's employer. *Meiers v. Umla*, 6 Kulp 332.

187. An attachment execution will not be dissolved upon an affidavit that the debt due by the garnishee is salary. *Reed v. Buck*, 32 W. N. C. 204. Contra, *Miller v. Rush*, 25 P. L. J. 72.

188. Where the garnishee in his answer admitted an indebtedness to the defendant, but claimed that it was for wages due, the court dissolved the attachment. *Benedick v. Fake*, 7 York 193.

(c) Of the writ and service.

189. An order adding the name of a stranger as a garnishee, without an alias writ or prior rule, is irregular, and all proceedings against him will be reversed and set aside. *Barnes v. Hays*, 129 P. S. 554.

190. The plaintiff in an attachment execution may add the names of the garnishees to the writ after the same has been tested and issued. *McCambridge v. Barry*, 29 W. N. C. 92.

191. An attachment execution issued by a justice must be made returnable to some certain day and at some certain hour or between two designated hours. *O'Neill v. Roche*, 1 Lack. Jur. 326.

192. An attachment execution is well executed if served in the same manner as a summons. *Mesker v. Frothingham*, 1 Dist. Rep. 120.

193. Upon attaching bank stock of the defendant in the hands of his assignee as collateral, it is not necessary to serve the bank with the attachment. *Geddes v. Geddes*, 7 C. C. 660.

194. Where the garnishee is a corporation of this state having its office outside the county, the writ may be served on the general manager, who is also one of the directors, when he is temporarily within the county. *Reynolds v. Lochiel Iron & Steel Works*, 11 C. C. 33; s. c. 29 W. N. C. 478.

195. Under the act 20 June 1883, amending the act 4 April 1873 (Brightly's Purdon 1060), an attachment execution may be served on the state agent of a foreign insurance company as garnishee, whether the agent has his office in the county in which the writ issues or not. The act of 1883 is not unconstitutional as special legislation. *Kennedy v. Agricultural Ins. Co.*, 165 P. S. 179.

196. After a foreign corporation which has been served with a writ of attachment execution as garnishee enters a general appearance, it cannot avail itself of an insufficiency in the service of the writ. *Commonwealth Title Ins. & Trust Co. v. Brown*, 11 C. C. 542.

197. An attachment execution against a foreign insurance company should be served upon the agent designated to receive process for the company; a service upon a local agent to effect insurance, is invalid, but such a defective service was held to be waived by an appearance.

Where the garnishee appears and acknowledges an indebtedness to the defendant, neither the garnishee or the defendant nor subsequent attaching creditors can set up a defective service. *Sonnenman v. Gable*, 7 York 107.

198. Where the garnishee appears after the service and answers that he is indebted to the judgment defendant, neither the garnishee nor the defendant can afterwards set up defects in the service of the attachment against the entry of judgment against the garnishee. *Wisecarver v. Braden*, 146 P. S. 42.

199. Objection should be made to the service either before or at the time of filing of answers to the interrogatories; a return of service by leaving a copy of the writ with an adult member of the family, with which the garnishee resides, is sufficient to bind the garnishee; and this, although it appears that the landlady of the garnishee upon whom the service was made was a defendant in the cause. *Kohler v. Thorn*, 154 P. S. 180.

200. An attachment execution may be served on garnishees, in whose possession the property of the defendant is supposed to be; and this, although such garnishees are not named in the writ. *Judge v. Reinhart*, 3 Dist. Rep. 202.

(d) Rule to quash.

201. Where an attachment execution was issued upon a conditional judgment, and the only breach of the bond averred was, that the defendant had failed to pay certain overdue premiums, the attachment was properly set aside upon payment by the defendant of the overdue premiums and costs. *Scott v. Phillips*, 140 P. S. 51.

202. Upon a motion to dissolve an attachment where the facts alleged are not admitted, the court will not summarily pass upon them but will refuse to dissolve; the proper method is to plead *nulla bona*, and put the cause at issue. *Smith v. Hartman*, 5 York 55.

203. Where a legacy is attached, and the defendant himself is the executor of

the will under which he is entitled to the legacy, and, as such executor, he is summoned as garnishee; the attachment will not be dissolved because the executor and defendant are the same person. *Union National Bank v. Fagan*, 34 W. N. C. 20; *Fagan's Estate*, 34 W. N. C. 66.

204. Where an attachment execution is issued on a judgment more than five years old, it will be set aside, unless it be accompanied with a *scire facias* to revive as provided by the act 19 May 1887 (Brightly's Purdon, 829). *Sweeting v. Wanamaker*, 36 W. N. C. 279; s. c. 4 Dist. Rep. 246.

(e) Payment into court.

205. If a judgment be attached by a creditor of the plaintiff, proceedings on the judgment will not be stayed, but the proceeds thereof will be ruled into court. *Durham v. Walsh*, 7 Lanc. 30.

206. The payment into court by the garnishee is a good defence to a suit against him by the defendant in the execution. *Beatty v. Lehigh Valley Railroad Co.*, 134 P. S. 294; s. c. 26 W. N. C. 118.

207. Where a defendant in attachment execution appears at the hearing before a justice and claims the benefit of the exemption law and the justice disallows the claim and enters judgment against the garnishee, from which judgment the defendant takes no appeal, he cannot afterwards question the validity of the judgment by a rule to show cause why the money paid into court by the garnishee should not be withdrawn by the defendant. *Boland v. Spitz*, 153 P. S. 590.

208. Where a garnishee, by the allowance of the court, pays the money into court, he is thenceforth discharged from further responsibility upon the attachment, and it is error, in the further contest with regard to the fund, to involve the garnishee in it. *Rothschild v. Morrison*, 2 Lack. Jur. 183; s. c. 4 Del. 573.

209. Where the garnishee receives notice from a subsequent judgment creditor, who also claims the fund, that the judg-

ment on which the attachment issued is void through fraud, the garnishee will be allowed to pay the money into court, and a rule against him for judgment will be discharged. *Stockham v. Pancoast*, 1 Dist. Rep. 135.

210. Where the garnishee admitted an amount in his possession, but stated that notice had been received that the defendant had made an assignment for creditors and the garnishee disclaimed any interest in the subject-matter, the court permitted it to pay the money into court with leave to interplead. *Rodgers v. Santa Claus Co.*, 27 W. N. C. 574.

(g) Issue.

211. Where the garnishee in an attachment execution suggested in his answers that the money in his hands was claimed by third parties, and at the instance of the plaintiff and the claimant he paid the money into court, an interpleader was awarded to determine the ownership of the fund, upon a rule taken by the claimant; and this, though the garnishee made no application for the interpleader. *Stern v. Jones*, 7 Kulp 19.

212. Where a fund in the hands of a garnishee is claimed by two parties, an interpleader will be granted on the petition of the garnishee to try the title to the fund. *Kistler v. Thompson*, 3 Lack. Jur. 341.

(h) Of the garnishee.

213. The garnishee cannot relieve himself from liability by conveying to another the land upon which the debt attached is also a lien. *Stover v. Stover*, 6 C. C. 614.

214. Garnishees are not liable to attachment creditors for the price of printing done by the defendant, at the instance of the sheriff, for the garnishees whilst the defendant's plant was in the hands of the sheriff on other executions; the garnishee having paid the price of the work to the sheriff, who had distributed

it to the other execution creditors. *Ditman v. Buist*, 125 P. S. 609.

215. It is the duty of garnishees to withhold during the pendency of attachment proceedings, the moneys of the defendant which come into their hands. *Bremer v. Mohn*, 169 P. S. 91.

216. Where, in a judgment against a contractor, his employer was summoned as garnishee, and at the time of the service of the attachment, an amount in excess of the judgment was due to the contractor subject to a claim of forfeiture of deferred payments, and after such service the garnishee released its claim of forfeiture and paid the money to the contractor and accepted a bond of indemnity against the attachment; it was held, that the garnishee was liable for the amount of the judgment. *Humphrey v. O'Donnell*, 165 P. S. 411.

217. A garnishee in an attachment execution must, in good faith to the owner, contest every inch of the ground; otherwise he will not be discharged from liability for the debt. *Schempp v. Fry*, 165 P. S. 510.

(i) Interrogatories and answers.

218. If the garnishee set up in his answers merely a broad denial of his liability, he will be ordered to file more specific answers. *Case v. McDaniel*, 7 C. C. 192.

219. A garnishee in attachment execution who fails to make full, direct and true answers to the interrogatories, is estopped from afterwards, in a collateral proceeding, setting up a state of facts different from that disclosed in his answers. *Baker's Appeal*, 3 Atlan. 766.

220. The answer of a garnishee, who is also the assignee of a judgment from the defendant, that the assignment was made to him as collateral security for a note, is sufficient. If uncontradicted by other evidence, it will be taken as true. *First National Bank v. Ladd*, 126 P. S. 188.

221. Where the answers of the gar-

nishee are deemed insufficient, the proper practice is to file exceptions, demur or go to issue, and not to enter a rule for more specific answers. *Grauer v. Watson*, 3 Dist. Rep. 641.

222. Where a plaintiff takes judgment against a garnishee on his answers, he cannot afterwards require answers to additional interrogatories. *Sweeting v. Wanamaker*, 36 W. N. C. 279; s. c. 4 Dist. Rep. 245.

223. Upon an attachment execution against a bank as garnishee, where the answer set forth that the defendant had a deposit with the garnishee arising from a discount previous to the attachment which was put to the defendant's credit, and that the discounted note had been re-discounted by another bank for the garnishee; it was *held*, that the answer was insufficient, and that although the defendant was insolvent, the bank had no authority to withhold, by way of equitable estoppel, the deposit to meet its liability on the note. *Newbold v. Patrick*, 42 P. L. J. 299.

224. A garnishee is entitled to distinct notice of any assignment of the fund, and such notice should be accompanied by the evidence of transfer; in the absence of such notice, he is bound to answer that he has the funds of the defendant. *Miner v. Kosek* 7 Kulp 72.

(k) Trial.

225. On the trial of an attachment execution where the defendant set up a transfer of his claim against the garnishee to a third person, the *bona fides* of such transfer was properly left to the jury. *King v. Beeson*, 8 Atlan. 198.

226. If the garnishee sets up in his answers an assignment from the defendant of a judgment, subject to a previous assignment to a third person of part thereof, and the latter be made a party defendant on the record, the facts concerning the first assignment can be tried without a separate issue. *First National Bank v. Ladd*, 126 P. S. 188.

227. If unpaid purchase money be attached, the plaintiff is estopped from proving that the contract of sale was invalid. *Sayers v. Kent*, 1 Atlan. 442; s. c. 3 Cent. 610.

228. The plaintiff in an attachment execution having attempted to prove a specific contract between the defendant and garnishee, is estopped from denying the validity of the contract as fraudulent against creditors. *Ibid*.

229. The garnishee in attachment execution cannot set off against the funds in his hands, a claim against the defendant, which, at the date of the service of the attachment, was not ripe for action. *Knight v. Booz*, 5 Montg. 33.

230. An execution attachment is not a civil suit or action within sec. 8 of the act 16 June 1836 (Brightly's Purdon 125), authorizing a rule of reference to arbitrators. *Stranahan v. Stranahan*, 146 P. S. 44.

231. Where a mortgage has been assigned by the two owners thereof (one of whom was the defendant in the attachment execution) to the garnishee, and one of the two assignors (the defendant) testified that the assignment was made in fraud of creditors, which was contradicted by the other assignor and the garnishee, who both testified to a full consideration for the assignment; it was *held*, that the court properly instructed the jury to find for the garnishees. *Skiles v. Dickson*, 147 P. S. 117.

232. Upon the trial of an attachment execution, where the plaintiff claims that the defendant owes the garnishee money, and it appears that the garnishee held a judgment against the defendant which had been opened, and upon the trial of which a judgment had been entered in favor of defendant, and upon which trial the defendant had claimed that the note then in suit had never represented a real debt; it was *held*, that declarations written or oral of either the defendant or the garnishee, which tended to show that the judgment did represent a real debt, were admissible in favor of the plaintiff.

Sommer v. Gilmore, 160 P. S. 129. See *Palmer v. Gilmore*, 148 P. S. 48.

233. In an attachment execution where the garnishees claimed that the fund in their hands was the proceeds of lands belonging to the son of the defendant and deposited by the defendant under a power of attorney from his son, and there was evidence tending to show that the title to the property was put in the son under circumstances tending to indicate an intent to cover up the title; it was *held*, that the case was for the jury. *First National Bank of Brookville v. Cathers*, 164 P. S. 343.

234. Where a first execution creditor purchased the defendant's horses and wagons at a sheriff's sale, and after the sale employed the defendant at a certain salary per week to carry on the same business, and he subsequently sold the business for more than the amount of his judgment, and an attachment execution was issued against him by another creditor of the defendant claiming that he had agreed to transfer the property back to the defendant after he had been paid his debt; it was *held*, that the evidence was insufficient to sustain such alleged agreement. *Dowdall v. Wisner*, 167 P. S. 475.

(D) Judgment.

235. In an attachment against executors as garnishees of an annuitant, where the answers admit an indebtedness for a sum certain, judgment will be entered against the garnishees, although they have not settled the estate, which, however, is considered solvent, or set apart any funds for the payment of the annuity. *Rhodes v. Kemble*, 12 C. C. 470.

236. Where an attachment execution was issued upon a judgment against Chr. Alten, whose correct name was Christian Alten, and the copy served by the sheriff on the bank as garnishee gave the defendant's name as "Charles," and the bank in its answer admitted having held a certain sum of money on deposit

by Christian Alten, but alleged that it had subsequently paid it out on checks; it was *held*, that, as it did not appear that "Chr." stood for Christian, the rule for judgment against the garnishee upon its answer would have to be discharged. *Burr v. Alten*, 2 Lack. Jur. 178.

237. For the form of a judgment against a garnishee building association upon its admission that the defendant was the owner of stock therein, see *Zurflich v. Sossong*, 3 Lack. Jur. 7. See also *Davidson v. Mullaly*, 3 Lack. Jur. 181.

238. Judgment will not be entered against the garnishee in the absence of an absolute admission of indebtedness. *Kistler v. Thompson*, 3 Lack. Jur. 341. See *First National Bank of Lansdale v. Beaver*, 3 Lack. Jur. 403.

239. Where a garnishee corporation admits that stock in the company stands on its books in the defendant's name, judgment will be entered against the garnishee and execution issued; the corporation has no lien on the stock for a debt due it by a stockholder, and the company cannot set up that the defendant was indebted to it, and ask that the plaintiff's execution extend to only so much of the stock as remains after the garnishee has taken out the amount of its claim. *Lanahan v. Collins*, 28 W. N. C. 287.

240. Where the plaintiff does not take judgment for the amount admitted in the garnishee's answer, but goes to trial against the garnishee, the garnishee is entitled to a verdict, unless the jury find in his hands a larger sum than was admitted in the answer. *Erbs v. Weimer*, 32 W. N. C. 204.

241. A judgment generally against the garnishee for want of an appearance is irregular. *Neilson v. Confer*, 7 Lanc. 91.

242. Where interrogatories were filed in pursuance of a rule to file them, but no copy was served on the opposite party; it was *held*, that a judgment of non pros. could not be properly entered, and would be stricken off. *Herst v. Beckhous*, 12 C. C. 582.

243. Where the garnishee fails to ap-

pear after service of the attachment with clause of summons, but no special attachment of goods or credits, the plaintiff in an attachment execution is entitled to a judgment by default, but the plaintiff cannot liquidate it or have execution without first by writ of inquiry or before the prothonotary, as the rules may prescribe, establishing his claim by evidence of the garnishee's possession of the goods or credits of the defendant and the measure of his damages is the value of the same. Where the attachment is levied upon specific goods, the default may be taken as an admission of the possession of such goods, but the plaintiff must establish their value; but if the attachment is of money or a debt, and the amount appear in the sheriff's return, no further evidence or inquiry is necessary. *Longwell v. Hartwell*, 164 P. S. 533.

244. The proper form of a judgment against a garnishee is for plaintiff against the garnishee, and that the garnishee has in his hands certain goods, effects or credits, to wit, of the value , or that the garnishee is indebted to the defendant in the sum of . The plaintiff's measure of damages is the value of the goods attached not exceeding the amount of his judgment, interest and costs against the defendant. The single exception is where the garnishee neglects or refuses to answer the interrogatories; in such case, under the act 13 June 1836, sec. 57 (Brightly's Purdon 933), the judgment against him is, that he has goods or effects of the defendant sufficient to satisfy the plaintiff's demand. *Longwell v. Hartwell*, 164 P. S. 533.

245. A judgment against a garnishee will not be opened upon the application of a third party who gave notice to the garnishee that the money in its hands belonged to him and not to the defendant in the execution. *Shultz v. Hoffman*, 13 C. C. 90.

(m) Counsel fees and costs.

246. The garnishee is not entitled to a counsel fee under the act of 11 June

1885 (Brightly's Purdon 838), where the defendant claims all the property in his hands under the exemption law. *Wengert v. Bowers*, 8 C. C. 292; *Freeman v. Wanner*, 5 Montg. 81.

247. Where a garnishee in attachment execution denied having anything in his hands and the plaintiff filed a bill of discovery; it was held, that in taxing the garnishee's costs, he was entitled to be allowed the sum paid by him for printing his answer to the bill of discovery. *Mills v. McLoughlin*, 27 W. N. C. 573.

248. Where the amount admitted by the garnishee is substantially greater than the amount of the plaintiff's claim, the court will not tax a garnishee's counsel fee. *Getz v. Smith*, 29 W. N. C. 459. *Juhnson v. Smith*, 29 W. N. C. 477.

249. Where an attachment execution was issued by a justice and the garnishee took an appeal; it was held, that the garnishee was not entitled to have a garnishee fee taxed as part of the costs under the act 29 April 1891 (Brightly's Purdon 839); such an attachment is not an attachment execution issued out of a court of record. *Deervester v. Hook*, 9 Lanc. 247.

250. If the garnishee in attachment execution have no funds, the plaintiff alone is liable for the costs. *Warniche v. Seamen*, 5 Kulp 428.

251. Where a judgment is entered against the garnishee upon his answer admitting a certain sum to be due, the plaintiff is not entitled to costs against the garnishee. *Geist v. Hartman*, 11 C. C. 40; s. c. 29 W. N. C. 477.

(n) Exemption.

252. On a judgment for manual labor, under the act of 4 March 1887 (Brightly's Purdon 834), salary due the defendant for clerical services is not entitled to exemption on attachment execution. *Wilson v. Hasley*, 7 Lanc. 98.

253. Where a judgment for board has been regularly obtained under the act 8 May 1876 (Brightly's Purdon 2077) and

wages have been regularly attached under such judgment, the defendant is not entitled to claim his exemption under the act 4 April 1889 (Brightly's Purdon 834). *Weisman v. Weisman*, 133 P. S. 89; *McCarty v. Dougherty*, 16 C. C. 86; s. c. 1 Mag. & Con. 39; *Dillon v. Treverton*, 16 C. C. 89.

254. Where an attachment execution has been served upon the debtor, his claim for the exemption must be made during the term to which the writ is returnable. *Fallon v. Keller*, 1 Lack. L. N. 158; *Uhrich v. Gockley*, 2 Dist. Rep. 350.

See EXECUTION, VII. (e).

(o) Effect of the attachment.

255. An attaching creditor may pursue a fund from whomsoever it may be owing; so, the defendant's assignment will avail nothing against the attachment, though the real liability to pay the debt has devolved upon the garnishee's vendee. *Stover v. Stover*, 6 C. C. 614.

256. An attaching creditor is not liable (in an action for the malicious abuse of process) for the depreciation of stock in the name of his debtor's wife and attached by him as his debtor's property, in which suit judgment had gone against him. *Sargent v. Fuller*, 132 P. S. 127; s. c. 25 W. N. C. 366.

257. Where an attachment execution is served upon a person as garnishee, it binds not only the moneys due the defendant by him, but also moneys due by a partnership of which he is a member. *Judge v. Reinhart*, 3 Dist. Rep. 202.

258. The drawing of a check against a deposit is not such an appropriation of the fund in the hands of the bank as will defeat an attachment execution served on the bank before the presentation of the check. *Roberts v. Boyle*, 8 York 13.

259. Upon the distribution of a decedent's estate the creditor of an heir who has attached his share or acquired a lien on his undivided interest in the real

estate by the entry of a judgment after the decedent's death, can take nothing but what remains of the share after payment of the amount he owed the decedent. *Kunkle's Estate*, 6 York 123.

260. Where a legacy is given to a debtor, an attaching creditor can rise to no higher position than that occupied by the legatee, and where the legatee, by reason of the debt, is entitled to no share of the estate, an attaching creditor takes nothing. *Schue's Estate*, 7 York 178.

261. Where an attachment execution was served upon a tenant as garnishee, and at the time of service nothing was due to the landlord, and the term ended during the pendency of the attachment, when the tenant rented the premises for another year upon the condition that the rent should be paid in advance, which was done; it was held, that the attachment did not bind the rent paid for the new term. *Bowman v. Stephens*, 8 Montg. 27.

262. The service of a writ of attachment execution will bind the property in the hands of the garnishee from the time of service, although the writ be not served on the defendant until after an assignment by him to the garnishee of the stock attached. *National Bank of Spring City v. National Bank of Pottstown*, 11 Montg. 64.

263. Where A and his wife conveyed land to B subject to an annuity to the grantors, and the principal after their death to their heirs, of whom B was one, and the land was sold under execution to C, who conveyed it to D, and upon the death of A, who survived his wife, an attachment execution was issued against B including D as garnishee, to recover B's share of the principal; it was held, that B's right to any part of the principal was merged in his estate and passed to the sheriff's vendee and from him to D, and there was no indebtedness of D to B. *Smith v. Hartman*, 5 York 55.

264. An attachment execution served on a garnishee in Pennsylvania cannot bind defendant's goods in the hands of

the garnishee in another state, but it will, if the goods have been sold, bind the proceeds in the garnishee's possession. *Merchants' & Manufacturers' Nat. Bank v. Baeder Glue Co.*, 164 P. S. 1.

265. Where receivers had been appointed in the District of Columbia for an insolvent Virginia corporation; it was *held*, that the courts of this State would not give such effect to the appointment as would enable it to prevail over contemporaneous and subsequent attachment executions by Pennsylvania creditors. *Smith v. Fidelity Building Loan and Investment Ass'n*, 4 Dist. Rep. 317.

266. Where goods deposited with a creditor as collateral security for a debt have been sold, the debtor cannot collusively waive his right to an account from the creditor, so as to defeat the right of his attaching creditor to require an account from the creditor of the proceeds of the sale. *Merchants' and Manufacturers' Nat. Bank v. Baeder Glue Co.*, 164 P. S. 1.

267. Property which from its nature may be a burden rather than a benefit to the estate, does not pass to an assignee in bankruptcy without a distinct acceptance by him; where the bankrupt was the owner of an interest in a telegraph line which was in litigation and the assignee asserted no ownership and took no part in the suit; it was *held*, that he could not, upon the successful termination of the suit, claim the resulting fund; especially as against an attaching creditor of the bankrupt on a judgment obtained for a debt incurred subsequent to the bankruptcy. *Beall v. Dushane*, 149 P. S. 439.

268. The failure of an assignee for creditors to include in his inventory a remainder interest of the assignor in the principal of a dower, was *held* not to operate as a waiver of his claim, nor as a reinvestiture in the assignor so as to enable a judgment creditor, after the death of the widow, to attach such interest in the hands of the owner of the land. *Bloom v. Miller*, 11 C. C. 620.

ATTACHMENT OF VESSELS.

See SHIPPING.

ATTORNEY GENERAL.

1. On an appeal from a tax settlement, the attorney general's commissions go into the state treasury as a penalty for tardiness in the payment; where a county treasurer embezzled personal property tax and a settlement was made against the county, without the county officers knowing of the settlement, it was *held*, that the attorney general's commissions should not be charged against the county. *Comm'th v. Philadelphia County*, 157 P. S. 531, 550, 558.

2. Where the state personal property tax is embezzled and a settlement is made against the county, and the neglect of the commonwealth's officers to enforce quarterly returns and payments relates only to a single quarter of the year, and the county officers have had ample opportunity for investigation, the attorney general's commissions may be imposed upon the county. *Comm'th v. Philadelphia County*, 157 P. S. 550.

3. The right of the commonwealth to a tax cannot be lost by the neglect or unfaithfulness of her agents, but this rule applies only to the tax and not to the penalties; where a city collected the tax on loans and paid it over to its treasurer, and for sixteen months afterwards not a quarterly return or payment was requested or exacted by the commonwealth's officers; it was *held*, that interest on the tax at twelve per cent should be lowered to six per cent, and that the fees of the attorney general should be stricken off. *Comm'th v. Philadelphia County*, 157 P. S. 558.

4. Where one water company seeks to condemn the property of another company on the ground that the charter of the other corporation is forfeited by non user, the proceedings must be conducted under the act 16 June 1883, sec. 5 (Brightly's Purdon 411), by the attorney general; such a question cannot be raised upon a

petition for leave to file a bond, but the court will hold under advisement the application to file a bond until the proceedings at the instance of the attorney general are finally disposed of. *Lebanon Water Co.*, 9 C. C. 589.

ATTORNEYS.

See ASSIGNMENT: ATTACHMENT: EVIDENCE, XLVII.: JUDGMENT, I.: LIMITATION: MALICIOUS PROSECUTION: POWERS OF ATTORNEY: PRACTICE, II., XXXIX.

- I. Admission of attorneys.
- II. Removal and suspension.
- III. Duties of attorneys.
- IV. Authority of attorneys.
- V. Responsibilities of attorneys.
- VI. Lien of attorneys.
- VII. Compensation of attorneys.
- VIII. Advice of counsel.

I. Admission of attorneys.

1. The common pleas of Cumberland county permitted a woman to be registered as a student at law. *Kast's Case*, 14 C. C. 432.
2. A female may be admitted to practise in Montgomery county as an attorney at law. *In re Richardson*, 10 Montg. 32.
3. The crier is allowed by law to receive one dollar for each attorney admitted to practise. *In re Court Officers*, 3 Dist. Rep. 196.

II. Removal and suspension.

4. An attorney will be disbarred for intentionally presenting in his paper-book in the supreme court the docket entries of the court below in an altered or garbled form; otherwise, if the misstatement be not made with an intent to mislead the court. *In re Van Horn*, 135 P. S. 110; s. c. 26 W. N. C. 40.
5. Abstracting from the files in the prothonotary's office a receipt attached to a *feri facias*, is such professional mis-

conduct as warrants the suspension of an attorney from practice; and this, though there be no proof of a criminal intent. *In re Blank*, 1 Cent. 910.

6. An attorney was suspended from practice for six months for contempt of court in saying in open court that his client was refused the privilege of entering bail after conviction, because he had no "political pull." *In re Logue, Public Ledger*, Oct. 25, 1890.

7. A decree of disbarment executes itself and a recognizance on a writ of error, to obtain a *supersedeas*, is a nullity. *Comm'th v. Serfass*, 1 Northam. 317.

8. An attorney who proclaims in a public place with intent to stir up riot and disorder, that which he knows not to be the law, may be disbarred; in this case, however, the court accepted the attorney's explanation of what he really said, and discharged the rule. *Jones's Case*, 12 C. C. 229.

9. The subject of disbarment of attorneys is considered in a note to *In re Gates*, 2 Atlan. 215.

III. Duties of attorneys.

10. The mere entry of a judgment by an attorney at law imposes no duty on him either to notify his client or to revive the judgment when its lien is about to expire. *Cook v. Foster*, 5 Cent. 256.
11. As to the misconduct of an attorney in the argument of a case to the jury, see a brief of authorities in note to *Bullard v. Boston & Maine Railroad Co.*, 5 Atlan. 845.

IV. Authority of attorneys.

12. Two of three members of a firm may bring suit in the firm name (and give a sufficient warrant of attorney therefor) upon a contract made by the firm, to collect what is alleged to be due it. *Clarke v. Slate Valley Railroad Co.*, 136 P. S. 408; s. c. 26 W. N. C. 541.
13. If judgment be entered in ejectment in favor of plaintiff, to be released

on payment of a sum certain within a specified time, the plaintiff's counsel has no power to extend the time of payment without express authority from the plaintiff. *Beatty v. Hamilton*, 127 P. S. 71.

14. The plaintiff's attorney at a sheriff's sale having reached the limit of bid authorized by his client, is at liberty to make with the purchaser such arrangement as he thinks best for his client. *Bartolet v. Saylor*, 12 Atlan. 854; s. c. 11 Cent. 787.

15. To a *scire facias* to revive a judgment it is a good defence that payment was made by defendant's brother to an attorney who was associated with the plaintiff's attorney of record; and this, though a previous assignment to the brother and a satisfaction entered by him had been stricken off. *Phillips v. Beatty*, 135 P. S. 431.

16. An attorney cannot compromise a suit without the authority of his client. *Luzerne Building Association v. People's Saving Bank*, 6 Kulp 92.

17. An attorney has no general authority to compromise his client's cause, and if he does so without his client's consent, his client will only be bound by his subsequent ratification or the receipt of the money; but where a claim was transmitted by New York attorneys to their correspondent in Philadelphia for collection, and the latter, by the authority of the New York attorneys, assigned the judgment to the defendant's attorney for a money consideration, who entered satisfaction thereon, and the money was transmitted to the New York attorneys; it was held, that the authority of the New York attorney was general, and that the compromise was valid and binding upon the plaintiffs, and the court refused to set aside the assignment and satisfaction. *Schroeder v. Gillespie*, 2 Dist. Rep. 221.

18. After judgment has been obtained, the plaintiff's attorney may accept the money for his client and give a receipt for it, but he cannot assign it to another or release lands bound by it; he cannot compromise the claim and receive less than is due, and a satisfaction entered

by him without full payment or authority or ratification by his client will be stricken off. *Ely v. Lamb*, 10 C. C. 209.

19. An attorney at law who has been employed to bring suit has an implied authority to give a bond of indemnity to a constable in his client's name. *Swartz v. Morgan*, 163 P. S. 195.

20. An attorney at law has no implied authority to assign his client's judgment in consideration of the cancellation of his own individual obligation. *Bosler v. Seagrigh*, 149 P. S. 241.

21. An attorney at law has no authority as such to receive the payment of the principal of a mortgage and enter satisfaction thereon; to authorize him to do so, express authority must be shown, and in the absence of such express authority, his possession of the papers is an indispensable evidence of his authority; that the attorney had been usually employed by the lender to receive moneys, or had received the principal of mortgages on other occasions, was held not to constitute a sufficient authority to receive the principal of a particular mortgage where no express authority was shown. *Bryant v. Hamlin*, 3 Dist. Rep. 385.

22. Where the attorney for a judgment debtor contracted with the plaintiff as to the application of funds to be derived from the private sale of defendant's lands, and such agreement showed no authority to said attorney to receive the money on the plaintiff's behalf; it was held, that the fact that the plaintiff knew that the attorney was to receive the proceeds of such sale, did not make the latter the plaintiff's attorney or operate as a ratification of his acts. *Kephart v. Zeek*, 151 P. S. 423.

23. An offer to show that the solicitor of a railroad company lessor had control of its legal business, is not sufficient proof of his authority to accept the surrender of a lease. *Jamestown & Franklin R. R. Co. v. Egbert*, 152 P. S. 53.

24. Where an agreement is entered into by counsel that a judgment upon a mechanic's lien be amended so as to change the first name of the wife, one of

the defendants, and that the judgment be stricken off, and the defendants permitted to file an affidavit of defence, such an agreement cannot afterwards be repudiated by the wife. *Jobe v. Hunter*, 165 P. S. 5.

25. Where an attorney at law accepts securities instead of money in satisfaction of a judgment, his client must either ratify or repudiate; he cannot do both; if he acquiesces in the satisfaction and proceeds to enforce collection of the securities received, this is a ratification and the satisfaction will not be stricken off. *Whitesell v. Peck*, 165 P. S. 571.

26. A city solicitor has no authority to begin a suit on behalf of a city by virtue of the power of his office nor under the authority of the highway committee; where, however, he has filed a bill without authority the court will, in a proper case, hold the bill until the city councils have an opportunity to ratify the suit. *Lebanon v. Lebanon & Annville Street Ry. Co.*, 1 Dist. Rep. 563.

27. Where a defendant had not authorized an attorney to enter an appearance for him, but he had actual knowledge that service had been accepted by the attorney and that judgment had been entered by default; it was held, that he would not be permitted after the lapse of ten years to disavow the action of the attorney and have the judgment opened. *Lytle v. Forrest*, 4 Dist. Rep. 292.

28. Where an attorney at law was employed to prosecute an appeal to the supreme court and collect all moneys due the plaintiff, the payment to such attorney is a proper payment. *Lehr's Estate*, 3 York 80.

29. A rule upon plaintiff's counsel to file his warrant of attorney will be discharged on such warrant being filed; whether a subsequent power by plaintiff to defendant's counsel to discontinue the suit amounted to a revocation of the first power was not decided. *Levey v. Norton*, 3 Northam. 66.

30. A *ieri facias* will not be set aside upon the application of subsequent lien

creditor's on the ground that the writ was issued on the præcipe of an attorney at law not admitted to practise in the county in which it was issued. *Hooven Mercantile Co. v. Morgan*, 15 C. C. 567.

V. Responsibilities of attorneys.

31. An attorney cannot buy in his client's land at a treasurer's sale and hold the same as his own. *Elliott v. Tyler*, 5 Cent. 543.

32. A compromise made by an attorney for his client's benefit cannot be so manipulated by the former as to inure to his advantage at his client's expense. *Third National Bank v. Hunsicker*, 8 C. C. 635; s. c. 6 Mont. 73.

33. Where an attorney at law receives moneys from time to time for investment and enters their receipt and also his payments to the client in a continuous book account, the statute of limitations has no application to such account while it continues running and unsettled. *McCain v. Peart*, 145 P. S. 516.

34. Where an attorney is employed to take possession of a number of properties and to rent them until sold, to make sale of them and to collect all rents and purchase money and to pay taxes and expenses out of the moneys so received, and he dies before completing his engagement, the statute of limitations runs against his liability to account only from his death. *Johnston v. McCain*, 145 P. S. 531.

35. In account render by the principal against the executor of an attorney, a statement of the attorney's accounts relating to his client's business in his own handwriting is admissible for the plaintiff, and it need not be shown to have been communicated by the attorney to the plaintiff or his agent. *Johnston v. McCain*, 145 P. S. 531.

36. Where a person is both the attorney and surety of an administrator, he is amenable to the jurisdiction of the orphans' court, and if he has possession of the property of the intestate, a decree may be entered against him personally

for the amount in his possession. *Watts's Estate*, 158 P. S. 1.

37. An attorney at law was held liable for failure to collect a loan secured by bond and mortgage on several tracts of land where there was evidence that he was furnished with the reference to the mortgage containing a full list of the tracts of land and the warrantee names, that before the whole debt was collected the lands were sold at a tax sale at a price insufficient to cover the mortgage, and it appeared that the attorney was present at the tax sale and that the lands had been advertised by the warrantee names in a number of different newspapers of the county. *Waln v. Beaver*, 161 P. S. 605.

38. In an action on a promissory note executed by the general manager of a firm, who was also an attorney at law, where it appeared that he was also the attorney of the payee for whom he had been authorized to make the investment, and it also appeared that after his death the note was found in an envelope endorsed with the name of the payee, and it further appeared that two days after he received plaintiff's check he had deposited it to his individual account as attorney, and that he paid the interest on the note quarterly; it was held, that the questions of the delivery of the note and whether or not the money was borrowed in good faith for the firm were for the jury. *Lerch v. Bard*, 162 P. S. 307.

VI. Lien of attorneys.

39. An attorney, who attends to the business, which produces a fund in court and renders valuable services thereto, is entitled to compensation out of the fund. *Spencer's Appeal*, 9 Atlan. 523.

40. An attorney is entitled to be first paid out of a fund which is in a large measure the result of his individual labor and skill. *Atkinson's Appeal*, 11 Atlan. 239.

41. Where sales of real estate were set aside on petition of heirs and finally

brought an increased price, a proportion of the counsel fees of the petitioners was properly charged against the fund realized. *Dundas's Appeal*, 12 Atlan. 485; affirming *Dundas's Estate*, 43 L. I. 16, 194.

42. An attorney who issues execution and is subsequently, but before distribution, relieved, has no lien for his fees upon the fund awarded his client. *Uhlenback v. Kiefer*, 6 Montg. 52.

43. An attorney for the creditor of a decedent's estate who, without being requested by the administrator, assists the counsel for the administrator in the trial of the case, is not entitled to be paid out of the estate. *Moore's Estate*, 8 C. C. 447.

44. Upon the distribution of a fund in court, made on execution, the fees of the plaintiff's attorney are not entitled to be paid out of the fund. *Philadelphia & Reading Railroad Co.'s Appeal*, 3 Atlan. 838.

45. A debtor in failing circumstances may prefer his creditors, by a confession of judgment, as he sees fit. In giving several judgments to his attorney to be entered up he may prefer his attorney's judgment to the others. *Harris's Appeal*, 5 Cent. 553.

46. Where an attorney for the plaintiff has an irrevocable power of attorney to collect for a contingent fee, and the defendant, with actual or constructive notice of such agreement, induces the plaintiff to revoke the power and to enter satisfaction, the court will strike off satisfaction so far as it affects the interest of the attorney. *Pankake v. Ackerman*, 4 Del. 38; s. c. 6 Lanc. 225.

VII. Compensation of attorneys.

47. An attorney's skill in avoiding litigation in complicated estates is as much a subject of compensation as final success. *McLean's Estate*, 1 Northum. 221.

48. The supreme court sustained an allowance by an administrator to his

attorney of a contingent fee of one-half of the amount collected. *Mumma's Appeal*, 127 P. S. 474.

49. Where a client has a claim against the government to enforce which a legislative mandate is required and his agreement with his attorney is for the payment of a contingent percentage of the amount received, and the principal service contemplated and performed is in the procurement of the necessary legislation, the contract is void as against public policy. *Spalding v. Ewing*, 149 P. S. 375; reversing s. c. 9 C. C. 471.

50. Where an agreement is made to pay a contingent fee of fifty per cent upon the collection of a claim, and the attorney contents himself with securing judgment and subsequently reviving it, and with issuing an execution which turned out to be fruitless, when a reasonable search would have shown him that the defendant had property amply sufficient to meet the debt, the attorney will not be allowed such contingent fee upon the employment of additional counsel and collection of the debt. *Sloan's Estate*, 161 P. S. 237; affirming s. c. 14 C. C. 359.

51. Where a debt is due to a decedent, a contract by the mother and sole next of kin to pay a contingent fee of fifty per cent for its collection will not be held to be binding upon her descendants nor upon the estate toward which she stood in no other relation than that of distributee. *Sloan's Estate*, 161 P. S. 237; affirming s. c. 14 C. C. 359.

52. A contract with a county solicitor for the prosecution of a claim on a contingent fee is void, but he may still recover what his services were worth upon the proof of a new engagement after the expiration of his official term. *Fulton v. Lancaster County*, 162 P. S. 294; affirming s. c. 10 Lanc. 81.

53. An agreement for a contingent fee is not illegal, but in such case public policy forbids that the attorney should so arrange with his client as to preclude him from negotiating and agreeing with

his adversary, and the attorney will not be permitted to hold his interest undeclared until after the settlement and then assert it against the settlement. *Murray's Estate*, 13 C. C. 70.

54. The county is liable for the services of an attorney appointed by the court to sue the sureties of a prothonotary who had misappropriated moneys paid into court. *Northampton County v. Steele*, 1 Mona. 582; affirming *Steele v. Northampton County*, 1 Northam. 407.

55. An attorney who compels his client to bring an action for moneys due him, forfeits all fees which may have been agreed upon for his services. *Large v. Coyle*, 12 Atlan. 343.

56. Under the act of 13 June 1836 (Brightly's Purdon 1706) the court may include the counsel fees of the successful party in the costs and charges for the removal of a pauper. *Overseers of Jordan v. Overseers of Jackson*, 8 C. C. 152.

57. The plaintiff in a judgment is entitled to stipulated attorneys' commissions, although he himself be an attorney at law, and collect the same. *Hook v. Montgomery*, 7 C. C. 268.

58. The orphans' court has no jurisdiction to entertain a petition praying that money retained by an attorney in good faith for services, out of the fund collected by him, be paid over to his clients. *Robb's Estate*, 6 C. C. 644; s. c. 46 L. I. 210.

59. If the trust fund be not under the control of the court and distribution has been made to the *cestui que trust* by the supreme court, the common pleas has no jurisdiction to order the money into court in order to fix the counsel fees of the attorney of the *cestui que trust*. *Gingrich's Estate*, 9 C. C. 16.

60. The orphans' court should not reduce an allowance by an auditor to counsel for professional services without giving a satisfactory reason for such reduction. *Mumma's Appeal*, 127 P. S. 474.

61. A judgment confessed to an attorney by his client will stand as security

only for what is actually due, and on an allegation of fraud will be opened. The burden is on the attorney to establish its fairness. *Acker v. Lambert*, 4 Montg. 189.

62. The plaintiff's employment by the defendant as her attorney being conceded, the question of the amount of compensation was properly left to the jury. *Taggart v. Hower*, 17 Atlan. 13.

63. A member of a firm who employs an attorney and states that he is individually employing him, is liable individually for the latter's fees. *Playford v. Hutchinson*, 135 P. S. 426.

64. In an action for professional services by an attorney, evidence of services and fees of other attorneys on the same side is irrelevant and incompetent. *Playford v. Hutchinson*, 135 P. S. 426.

65. In an action for legal services and costs paid, an affidavit of defence which evasively denies the plaintiff's employment, (but admits the services and avers mismanagement, neglecting however to state wherein it consisted,) is insufficient to prevent a summary judgment. *Chain v. Hart*, 140 P. S. 374.

66. In a suit for fees where the plaintiff averred that he had been employed by the defendants, two of the executors of a will, and had been dismissed before the account was filed, that at the audit of which he presented a claim for one thousand dollars, that the defendants made no objection to the amount claimed, but that their counsel claimed that the estate should not be charged with the whole of it, and the court thereupon allowed the plaintiff five hundred dollars without prejudice to his right against the executors personally for the balance; it was held, that upon an affidavit of defence that the plaintiff had rendered the defendants no services, that he had been employed as counsel for the estate and had been paid for his services on such employment, that the defendants had never promised to pay him anything, and that his services to the estate were worthless, it was not error to refuse judgment for want of a sufficient

affidavit of defence. *Fox v. Rentschler*, 147 P. S. 240.

67. In an action to recover counsel fees, a refusal of judgment for want of a sufficient affidavit of defence will not be reversed where the defendant avers that she never employed the plaintiff and only knew him as an assistant to the counsel employed by her. *Tredway v. Kennedy*, 153 P. S. 438.

68. Where the plaintiff represented a life tenant in litigation with remaindermen, and a compromise was reached by which the life tenant was to convey all her interest to the remaindermen in consideration of their paying to her eleven thousand dollars, and to her attorney, the plaintiff, one thousand dollars, and the whole sum of twelve thousand dollars was paid to the life tenant, who refused to pay the plaintiff and alleged that she had not employed him and denied the settlement as testified to by him; it was held, that the case was for the jury. *Smith v. Eyre*, 161 P. S. 115.

69. In an action by an attorney at law to recover a fee, a statement made by the plaintiff's attorney in the absence of his client to the effect that the plaintiff did not claim the fee, is inadmissible against the plaintiff. *Smith v. Eyre*, 161 P. S. 115.

70. Where the counsel fees of the plaintiff in partition were fixed at a sum certain by agreement with defendant's counsel and were ordered to be paid out of the fund, and after payment the agreement was disaffirmed by the defendant; it was not error to revoke the order of taxation and proceed to a retaxation. *Luzerne Building Ass'n v. People's Savings Bank*, 142 P. S. 121; affirming s. c. 6 Kulp 92.

71. Where an attorney fee is paid by the plaintiff under a discontinuance, the counsel for the defendant is entitled to it. *Hamilton v. Hamilton*, 10 C. C. 255.

See JUDGMENT, 1.

VIII. Advice of counsel.

72. Upon an indictment for making a false affidavit to support an application

for a land warrant, that the lands were unimproved; it was *held*, that the affiant could not be convicted of perjury, where it appeared that the affidavit was made upon the advice of counsel, and under the act 23 April 1889, P. L. 46, the land was unimproved. *Comm'th v. Clark*, 157 P. S. 257.

See **MALICIOUS PROSECUTION.**

ATTORNMEN.

See **LANDLORD AND TENANT.**

AUCTION.

1. The act 2 April 1830 (Brightly's Purdon 1655), forbidding sales at auction, applies to pedlars under soldiers' licenses, granted under the act 8 April 1867 (since amended by the act 9 June 1891, Brightly's Purdon 1656). *Comm'th v. Rosencrans*, 9 C. C. 399.

AUDITORS.

- II. Powers of auditors.
- III. Duties of auditors.
- IV. Reports of auditors.
- VI. Recommitment.
- VII. Compensation.
- VIII. Costs of audit.

II. Powers of auditors.

1. The auditor of an assignee's account has no power to inquire into the validity of a judgment regular on its face, but he may receive evidence that a judgment given for one purpose has been fraudulently used for another purpose. *Stark's Appeal*, 128 P. S. 545.

2. The validity of a judgment, regular on its face, cannot, there being no allegation of collusion, be inquired into by an auditor on the distribution of a fund arising from the sale of a decedent's real estate, but evidence may be received of payments thereon. *Lefever's Estate*, 7 Lanc. 131.

3. The court cannot authorize an auditor, appointed to distribute a fund, to

pass upon the validity of a claim before a referee in another proceeding. *Christy v. Sill*, 131 P. S. 492.

4. Where the maker of a promissory note made an assignment, and a dividend was paid to the payee's administrator by mistake instead of to his assignee, an auditor appointed to distribute the estate of the payee can correct the mistake, and award the dividend to the holder of the note. *Fisher's Estate*, 7 Lanc. 333.

III. Duties of auditors.

5. As to the duties of auditors, see *Bortz's Estate*, 2 Northam. 81.

IV. Reports of auditors.

6. An auditor's finding of fact will not be set aside except for clear palpable mistake. *Eggert's Estate*, 1 Northam. 17.

7. The finding of facts by an auditor should not be set aside except for clear error. *Ames's Appeal*, 10 Cent. 301.

8. The findings of fact by an auditor will not be disturbed in the absence of manifest error. *Morrison's Estate*, 5 Montg. 155.

9. A finding of fact by an auditor must be accepted, unless error clearly appears. *Atkinson's Appeal*, 11 Atlan. 239.

10. A finding of fact by an auditor, approved by the court below, will not be disturbed because the evidence is conflicting. *Sickler's Appeal*, 17 Atlan. 32.

11. The finding of an auditor upon a question of fact must, if the court be not satisfied that a mistake has been committed, be confirmed. *Sheble's Appeal*, 4 Cent. 667.

12. An auditor's finding as to the compensation of an executor or administrator will not be disturbed except for glaring error. *Hemingway's Estate*, 1 Northam. 139.

13. The supreme court will not go over the evidence to correct matters of fact found by an auditor, and approved by the court below, except it be an extreme case — one of clear error. *McCarthy's Appeal*, 14 Atlan. 352; s. c. 13 Cent. 228.

14. The finding of an auditor upon a question of fact being sustained by the court below, the supreme court will not reverse, because the finding might have been the other way, if the evidence was sufficient to sustain the finding. *Lewis's Appeal*, 127 P. S. 127.

15. The orphans' court should not reduce an allowance by an auditor to counsel for professional services, without giving a satisfactory reason for such a reduction. *Mumma's Appeal*, 127 P. S. 474.

16. If the finding of an auditor on a question of fact be unsupported by the evidence, it will be set aside. *Brunner's Estate*, 6 Montg. 115.

17. The court refused to interfere with the finding of an auditor that a debt was converted into an advancement. *Sickler's Estate*, 2 Mona. 23. See *Bittle v. Bittle*, *Ibid.* 17.

18. The supreme court will not, except for clear error, reverse an auditor's finding of fact which has been approved by the court below. *Prouty v. Prouty & Barr Boot and Shoe Co.*, 155 P. S. 112; *Donaldson's Estate*, 158 P. S. 292; affirming s. c. 40 P. L. J. 260.

19. Whether an obligor against whose name there is no seal, adopted the seal opposite the name of another obligor as his own, is a question of fact; a finding of an auditor upon such fact, approved by the court below, will not be disturbed on appeal except for plain error. *Hess's Estate*, 150 P. S. 346.

20. The finding by an auditor that a party sought to be charged as a partner was not a partner, such finding being approved by the court below, will not be reversed in the supreme court except for clear error. *Boffenmyer's Estate*, 150 P. S. 540; affirming s. c. 8 Lanc. 257.

21. An auditor's finding of fact, if based upon sufficient evidence and approved by the court below, will not be reversed by the supreme court. *Countryman's Estate*, 151 P. S. 577.

22. A finding of fact by an auditor must be regarded as conclusive in the

absence of plain error. *Penn Bank's Estate*, 152 P. S. 65.

23. An affirmative finding by an auditor, sustained by the court below, that a judgment is not collusive and fraudulent, will not be reversed by the supreme court except for palpable error. *Baird v. Ford*, 152 P. S. 637.

24. The finding of an auditor approved by the court below will not be questioned in the supreme court unless the evidence submitted was insufficient fairly to sustain the findings; his admission of incompetent testimony is no ground for reversal unless it also appears that he was influenced by it, or that it might and ought to have led to a different conclusion. *Harbison's Estate*, 145 P. S. 456.

25. An auditor's finding of facts will not be disturbed except for manifest error. An exception that he erred in allowing certain items in the costs of audit will be dismissed as too general. *Schenck's Estate*, 5 York 167.

26. The court will set aside an auditor's finding of facts contrary to the evidence. *Selser's Estate*, 8 C. C. 254.

27. An auditor's finding of fact, which is merely an inference drawn by him from other facts, has not the value to which his finding of fact is ordinarily entitled. *Reading Iron Works' Estate*, 150 P. S. 369.

28. The mere admission of incompetent evidence by an auditor or by the orphans' court will not justify a reversal, unless it appear that the adjudication was influenced by such evidence. *Roberts's Appeal*, 126 P. S. 102.

29. The supreme court will not reverse the finding of an auditor because of the admission of irrelevant testimony, where such evidence was not the basis of any finding and did no harm. *Countryman's Estate*, 151 P. S. 577.

30. An auditor's report will not be set aside because of the admission of an incompetent book, where he finds in favor of the claimant on other competent legal evidence. *Neely's Estate*, 5 York 199.

31. An exception that an auditor has

failed to report the whole of the testimony, should be filed within the time specified by rules of court. *Lloyd's Appeal*, 6 Atlan. 915.

32. Exceptions not filed with an auditor within the time specified by rule of the orphans' court, will not be considered by the court below nor by the supreme court. *Riegel's Estate*, 133 P. S. 38.

33. In passing upon exceptions to an auditor's report, it is not error for the court to go outside of it, if there be nothing to show that it went outside of the evidence. *Wolf v. Ferguson*, 129 P. S. 272.

34. An exception to an auditor's report as to the amount due an unpreferred creditor, there being no fund to reach him, will be dismissed without prejudice. *Kuhn's Estate*, 2 Northam. 187.

35. One who attacks a master's or auditor's report has emphatically the laboring oar. Suggestions as to the preparation of exceptions and briefs in support thereof. *Stocker v. Hutter*, 2 Northam. 53.

36. A second report will not be set aside because the re-reference was irregular. *Davis v. Griffiths*, 1 Lack. Jur. 112.

37. The orphans' court cannot be expected to notice exceptions to the findings of fact of an auditor, where the errors alleged are not clearly and distinctly specified. *Burke's Estate*, 144 P. S. 190.

38. Where the report of an auditor distributing the proceeds of a sheriff's sale has been lost after confirmation *nisi*, the court may inquire into the nature of the report and determine the validity of the exceptions without recommitting the case to the auditor. *Andrews v. Fishing Creek Lumber Co.*, 161 P. S. 204.

VI. Recommitment.

39. Where an auditor was appointed to distribute a fund raised by a sheriff's sale, which fund was claimed by a landlord who had authorized the tenant to make improvements, and was also claimed by the persons who had made the im-

provements under an agreement with the tenant, who was the defendant in the execution; it was *held*, that the auditor should have found the amount of rent due the landlord and whether the costs of the improvements were proper credits on account of the rent, and in the absence of such findings the supreme court referred the case back to the auditor for a proper finding of fact. *Wilkinson v. Kugler*, 153 P. S. 238.

VII. Compensation.

40. The supreme court will not assume an auditor's fee to be excessive in the absence of testimony showing it to be unreasonable. *McCann's Appeal*, 9 Atlan. 48.

41. An auditor's fee of three hundred dollars for twenty days' services was sustained. *Geisinger's Appeal*, 1 Mona. 600; s. c. 17 Atlan. 222.

42. If an auditor of a large estate be appointed at the request of parties, his fees should be liberal, especially if his report shows great skill and industry. *Lazarus's Estate*, 6 Kulp 53; affirmed in 142 P. S. 104; and reversed in 145 P. S. 1.

43. Where the testimony could be taken in one meeting and the estate amounted to \$1102.83, a fee to the auditor of \$115 was held to be excessive. *Bracken's Estate*, 138 P. S. 104; s. c. 38 P. L. J. 132.

44. Auditors can only charge the amount allowed by act of assembly unless their compensation be agreed to by all the parties or fixed by the court; upon a distribution of a balance of four thousand nine hundred and thirty-seven dollars by three auditors, where there were eighteen different meetings and much testimony taken and many disputed points to decide; it was *held*, that a fee of six hundred dollars was not exorbitant where all the counsel interested were satisfied. *Miller's Estate*, 8 Lanc. 249.

VIII. Costs of audit.

45. The disposition of the costs of an audit in the orphans' court will not be reversed except for clear abuse of discretion. *Lusk's Estate*, 150 P. S. 517.

46. When the costs of audit are placed upon the party in default, a decree will not be modified by the supreme court where the question was not raised in the court below. *Potter v. Langstrath*, 151 P. S. 216.

47. Where money is ordered into court by a judgment creditor who asks for the appointment of an auditor, the costs of the audit should be paid out of the fund; and this, although the judgment of such creditor be subsequently set aside. *Griffis v. Griffis*, 12 C. C. 390.

See COSTS, 1.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, XII.

AUTREFOIS CONVICT.

See CRIMINAL LAW, XII.

AVERMENTS DEHORS.

See PRACTICE.

AVOWRY.

See REPLEVIN.

AWARD.

See ARBITRATION.

BAGGAGE.

See CARRIERS.

BAIL.

See ARREST: CRIMINAL LAW: APPEAL AND ERROR: PRIVILEGE: RECOGNIZANCE.

I. When bail is demandable.

II. Of the affidavit and discharge on common bail.

III. Of the *capias* and service.

I. When bail is demandable.

1. An action under the act of 26 February 1855 (Brightly's Purdon 1230) for the penalty for selling liquor on Sunday cannot be commenced before the justice by *capias*. *Comm'th v. Schweitzer*, 1 Northam. 375.

2. A husband will not be held to bail for slanderous words spoken by his wife, not in his presence nor with his knowledge or consent. *O'Connor v. Welsh*, 29 W. N. C. 92.

3. Bail is demandable in an action of trespass *de bonis asportatis*, but in such an action against a constable for an act done by him in the line of his office, where his official bond is sufficient in amount to cover the probable damages, he will not be required to furnish additional bail to the action. *Mellick v. Osterstock*, 3 Northam. 83.

4. If a freeholder be sued jointly with an unprivileged person, the *capias* as to the former will not be abated, but he will be discharged on common bail. *Schoettler v. Demme*, 47 L. I. 70.

5. A defendant who is arrested on a *capias*, and who desires to avail himself of the exemption from arrest because he is a freeholder, must make his application before the expiration of the term to which the writ was issued; it was *held*, that a delay of three years was fatal. *Gottschall v. Reinhart*, 9 C. C. 415.

6. One who possesses a freehold of the value of one hundred and thirty-three and one-third dollars is exempt from arrest on a *capias* without regard to the amount of the plaintiff's demand, and a *capias* against such a person will be abated. A plea of freehold is not sustained if the defendant's real estate is encumbered for nearly its full value, but where the property is sufficient to pay the encumbrances and satisfy the plaintiff's demand, the defendant will be discharged on common bail. *Logan v. O'Neill*, 34 W. N. C. 281.

7. Where the defendant pleads his freehold, the court will dispose of a mo-

tion to abate the *capias*, or discharge on common bail, in a summary manner, either by the examination of the defendant's title papers or by affidavits, depositions and official searches. *Logan v. O'Neill*, 34 W. N. C. 281.

II. Of the affidavit and discharge on common bail.

8. An affidavit of deceit in the procurement of endorsements to promissory notes, and that the defendant is about to quit the country, is not sufficient to support a *capias ad respondendum*. *Buch v. Usher*, 7 C. C. 292.

9. An affidavit to hold to bail is insufficient where the averment is simply that the defendant assigned to plaintiff a claim against a railroad company, and that he afterwards, without the plaintiff's authority, collected the claim from the company and converted it to his own use. *Mangaletti v. McMillan*, 10 C. C. 239.

10. Where the defendant was arrested under a *capias* for maliciously arresting the plaintiff on a charge of receiving stolen goods knowing them to have been stolen, the defendant was discharged on common bail where the affidavit failed to state that the plaintiff did not know that the goods were stolen. *Aarons v. Dunseith*, 11 C. C. 208.

11. In an action for breach of promise of marriage, where the affidavit to hold to bail averred that the defendant, after obtaining the consent of the plaintiff's parents and taking out a license, refused to have the ceremony performed or to see her, or to have anything to do with her, and had written a letter to her to that effect; it was held, that the defendant would not be discharged on common bail; it was not necessary to aver that the plaintiff offered to marry the defendant. *Weaver v. Cline*, 12 C. C. 363.

12. The defendants will be discharged on common bail where the affidavit in trespass *quare clausum fregit* fails to set forth in the body thereof the names of the defendants, and simply refers to them as

"the said defendants." *Hower v. Bennet*, 15 C. C. 557.

13. Query, whether in a proceeding begun by *capias* three different causes of action, to wit, conspiracy, malicious prosecution and slander, may be joined in the same statement and affidavit to hold to bail. *Nash v. Bloom*, 10 C. C. 358.

14. The question of the discharge of a defendant on common bail must be determined by the plaintiff's affidavit alone; in actions for libel or slander special bail will only be required where the plaintiff swears positively to special damages, or where the defendant is about to leave the jurisdiction. *Renninger v. Dillon*, 2 Dist. Rep. 819.

15. An affidavit to hold to bail for an assault and battery should set forth the details of the alleged wrong, and of the injury therefrom, and the amount of damages claimed, so that the reasonableness of the bail may be made to appear. *Gall v. Molessa*, 3 Dist. Rep. 537.

16. In trespass for assault and battery, the right of the plaintiff to require bail cannot be questioned by means of counter affidavits upon a rule to discharge on common bail; such counter affidavits are admissible where the amount of the bail demanded is alleged to be excessive and oppressive. *Gall v. Molessa*, 3 Dist. Rep. 537.

17. The affidavit alleging the slanderous words, that plaintiff had a "dead sow for a door-step" and "he is a stinker," the defendant was discharged on common bail. *Noll v. Jacoby*, 7 Lanc. 365.

18. It is not necessary that an affidavit be filed with the *præcipe*, and though a defective one be filed therewith, a motion to discharge on common bail will be treated as a rule to show cause of action, and the plaintiff will be permitted to file another affidavit in response to it. *Tyffany v. Billings*, 7 Lanc. 381; s. c. 2 Lack. Jur. 102.

19. The court refused to discharge on common bail, although the affidavit was made by an employee of the plaintiffs, and the names of the plaintiffs did not appear

in the body of the affidavit, but they were simply referred to as "said plaintiffs." *Grieb v. Schweriner*, 11 Lanc. 191.

20. Where the affidavit to hold to bail alleged that the defendant, who was in partnership with another, made false and fraudulent representations of the financial condition of the partnership and deceived plaintiff into allowing purchases on credit, and that the firm's goods had been levied on and sold by the sheriff on a confessed judgment given for a debt fraudulently concealed from the plaintiff, the court refused to quash the *capias* but made absolute a rule to discharge the defendant on common bail. *Bard v. Naylor*, 33 W. N. C. 251.

21. Where the words are not set out in the affidavit to hold to bail in the language in which they were spoken, the defendant will be discharged on common bail. *E— v. R—*, 12 C. C. 274.

22. In an action for slander where the affidavit to hold to bail simply averred that the plaintiff was injured in her good name, fame and reputation, without alleging any special damage, and neglected to state where the offence was committed, the defendant was discharged on common bail. *Zeller v. Katzensgroh*, 12 C. C. 451.

23. Where the defendant has not been arrested and the writ of *capias* fails by a return of *non est inventus*, a rule to show cause of action and to discharge on common bail is premature. *Robbins v. Redheffer*, 33 W. N. C. 220.

III. Of the *capias* and service.

24. Where a *capias* is served on the wrong person, the proper practice is to take a rule to show cause why the person served should not be discharged on common bail; the court will not set aside the service. *Lisansky v. Herzog*, 2 Dist. Rep. 220.

25. Where a resident of one county was brought before a justice in another county upon a charge of assault and battery, and a writ of *capias* was issued in a civil suit

and served upon him in the latter county, and he gave bond for his appearance, and did not move to set aside the service of the writ until a month afterwards; it was held, that the giving of the bond and the delay in making the application amounted to a waiver of his right to have the service set aside. *Bailey v. Elcock*, 1 York 123.

See PRIVILEGE.

BAILMENT.

See CARRIERS: FACTORS: SALE.

- I. Deposit.
- III. Pledge.
- IV. Hiring.
- V. Location.
- VII. Warehousemen and wharfingers.
- VIII. Commission brokers.

I. Deposit.

1. A deposit is a naked bailment of goods to be kept without recompense, and to be returned when the bailor shall require it. *Wilson v. Prosser*, 5 Kulp 471.

2. A merchant tailor is not responsible for the loss of a pocket-book from a customer's vest while the latter is trying on a new one. *Goff v. Wanamaker*, 25 W. N. C. 358.

3. Where a customer visits a store to buy a suit of clothes, and lays aside his coat and vest for the purpose of trying on the garments selected, and the salesman suggests that the customer's watch and chain had better be put in a drawer where he guessed it would be safe, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect, but if the jury find that the property was stolen, such finding would be a complete exculpation if the bailee exercised ordinary care. *Woodruff v. Painter*, 150 P. S. 91.

4. A gratuitous bailee is liable only for fraud or for such gross negligence as amounts to fraud. *Hibernia Building Ass'n v. McGrath*, 154 P. S. 296.

III. Pledge.

5. A pledgor of fraudulent stock, who himself has no claim for indemnification, cannot recover from his pledgee for value, any part of what the latter has recovered from the corporation by way of indemnity; and this, though such indemnity may have consisted of general shares which increased in value exceeding the debt of the pledgor to the pledgee. *Kisterbock's Appeal*, 127 P. S. 601.

6. Upon the pledge of shares of stock for a single particular indebtedness, with power to sell and apply, equity has no jurisdiction to compel a re-transfer and account. The pledgor has a complete remedy at law. *Roland v. Lancaster County Nat. Bank*, 135 P. S. 598.

7. Where a yacht belonging to a social club is pledged to a member as security for a loan to pay the purchase money, the treasurer of the club, on the sale of the yacht, must account to the pledgee for the sum received; that the treasurer paid bills of the club and for supplies for the yacht is no defence. *Loew v. Austin*, 140 P. S. 41.

8. Where collateral securities are deposited for the payment of a promissory note, such deposit has no effect to prevent the running of the statute of limitations against the right of action upon the note; but the pledge survives and the debtor cannot demand a return of the collaterals until the debt has been paid. *Hartranft's Estate*, 153 P. S. 530; affirming s. c. 8 Montg. 81.

9. The joint owners of a certificate of stock pledged for a joint debt cannot claim the exemption of three hundred dollars out of the proceeds of a sheriff's sale of the stock. *Hawley v. Hampton*, 160 P. S. 18; affirming s. c. 9 Montg. 150.

10. Where stock is deposited with a broker as collateral for purchases, and it is pledged by the broker and sold by the pledgees, the measure of damages for the conversion of the stock is its

market value at the date of the conversion. *Jamison's Estate*, 163 P. S. 143; reversing s. c. 3 Dist. Rep. 217.

11. Where some of the goods of an insolvent debtor were sold at a sheriff's sale and bought in by certain creditors who formed a company to resell them, and the president of the new company agreed that other goods of the debtor pledged to another creditor should be stored in the new company's store and should not be levied on; it was held, in a sheriff's interpleader, that another creditor corporation, of which the president of the new company was also president, could not levy upon such goods so as to defeat the rights of a creditor to whom they were pledged. *Tradesmen's National Bank v. Indiana Bicycle Co.*, 166 P. S. 554.

12. Where money is deposited by one of two contracting parties as a guaranty of good faith, it is forfeited by a failure of the party making the deposit to fulfil his part of the contract; and this, though there is no clause of forfeiture in the contract. Where such forfeiture inures to a city, the councils may not refund the money forfeited, in the absence of mitigating circumstances. *Easton v. Mutchler*, 2 Northam. 377.

13. Where money is borrowed and personal property delivered as security for the loan and the loan is tendered back and the lender declines to receive the money and refuses to return the property, assumpsit does not lie for the value of the property, unless the defendant has sold the article and received the money or otherwise made some profit out of it. *Lodge v. Supplee*, 11 Montg. 92.

14. A sale of the property or so much as may be necessary to satisfy liens for advances and for freight and storage charges, is evidently contemplated by the act 13 June 1874 (Brightly's Purdon 166), providing for the attachment of goods in the hands of bailees. *Richardson v. Nathan*, 167 P. S. 513; s. c. 36 W. N. C. 242.

15. The delivery of bills of lading without endorsement or with an improper endorsement is sufficient when made, accepted and intended as a pledge and security for the sum advanced or paid on the draft to which they are attached; after such a delivery, the holder must be deemed and taken as the owner for the accomplishment of the purpose for which the goods were pledged. *Richardson v. Nathan*, 167 P. S. 513; s. c. 36 W. N. C. 242.

16. Where goods in the hands of a bailee are seized under foreign attachment, the property represented by the bills of lading is in the custody of the law, and cannot lawfully be sold without an order of court, but, after the attachment is dissolved, the rights and powers of the pledgee of the bill of lading are the same as before the seizure, subject only to the duty of retention imposed by the bond given on the dissolution of the attachment. *Richardson v. Nathan*, 167 P. S. 513; s. c. 36 W. N. C. 242.

See DEBTOR AND CREDITOR, VI.

IV. Hiring.

17. A lease on monthly payments, with a proviso that the lessee shall have no title "except upon the full and entire payment of all the monthly payments," nor until a bill of sale shall have been executed and delivered, is but a bailment. *Cope v. Singer Manufacturing Co.*, 1 Mona. 650; affirming *Singer Manufacturing Co. v. Cope*, 5 Lanc. 286. See *Singer Manufacturing Co. v. Flennigan*, 7 C. C. 45.

18. An agreement to let personal property to hire for a term of years, and in case of no default to execute a bill of sale, is as against the creditors of the lessee a bailment and not a conditional sale. *Ditman v. Cottrell*, 125 P. S. 606.

19. A lease with a privilege of purchase, when indefinite monthly payments shall aggregate a certain sum, constitutes a sale and not a bailment. *Uhlinger v. Moyer*, 2 Northam. 256.

20. A levy upon goods bailed or demised is such a disturbance of the bailee's possession as to constitute a trespass, though the goods be not actually taken. *Dixon v. White Sewing Machine Co.*, 128 P. S. 397.

21. One who purchases a leased piano from the bailee takes no title to the same, and a failure to mark the bailor's name on the piano will not estop him from recovering. *Miller Piano Co. v. Parker*, 155 P. S. 208.

22. Where a person receives goods under an agreement by the terms of which he is to keep them during a certain period, and if, within that time, he pays for them he is to become the owner, but otherwise he is to pay for the use of them, he receives them as a bailee, and the property in the goods is not changed until the price is paid. *Brown v. Billington*, 163 P. S. 76.

23. Where a contract of bailment provided for the lease of a machine at a certain hire, payable in instalments, the lessor to retain title until the last instalment be paid, and the contract was accompanied by a bond and warrant to confess judgment; it was *held*, that the lessor might upon default either rescind the contract and take possession of the machine or enter judgment upon the bond, but, having elected to resume possession, he could not afterwards enter judgment. *Seanor v. McLaughlin*, 165 P. S. 150.

24. Where a bailor under an instalment contract, after an instalment had become due, entered judgment under the warrant of attorney in the agreement, and subsequently entered and took possession of the goods, and about one hour after the goods were taken judgment was entered against the bailee by the defendant and a writ of *feri facias* was issued thereon, and under said writ the bailor claimed the goods; it was *held*, upon the trial of a sheriff's interpleader, that the defendant had no lien upon the goods. *Durr v. Replogle*, 167 P. S. 347.

25. If it be shown to be the real in-

tent of the parties that an agreement was to be regarded as a conditional sale, such intent will prevail although the agreement on its face be a bailment, and in such case, where the vendee has paid part of the purchase money, he will be held to be entitled to the return of an equitable portion thereof upon the vendor retaking the goods on condition broken. *Simon v. Edmundson*, 10 C. C. 315.

26. The lessee of an organ who had agreed to insure the organ against loss or damage by fire or water, and who failed to do so, was held to be liable for its value where the same was subsequently destroyed by fire; and this, though the conflagration destroyed almost the entire town and might be within the designation of "*actus Dei*." *Smith Organ Co. v. Abbott*, 11 C. C. 319.

27. An agreement for the lease of household goods at a certain stipulated rental, with the provision that the title shall remain in the lessors until the conditions are complied with, and a further provision that upon a compliance with the provisions of the lease, a bill of sale shall be executed, is a bailment and not a conditional sale, and vests no title in the lessee, and such goods are not subject to execution by a creditor of the lessee. *Wieder v. Roeschman*, 13 C. C. 94.

28. Where a manufacturer of machinery contracted to erect at a brewery certain refrigerating machinery on foundations to be built by the owner of the brewery, and the latter promised to pay a certain sum in stipulated instalments with an express condition that the title, ownership and possession should not pass until all of said payments had been made, and it was further provided that when the last instalment had been paid the manufacturer should give a bill of sale, and the manufacturer reserved the right to remove and sell the machinery on default and to collect the balance due less the proceeds of such sale; it was held, that the transaction was a conditional sale and not a bailment, and that

the machinery, while in the possession of the owner, could not be claimed by the manufacturer in a sheriff's interpleader as against an execution creditor of the owner of the brewery. *Ott v. Sweatman*, 166 P. S. 217; affirming s. c. 15 C. C. 97.

29. Upon a bailment of personal property there is always a right or duty to return the property delivered which distinguishes it from a conditional sale where there is an absolute liability to retain and pay for it; a bailment will not be changed into a conditional sale by a provision for the giving of notes for the value for the bailor's accommodation, nor by a provision allowing a factor upon a sale of the property delivered to retain for himself all in excess of an invoice price. *Bridgeport Organ Co. v. Guldin*, 3 Dist. Rep. 649.

30. Where a chattel has been rented or loaned to another person, its possession by the lessee will not justify its seizure and sale as his, upon the execution of a creditor, whose debt was contracted before the loan or transfer was made. *Davis v. Turner*, 7 Kulp 85.

31. Where the claimant rented a heating machine to certain parties at a certain rental, upon a contract that the machine was to become the property of the lessees when the rental paid should amount to a certain sum, and it appeared that the lessees, with the lessor's consent, transferred the machine to the assignor company, the lessees agreeing to protect the company from the payment of any money that might be due or become due from or on account of the purchase of any machinery by said company; it was held, that such agreement did not amount to an assumption on the part of the assignor company to pay the rental for said machines, and that the claimant was not entitled to such rental upon a distribution of the assigned estate. *Gray & Kegel Shoe Co.'s Estate*, 8 York 85.

V. Location.

32. Where the goods in the hands of a bailee, under a *locatio operis*, are lost by the fraud or by the wilful or wanton conduct of the bailee, the bailor may bring either assumpsit on the contract or trespass for the tort. *Zell v. Dunkle*, 156 P. S. 353.

33. Where a bailee stores and cares for his customer's goods in the same manner as he has stored and cared for his own, and a common disaster destroys both, the bailee will not be liable for the loss, in the absence of clear proof of the omission of precautions commonly taken by other persons in the same or similar trade. *Zell v. Dunkle*, 156 P. S. 353.

34. Where a common law lien for work done upon personal property is claimed, it is indispensable that the party who claims the lien should have an independent and exclusive possession of the property. *Fitzgerald v. Elliott*, 162 P. S. 118.

35. Where a person who is not compellable by law to receive bailments, gives notice that he will not receive any property for the purpose of his trade except on condition that he shall have a lien upon it not only in respect to the charges arising on the particular goods but also for the general balance of his account for like charges on other goods, a lien will be created on such other goods, and all persons who deal with him with the knowledge of such notice will be deemed to have acceded to that agreement; where such a notice was printed on the invoices of a dyer and the defendant had dealings with the dyer for three or four years; it was *held*, that the presumption was that the defendant knew of the conditions upon which the dyer received the goods. *Firth v. Hamill*, 167 P. S. 382.

36. One who takes a horse to board, has a common law lien upon him for the stipulated price. *Cadwalader v. Dilworth*, 26 W. N. C. 32.

37. An inn-keeper agister has a specific lien upon an animal for boarding and keeping; where such an animal is sold

under an execution and the proceeds of sale exceed the amount of the execution, the agister is entitled to be paid out of the fund. *Gross v. Emig*, 3 York 205.

38. An agister is not required to take any greater care of animals than an ordinary prudent man would take of his own property. *Jackson v. Rhodes*, 3 Lack. Jur. 123.

39. One who takes stock to pasture has a common law lien for his compensation; where a number of animals are pastured under an entire contract, the owner cannot remove any one of them without paying the amount due for all. *Yearsley v. Gray*, 140 P. S. 238.

40. Where a livery stable keeper has a lien on horses for their keep, and when the horses are demanded he denies the owner's title, he cannot in a subsequent action for the conversion of the property set up the lien as a bar to the owner's recovery. *Williams v. Smith*, 153 P. S. 462.

41. In an action of replevin against the keepers of a livery stable to recover possession of a carriage, where defendants claimed the right to retain the carriage by reason of an agreement that it should remain in their possession as security for a debt due them by the plaintiff's husband for keeping a horse, and there was evidence that five months before the writ issued, the plaintiff, after the removal of the horse, authorized the defendants to sell the carriage for a price named, and to retain from the money received the amount claimed to be due by her husband; it was *held*, that such authority was one to sell and not to retain, and was revocable at pleasure and did not defeat the plaintiff's right to recover. *Fitzwater v. Roberts*, 166 P. S. 454.

VII. Warehousemen and wharfingers.

42. In an action against the proprietor of a storage warehouse for alleged damage to goods by water, the defendant may show that the building was impervi-

ous to rain, as establishing the fact that the goods were damaged before he received them. *Doyle v. Mays*, 7 Atl. 747.

43. In an action for loss of eggs under a contract for cold storage, the burden is on the plaintiff to show that the eggs were in a fit condition to be kept at the temperature of defendant's warehouse, and that they were injured by defendant's act alone. *Boswell v. Collins*, 8 Atl. 845.

44. A bailee of personal property for storage cannot, by sale to a third person, pass a good title as against the real owner. *Mann v. English*, 7 C. C. 637.

45. Goods in a storage warehouse are not subject to attachment execution. The proper proceeding is by *feri facias*. *Cherry v. Nolan*, 25 W. N. C. 132.

46. A wharfinger cannot make such an unreasonable rule, as that no steam-engines except the wharfinger's shall be put upon its wharves for the purpose of unloading vessels. It is liable in damages for delay in unloading caused by attempting to enforce such a rule. *Lincoln v. Pennsylvania Warehousing Co.*, 8 C. C. 195.

47. Where a distillery issued a warehouse certificate to defendants that he held whiskey on storage, and the defendants sold the whiskey and endorsed the certificate to the order of the purchaser, and the purchaser then sold the whiskey to the plaintiff and endorsed the certificates to him, and after the last sale the defendants attached the whiskey as the property of their own vendee; it was *held*, that they were estopped by endorsing the certificates from objecting to the plaintiff's title; it was not decided whether such a certificate is within the warehouseman's act 24 September 1866 (*Brightly's Purdon* 165). *Rosenham v. Batjer*, 154 P. S. 544.

48. In an action on a warehouse receipt to recover damages for the non-delivery of the goods stored, the burden is on the defendant to show that the goods were delivered to somebody by the plain-

tiff's authority, or that they disappeared with the knowledge and consent or with the concurrence of the plaintiff. *Hoeverler v. Myers*, 158 P. S. 461.

49. A storage company which agrees to insure the goods of a customer, is liable for their value upon their destruction by fire in case they are not insured. *Tower v. Grocers' Supply & Storage Co.*, 159 P. S. 106.

50. A warehouse company which receives goods for storage, is bound to exercise ordinary diligence and care, but it is not liable for the loss of the goods by fire where it does not appear that the fire was caused by its own negligence; where the evidence failed to show the cause of the fire, it is error to submit the case to the jury; the failure to keep a watchman is not evidence of negligence in such a case. *Tower v. Grocers' Supply & Storage Co.*, 159 P. S. 106.

VIII. Commission brokers.

51. A consignment of goods upon the terms that they were to remain the property of the consignor until fully paid for, and that the consignee should remit the price within a certain time or return the goods, is not a bailment, but a sale, with an agreement that the title should remain in the consignor until the price was paid. Such an arrangement is valid between the parties, but not against the creditors of the consignee. *Peck v. Heim*, 127 P. S. 500.

52. Upon the trial of a sheriff's interpleader, where it appeared that the goods had been consigned to certain bankers, that the claimants paid the price of the goods to the bankers, and directed them to be delivered to the defendant in the execution, who gave the claimants a receipt, acknowledging the goods to be the claimants' property, and agreeing to sell the same and pay over the proceeds to the claimants, and the defendant in the execution was to have a share of the profits; it was *held*, that the transaction was a bailment and not a sale, and that

the goods were not subject to be taken in execution as the property of the bailee. *Monjo v. French*, 163 P. S. 107. See *Brown v. Billington*, 163 P. S. 76.

BANKRUPTCY.

See CONFLICT OF LAWS.

III. Effect of the institution of proceedings.

VI. Of the discharge.

IX. Of the assignee.

X. Sales in bankruptcy.

XI. Probate of debts.

XII. Of the exemption.

III. Effect of the institution of proceedings.

1. A judgment being entered before bankruptcy of the defendant; upon a *scire facias* to revive after bankruptcy, the verdict will be moulded so as to affect only real estate, on which it was a lien prior to such bankruptcy proceedings. *Walters v. Oyster*, 1 Atlan. 430.

2. Voluntary proceedings in bankruptcy do not divest the dower of a wife in real estate owned by her husband and sold by his assignee; in such case the wife loses her statutory dower, but does not lose her dower at common law. *Gannon v. Widman*, 15 C. C. 474.

VI. Of the discharge.

3. A discharge in bankruptcy operates upon a judgment obtained between the commencement of the proceedings and the granting of the discharge, where the debt existed when the proceedings were commenced. The bankrupt is not barred from interposing the plea of bankruptcy by his neglect in asking for a stay of proceedings. *Nelson v. Guffy*, 37 P. L. J. 65.

4. One who has proved his debt in bankruptcy, cannot subsequently, in the absence of fraud, impeach the decree of discharge. *Lawver v. Gladden*, 1 Cent. 350.

5. To a *scire facias sur* judgment for a fiduciary debt, it is no defence that the defendant has been discharged in bankruptcy. *Weaver v. Weaver*, 1 Northam. 373.

6. A subsequent absolute, unconditional promise to pay, with a partial judgment, will revive a debt which has been discharged by proceedings in bankruptcy. *Huffman v. Johns*, 4 Cent. 658.

IX. Of the assignee.

7. An assignee in bankruptcy acquires the right to all property fraudulently conveyed by the bankrupt; a creditor cannot, after the commencement of the proceedings in bankruptcy, institute a proceeding to set aside a fraudulent conveyance. So equity will not in aid of an execution entertain a bill of discovery against the supposed fraudulent assignee of the bankrupt brought by one of his creditors. *Miners' Nat. Bank's Appeal*, 9 Atlan. 299.

8. Property which from its nature may be a burden rather than a benefit to the estate does not pass to an assignee in bankruptcy without a distinct acceptance by him; where the bankrupt was the owner of an interest in a telegraph line which was in litigation, and the assignee asserted no ownership and took no part in the suit; it was *held*, that he could not, upon the successful termination of the suit, claim the resulting fund; especially as against an attaching creditor of the bankrupt on a judgment obtained for a debt incurred subsequent to the bankruptcy. *Beall v. Dushane*, 149 P. S. 439.

9. Money received by an assignee in bankruptcy from the United States on a claim adjudicated by the court of commissioners of Alabama claims, is not an asset in the hands of the assignee to be distributed to the creditors, but belongs to the assignor; in such a case, however, the assignee is not liable to a suit at common law by his assignor, but the jurisdiction is in the United States court. *Levey v. Norton*, 10 C. C. 278.

10. Where all claims against a bankrupt's estate were more than twenty years old; it was *held*, that the fact that the assignee had permitted twenty years to elapse without claiming a certain asset was sufficient to raise a presumption that all the bankrupt's debts had been paid, which presumption was sufficient to throw upon the assignee the burden of proving that the debt still existed. *Sellers's Estate*, 5 Del. 5.

X. Sales in bankruptcy.

11. A sale in bankruptcy of real estate in the name of the bankrupt's wife, upon petition that the bankrupt's transfer to his wife was in fraud of creditors, cannot discharge the lien of a mortgage given by the bankrupt and his wife before the institution of bankruptcy proceedings. *Schwartz v. Kleber*, 7 Atlan. 209.

12. Where land was devised in remainder subject to a valuation, and the devisees accepted the real estate, but the valuation money was never paid, and the share of one of the devisees was sold by the sheriff, and that of the other by an assignee in bankruptcy; it was *held*, that the lien of the valuation money was not discharged by the sales. *Weiler's Estate*, 12 Lanc. 123.

XI. Probate of debts.

13. A claim for unliquidated damages, arising out of a contract, may be proved in bankruptcy proceedings and is discharged by the decree therein. *Flanagan v. Duncan*, 133 P. S. 373; s. c. 25 W. N. C. 491.

XII. Of the exemption.

14. Land being set aside to the debtor in bankruptcy proceedings, under the exemption laws, a subsequent transfer by him in trust for his children is not fraudulent as to creditors; and this, though his discharge was subsequently refused. *Boyd v. Martin*, 3 Del. 601.

BANKS.

See ASSIGNMENT FOR CREDITORS: TAXES, III.

- I. Banking department.
- II. Organization of banks.
- III. Banking business.
- IV. Responsibilities of banks.
- V. Rights and liabilities of stockholders.
- VI. Bank officers.
- VII. Deposits.
- VIII. Checks.
- IX. Suits by and against banks.
- X. Insolvency.

I. Banking department.

1. Under the act 8 June 1891 (Brightly's Purdon 177) the banking department is charged with the supervision of all banks and banking companies, trust companies, savings institutions, savings banks, provident institutions and all corporations having power and receiving money on deposit, and incorporated under the laws of this state. *In re Trust Companies*, 11 C. C. 489.

II. Organization of banks.

2. The evidence of the ratification of the contract of a bank with one of its promoters, to obtain subscribers to its stock, must be positive, and cannot be inferred from the mere silence of the directors. *Tift v. Quaker City Nat. Bank*, 141 P. S. 550; affirming s. c. 8 C. C. 606; 47 L. I. 308. See *Copeland v. Stoneham Tannery Co.*, 142 P. S. 446.

3. Banks of discount and deposit chartered by special acts are not subject to the regulations governing banking institutions organized under the act 13 May 1876, and are not restricted by the limitations as to loans contained in sec. 21 of that act (Brightly's Purdon 173); they are not, however, exempt from the general provisions of the act 17 April 1861 (Brightly's Purdon — title, Banks). *Central Bank of Pittsburgh*, 11 C. C. 511.

4. A bank incorporated by a special act of assembly before the banking company act of 13 May 1876 (Brightly's Purdon 168), is not made subject to that act by a renewal of its charter. *McKinley-Lanning Loan & Trust Co.*, 12 C. C. 40. See *Iron & Glass Dollar Savings Bank*, 12 C. C. 42.

5. In a proceeding to renew the charter of a bank under the act 10 May 1889 (Brightly's Purdon 185) the notice by advertisement required by that act cannot be waived by the stockholders of the bank. *In re Bank Charters*, 14 C. C. 144.

6. Under the act 20 May 1889 (Brightly's Purdon 209), providing for the formation of savings banks without capital stock, the auditor-general will approve a charter to the "Dime Savings Bank of Philadelphia"; and this, notwithstanding the protest of the "Dime Savings Fund and Trust Company" on the ground of similarity of name. *Dime Savings Bank of Philadelphia*, 9 C. C. 369.

III. Banking business.

7. A bank receiving a check for collection should send it to an independent bank, not directly to the bank on which it is drawn; neither should it accept in payment the latter's draft on another bank. An order by the depositor to the collecting bank to hold such a draft for a few days would condone the latter's negligence. *Hazlett v. Commercial Nat. Bank*, 132 P. S. 118; s. c. 25 W. N. C. 282.

8. A bank holding collateral for the payment of certain notes, cannot refuse to resign the collateral because the pledgor is indebted to it upon an entirely distinct cause of action. *McIntire v. Blakeley*, 12 Atlan. 325.

9. To entitle a bank to recover on renewal notes, it is not essentially necessary for its books to show an entry of their discount. *Moseby v. Bedford County Bank*, 4 Cent. 268.

10. If a note be tendered to a bank for discount, it cannot apply the proceeds to

the payment of the maker's endorsement on another note without his consent. *Parry v. Highley*, 8 C. C. 584.

11. A bank which holds its depositor's note, must charge it against his account at maturity; otherwise the endorser is discharged. *German National Bank v. Foreman*, 138 P. S. 474; s. c. 27 W. N. C. 154.

12. Where a draft for a sum exceeding five hundred dollars drawn upon a joint stock company was accepted in the name of the drawee "per Bernard Lauth, chairman," and Lauth was the only manager who signed the acceptance, and the draft was afterwards delivered by another of the managers to the payee, who had it discounted by a bank; it was *held*, that the bank was bound to know that the signatures of two managers were necessary to a valid acceptance, and it was further *held*, that if Lauth signed the acceptance with the understanding that his name was to be one of the two required by the statute, and that it was to be signed also by the manager by whom it was delivered and placed in his hands for that purpose, then Lauth did not become personally liable by reason of the neglect of his fellow-manager to complete the acceptance. *Mercantile Nat. Bank v. Lauth*, 143 P. S. 53.

13. Where a debtor bank at the clearing house failed before it settled on that day the balance against it, and the clearing house required all the banks which presented checks and drafts against the failed bank to take them back and to pay to them the full amount of such checks and drafts instead of the mere balance against the failed bank, and then distributed among the creditor banks; it was *held*, that the clearing house did not thereby render itself liable for the payment of a draft which the failed bank had undertaken to collect through the clearing house for a depositor from one of the banks which was a debtor on the day's settlement, but paid over as its balance a sum greatly in excess of the amount of the failed bank's checks and drafts upon

it, including the draft in question. *Crane v. Clearing House Association*, 13 C. C. 550; s. c. 32 W. N. C. 358. See *Crane v. Fourth Street Nat. Bank*, 4 Dist. Rep. 131.

14. Where the plaintiff sent a draft upon a bank to another bank for collection, which duly presented it to the drawee through the clearing house, and it was paid and a settlement made by the drawee with the clearing house, but the money instead of being paid to the collecting bank, which failed after the presentation of the draft, was applied by the clearing house to the payment of debts due the clearing house by the collecting bank; it was *held*, that the payment by the drawee to the clearing house was entirely unauthorized by the plaintiffs and was not an acquittance of the debt due the plaintiffs. *Crane v. Fourth Street Nat. Bank*, 4 Dist. Rep. 131.

15. Where a bank has discounted a promissory note, if the note is not paid at maturity, the maker cannot require the bank to appropriate the endorser's funds to the payment of the note, but where the bank hold funds of the maker, it is bound to appropriate his deposit to the payment of the note in relief of the endorser, and a failure to do so, to the loss of the endorser, renders the bank liable. *Mechanics' & Traders' Bank v. Seitz*, 150 P. S. 632; reversing s. c. 8 Lanc. 298. See s. c. 155 P. S. 191.

16. Where, upon the protest of a note, a clerk of the bank charged the note to the account of the endorser, but afterwards corrected this by entry of a credit, so as to let the account stand as before; it was *held*, that such credit, made under the direction of the cashier, was a new purchase of the note made after protest, and subject to the equities between the maker and the payee. *Mechanics' & Traders' Bank v. Seitz*, 150 P. S. 632; reversing s. c. 8 Lanc. 298. See s. c. 155 P. S. 191.

17. Where a bank has agreed to discount a note, and discovers, before it has paid the money, that the borrower is insolvent, it may tender back the note

given for discount and refuse payment to the borrower; the latter's assignee for creditors has no superior rights to the borrower himself. *Warner v. Hare*, 154 P. S. 548.

18. Where the president of a bank accepts for discount the promissory notes of a corporation, knowing them to have been executed in fraud of the corporation, the bank is estopped from asserting that the notes were issued in the exercise of an apparent authority in the treasurer to issue notes. *Millward-Cliff Cracker Company's Estate*, 161 P. S. 157.

19. The authority given by the revised statutes to national banks to lend money on personal security means the personal responsibility of the borrowers and their sureties; it does not mean the lending of money on the security of personal property; but where a national bank had sold asphalt blocks to the defendant and nothing remained for him to do but to pay the consideration; it was *held*, that he would not be allowed to set up that the contract was *ultra vires*. *Montgomery National Bank v. McCleaster*, 13 C. C. 392.

20. Under the act 13 May 1876, sec. 21 (Brightly's Purdon 173), a banking company cannot loan or invest more than ten per cent of its capital upon the credit of any one of its directors, but after such ten per centum has been reached, a note bearing the name of a director as endorser may be purchased, provided it be done wholly upon the credit of other names appearing upon the paper. *McKinley-Lanning Loan & Trust Co.*, 12 C. C. 40.

21. The sums which may be recovered from a national bank, under the act of Congress 3 June 1864, for taking usurious interest are penalties. *Osborn v. First Nat. Bank of Athens*, 154 P. S. 134.

22. The annual report of a loan and trust company should be made to the banking department, under the act 8 June 1891 (Brightly's Purdon 177), and not to the auditor-general. *McKinley-Lanning Loan & Trust Co.*, 12 C. C. 40.

23. A savings bank or a trust company

doing a banking business has no right to establish branches even within the municipal limits of a city or county which it has designated in its charter as the location of its place of business. *Germanantown Real Estate, Deposit & Trust Co.*, 15 C. C. 641.

24. Where a bank received a bill of lading made out to the order of the consignors with a draft attached, drawn on the purchasers of the carload of goods, and in the bill of lading was a direction to notify the purchasers; and the purchasers drew a new draft upon a person to whom they proposed to sell the goods, and the bank discounted the new draft and passed the amount of it to the purchaser's credit, who then drew a check upon this deposit for the amount of the original draft and delivered the check to the bank, and the purchasers failing to sell the goods to the person upon whom the second draft was drawn, sold them to other parties to whom they directed the railroad company to deliver the car, and the bank never notified the railroad company of its possession of the bill of lading and the company had no knowledge of its existence, and the purchasers subsequently failed and did not pay the second draft; it was *held*, in an action by the bank against the railroad company for a wrongful delivery of the goods, that the railroad company was not liable. *National Bank of Phoenixville v. Philadelphia & Reading R. R. Co.*, 163 P. S. 467.

IV. Responsibilities of banks.

25. The payment by a national bank of the three mill tax on the assessed value of its stock as provided by the 26th section of the act of 1 June 1889 was *held* to exempt its shares of stock, in the hands of individual stockholders, from local taxation. *Gorley v. Bowlby*, 8 C. C. 17.

26. A bank which has elected to collect from its stockholders a tax of six-tenths of one per cent on the par value of all the shares, was *held* not to be liable, under

the act of 30 June 1885, to an additional state tax of three mills on money at interest. *Miners' Savings Bank v. Wilkesbarre*, 5 Kulp 436.

See TAXES.

V. Rights and liabilities of stockholders.

27. The act of 16 April 1850 (Brightly's Purdon 201), providing for the individual liability of the stockholders of banking corporations, is applicable only to banks of issue. *Dreisbach v. Price*, 133 P. S. 560; s. c. 26 W. N. C. 61. See *Lebanon Tr. & S. D. Bank's Estate*, 10 Lanc. 393.

28. Under a charter providing that stockholders shall be individually liable to the extent of double the amount of their stock, each stockholder after the payment of the par value of his shares is liable to creditors in addition, to the extent of twice such par value. *Ibid*.

29. A married woman who is a stockholder in a bank is liable under the individual liability clause in its charter. *Ibid*.

30. An incoming stockholder in an unincorporated banking association is not liable for the debts contracted by the association before he entered it; and this, notwithstanding articles allowing a stockholder to sell his stock if not indebted on endorsements, and binding all stockholders individually to make good to all depositors the amount of their deposits. *Christy v. Sill*, 131 P. S. 492.

31. In an action against several individuals as copartners late doing business under the firm name of the Home Savings Bank, for the amount of a deposit in a banking institution of that name; it was *held*, that the burden was on the plaintiff to prove the alleged partnership, and until *prima facie* proof of such fact, the defendants were not called on to enter upon a defence. *Hallstead v. Coleman*, 143 P. S. 352; reversing s. c. 10 C. C. 434.

32. Where a proceeding was instituted to charge the owner of bank shares as a

general partner, and the evidence showed the organization of the bank, certificates of stock and dividends paid, and there was evidence that the owner of the stock received such dividend, and there was no proof that the officers or stockholders held themselves out as partners, although the reports to the auditor-general referred to the organization as a firm; it was held, that the supreme court was not warranted in reversing a finding by an auditor, affirmed by the court below, that the bank was not a partnership. *Gibbs's Estate*, 157 P. S. 59.

VI. Bank officers.

33. The president of a bank cannot make a valid contract to pay for obtaining depositors. *Tift v. Quaker City Bank*, 141 P. S. 550; affirming s. c. 8 C. C. 606; 47 L. I. 308. See *Copeland v. Stoneham Tannery Co.*, 142 P. S. 446.

34. The cashier of a national bank which holds the paper of a firm of which the cashier is a member, cannot waive liability on an accommodation note procured by him to be substituted for the indebtedness of his firm. *Allen v. First National Bank*, 127 P. S. 51.

35. If a man be treasurer of a company and the cashier of a bank, the knowledge he acquires in the capacity of treasurer will not be imputed to the bank, unless revealed by him to some of its officers. *Wilson v. Second National Bank*, 7 Atlan. 145.

36. The bond of a surety of a cashier of a bank is not invalidated by being given in the name of the bank instead of that of the commonwealth, as required by the act of 16 April 1850 (Brightly's Purdon 187). *Shackamaxon Bank v. Yard*, 47 L. I. 200; reversed as to another point in 143 P. S. 129. See s. c. 150 P. S. 351.

37. The death of the surety of the cashier of a bank does not release his estate from the obligation. *Ibid.*

38. The surety of a bank cashier is not discharged because, after the bond

was given, the principal was employed as individual ledger clerk, without notice to his surety. *Shackamaxon Bank v. Yard*, 150 P. S. 351. See s. c. 143 P. S. 129.

39. It is beyond the scope and power of the cashier of a private bank (himself a partner) to enter credits upon the bank book of a depositor without any check, bill or note being presented for discount; but if he enter the credits on the books of the bank, and the depositor be permitted to draw the money, the bank is estopped from setting up the want of authority in their cashier; otherwise as to credits not entered on the books of the bank though duly entered on the depositor's pass book. *Williams v. Dorrier*, 135 P. S. 445.

40. If bank directors use the ordinary care which bank directors usually exercise, and perform their duties in the same manner as they were performed by all other directors of other banks in the same city, they will not be held liable for misappropriations by the officers of the bank. *Swentzel v. Penn Bank*, 147 P. S. 140.

41. Where a director, acting upon information obtained in his confidential relation, withdraws the deposit of a partnership of which he is a member, on the day of the suspension of the bank, he will be ordered to repay it. *Swentzel v. Penn Bank*, 147 P. S. 140.

42. An officer of a defendant bank may be compelled to testify on behalf of the plaintiff whether there are any records in the bank books by which they can identify notes deposited with them for collection or discount, and the parties to those notes. *McManus v. Freeman*, 2 Dist. Rep. 144.

43. Upon the trial of an indictment against a banker for receiving money at a time when he knows that he is insolvent, the burden of proof is upon the commonwealth to show that the defendant was a banker, that he knew himself to be insolvent, and that he received the money as a deposit. *Comm'th v. Schall*, 12 C. C. 209.

44. Where the cashier of a bank without formal re-election was continued in his employment and the condition of his bond provided for his fidelity "for and during the time of his employment by the said bank, whether under his present election or any subsequent election to the said position, or whether under its present organization or charter or under any renewals or extension thereof"; it was held, that the obligation of the obligors covered the whole period of the cashier's service. *Shackamaxon Bank v. Yard*, 143 P. S. 129; reversing s. c. 47 L. I. 200. See s. c. 150 P. S. 251.

VII. Deposits.

45. Money deposited in the name of the depositor is, as between the bank and him, his money. If the bank pay it to a third person it must show not only that it did not belong to the depositor, but that it did belong to the person to whom it was paid. *Patterson v. Marine Nat. Bank*, 130 P. S. 419.

46. Money to the credit of a depositor may be shown to be the property of a third person, and be reached by attachment against the latter, or such third person may stop payment by proper notice. In the absence of any claim, however, the bank is bound to honor the depositor's check. *Hemphill v. Yerkes*, 132 P. S. 545; s. c. 25 W. N. C. 417.

47. Money deposited by one person as attorney for another belongs to the latter; neither the bank nor the attorney can deny it. *Bausman v. Burger*, 135 P. S. 499; s. c. 26 W. N. C. 355.

48. In the absence of proof of fraud a deposit in the name of a third person is *prima facie* in payment of a debt due him, and the latter's ownership is good as against all other persons. *Ferry v. McKenna*, 9 C. C. 17.

49. A bank which credits a depositor with a check left for collection may charge the same back to him in case the check turns out to be fraudulent. *Rapp v. National Security Bank*, 136 P. S. 426; s. c. 26 W. N. C. 458.

50. A trustee who deposits money in bank, under an agreement that it shall not be withdrawn except on two weeks' notice, is not personally liable in case of loss. *Law's Estate*, 144 P. S. 499; reversing s. c. 27 W. N. C. 345; 47 L. I. 504; s. c. Ibid. 534.

51. Under the act 13 May 1876, sec. 30 (Brightly's Purdon 174), an interest bearing time deposit will be regarded as a loan to the bank; it is not such a deposit as the bank is prohibited to pay interest on. *State Bank of Lock Haven*, 13 C. C. 433.

52. The act 4 June 1885 (Brightly's Purdon 804), providing for the refunding of escheated deposits, is limited to the escheat of deposits in banking companies; escheated corporation dividends not claimed by the person whose money has been escheated, but by his legal representatives, cannot be refunded out of the state treasury. *Bull's Estate*, 11 C. C. 441.

53. The act 9 May 1889 (Brightly's Purdon 499), providing for the punishment of bankers receiving a deposit with knowledge that the bank is insolvent, is not in violation of Art I., sec. 15, of the constitution, that the person of a debtor shall not be continued in prison after delivering up his estate for the benefit of creditors; where attorneys at law are the proprietors of a banking institution, they are amenable as bankers under that act; it is no defence that the defendant intended to return the money. *Comm'th v. Sponsler*, 16 C. C. 116; s. c. 1 Lack. L. N. 61.

54. Money deposited in bank to the credit of A may be shown to be the property of B, and in a suit by A the bank may defend by pleading an attachment issued by the judgment creditors of B. *Sweigart v. National Iron Bank*, 8 Montg. 203.

55. Where a depositor had three accounts in a bank, one individual, one as trustee and one as a partnership account, and he deposited checks which were drawn to his order individually, and

endorsed them for deposit to his credit individually, but the deposit slips apportioned the amount to the different accounts, and he drew on the various accounts as though the deposits were regularly made in each case; it was *held*, that he was estopped from afterwards asserting that the bank acted without authority in paying the checks upon the accounts other than his individual account. *Rennyson v. People's Nat. Bank*, 8 Montg. 46.

56. Upon an attachment execution against a bank as garnishee, where the answer set forth that the defendant had a deposit with the garnishee, arising from a discount previous to the attachment which was put to the defendant's credit, and that the discounted note had been rediscounted by another bank for the garnishee; it was *held*, that the answer was insufficient, and that, although the defendant was insolvent, the bank had no authority to withhold, by way of equitable estoppel, the deposit to meet its liability on the note. *Newbold v. Patrick*, 42 P. L. J. 299.

57. Where the attorney of an administrator made a deposit of estate money with a private banker, and received a certificate of deposit therefor payable in one year with interest, the transaction was held to be a loan, unauthorized by law, for which the administrator was responsible on the insolvency of the banker; and where the administrator became insolvent and the attorney, who was also a surety on the administration bond, paid the amount lost; it was *held*, that the deposit having been the act of the attorney and done without the knowledge of his co-surety, the latter was not liable to make contribution. *Eshleman v. Bolenius*, 144 P. S. 269; reversing s. c. 8 Lanc. 9.

58. Money deposited in the name of a wife is *prima facie* her money, and when claimed by her husband on her decease, the burden is on him to prove that it was his property. *Qualters's Estate*, 147 P. S. 124.

59. An administrator *de bonis non* is not entitled to recover from a bank the

amount of a deposit which originally stood in the name of the intestate, but which the deceased administrator reduced to his possession by a transfer to his own credit and which his administrator has since drawn out. *Sibbs v. Philadelphia Savings Fund Society*, 153 P. S. 345.

60. Where William Kerr gave money to his brother Varner to deposit in a bank and the money was deposited in the name of "William Kerr by Varner Kerr," and the pass-book delivered to Varner, who, at various times, drew the money out of bank upon his own signature; it was *held*, that as the bank knew the money belonged to William, and the deposit was in his name, there was no implication of authority in Varner to check it out, and the bank was liable for the whole amount deposited by William. *Kerr v. People's Bank*, 158 P. S. 305.

61. Where a deposit was in the name of a wife; it was *held*, that a testamentary paper in her handwriting, to the effect that the deposit really belonged to her husband, was competent evidence of his ownership; and this, although, when the paper was found, the signature was torn off; and where it further appeared that the wife had declared that the money belonged to her husband and that she had taken charge of it because he was not much of a business man; it was *held*, that such evidence was sufficient to rebut any presumption of a gift. *Gracie's Estate*, 158 P. S. 521; affirming s. c. 41 P. L. J. 9.

62. Under the act 9 May 1889 (Brightly's Purdon 499), it is sufficient that an indictment charge that defendant, being a banker and knowing that he was insolvent, received money from a depositor; it is immaterial that the act describes the offence as embezzlement. *Comm'th v. Rockefeller*, 163 P. S. 139. See *Comm'th v. Smith*, 11 Lanc. 350.

VIII. Checks.

63. A bank which, without cause, refuses to honor a depositor's check is

liable for substantial damages though no special loss be shown. *Patterson v. Marine National Bank*, 130 P. S. 419.

64. The holder of a check cannot maintain an action in his own name against the drawees; and this, though the check was for the entire balance due the drawer. *Maginn v. Dollar Savings Bank*, 131 P. S. 362.

65. If a check be drawn against the whole of a specific fund in bank which belongs to the payee, it operates as an assignment of the fund and passes a legal title thereto to the payee against the drawer and his attaching creditors. *Hemphill v. Yerkes*, 132 P. S. 545; s. c. 25 W. N. C. 417.

66. Under the act of 10 May 1881 the acceptance of a check or bill of exchange for over twenty dollars must be in writing. *Maginn v. Dollar Savings Bank*, 131 P. S. 362.

67. The acceptance of a check of a third person to the creditor's order is, in the absence of an agreement to the contrary, but a conditional payment. The debtor is not entitled to notice of dishonor nor is a return or tender of the check necessary before bringing suit for the original debt. *Holmes v. Briggs*, 131 P. S. 233. See s. c. 118 P. S. 283.

68. If the cashier of a bank procure a check from a depositor by false representations, and charge the same to his account, and then returns the check, but the money is not otherwise appropriated, the depositor may recover the amount from the bank. *Wood v. Tradesmen's Nat. Bank*, 6 Montg. 31.

69. If a check appears on its face that it might have been altered in its amount, and such alteration is alleged, it cannot be received in evidence until the alleged alteration is first explained. *Nagle's Estate*, 134 P. S. 31; s. c. 26 W. N. C. 14; reversing s. c. 2 Northam. 73.

70. Sufficiency of notice by a bank to the endorser of a forged check; *held*, that the defendant had, by his conduct, waived the return of the check. *Stroudsburg Bank v. Shupp*, 1 Northam. 35.

71. Betting is gambling within the act of 22 April 1794 (Brightly's Purdon 950), and a check given in pursuance of a bet is void even in the hands of an innocent third party for value. *Durr v. Barclay*, 8 C. C. 285.

72. Where a retail liquor license was paid for by a check and the bank failed the next day, before presentation; it was *held* to be no payment and the court would revoke the license on failure of licensee to take up the check. *Comm'th v. Shoemaker*, Public Ledger, 22 November 1890.

73. It was not decided whether a plaintiff who made checks at the request of a bank president, to enable the latter to deceive an auditing committee, was forbidden by public policy from setting up the transaction as a basis for a claim against the bank. *Penn Bank's Estate*, 152 P. S. 65.

74. The relation of debtor and creditor cannot be established by an unexplained delivery of money or a check by one person to another; the presumption in such case is, that the money or check was received in payment of an antecedent debt or loan. *Lowrey v. Robinson*, 141 P. S. 189.

75. A check without explanation must be considered as evidence of the payment of a debt rather than that of a loan, but under all the circumstances of the case at bar, checks were considered as a loan by the drawer to the payee. *Moyles's Estate*, 7 Kulp 215.

76. It is the duty of a payee of a check to present it for payment as soon as he reasonably may; where the drawer, the payee, and the bank were all in the same city; it was *held*, that a delay for three days in presenting a check for payment was unreasonable and threw upon the holder a loss arising from the bank's insolvency. *National State Bank v. Weil*, 141 P. S. 457.

77. Where a judgment note was given to secure any sums previously advanced or which might be thereafter advanced; it was *held*, that checks and receipts showing payments of various sums of

money both before and after the date of the judgment note, but not specifying on what account they were paid, were insufficient of themselves to establish an indebtedness, but having been admitted in evidence, the defendant might show that prior to making the said payments his decedent had deposited moneys in plaintiff's hands for investment or safe-keeping, and it was then for the jury to say whether the payments were made on account of such deposits. *McCain v. Peart*, 145 P. S. 516.

78. The payee of a check is a competent witness to prove that the check was drawn in the maker's lifetime in order to enable the payee to collect the money and pay it to a third person to whom the maker intended to present it as a gift. *Taylor's Estate*, 154 P. S. 183.

79. Where a check is drawn for the whole amount of the deposit, and the drawer intends, by means of the check, to make a gift to another of the whole fund, the check will operate as an equitable assignment of the fund. *Taylor's Estate*, 154 P. S. 183.

80. Where the defendants resided in Philadelphia and drew a check in that city on a Philadelphia bank, and delivered the same to the plaintiff's agent at defendant's place of business at Philadelphia, and the plaintiff, who was the payee of the check, lived in New York city, and his agent on the day he received the check, to wit, on May 5, returned to New York and delivered the same to his principal after the close of banking hours, who placed it in bank for collection on May 6, and the bank forwarded it to Philadelphia on May 7, and it was presented about noon of May 8, when the bank had closed its doors; it was held, that the plaintiff had used due diligence. *Rosenthal v. Ehrlicher*, 154 P. S. 396.

81. Under the act 5 April 1849 (Brightly's Purdon 1733) the mere acceptance of payment of forged paper is no longer of itself a bar to the recovery of the money by the party paying it, but the statute does not dispense with the

necessity of care and diligence on the part of the payer, nor exempt him from the consequences of his own negligence if thereby loss would accrue to the other party. Where the plaintiff, a bank, received a check on December 19, paid it to the defendant, who entered it on his books, and then dismissed it from further attention, and five days afterwards it was discovered that the drawer's name had been forged, and in the meantime the defendant had paid the money out; it was held, that the plaintiff had been guilty of want of due diligence and was not entitled to recover back the money. *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 P. S. 46.

82. Where checks against a partnership account were to be signed by both partners and the bank paid checks signed by one partner only; it was held, on an attachment execution against the bank by a creditor of the firm, that if the checks so signed by one partner were not used for a legitimate partnership purpose, the bank was liable to the extent of their amount to the attaching creditor. *Granby Mining & Smelting Co. v. Laverty*, 159 P. S. 287.

83. Sec. 5 of the act 21 March 1806 (Brightly's Purdon 1730) should be read into the act 25 May 1887 (Brightly's Purdon 1728). In a suit upon a bank check by one not a party to it, the statement should contain some averment of plaintiff's title or ownership, an averment of presentment to the drawer and a neglect or refusal on his part to pay, and also a statement of the amount justly due to the plaintiff. *Penn National Bank v. Kopitzsch Soap Co.*, 161 P. S. 134.

84. Under the act 10 May 1881 (Brightly's Purdon 221) a bank is not bound by the verbal promise of its president that a check shall be paid if the holder will retain it for a few days. *National State Bank of Camden v. Lindeman*, 161 P. S. 199.

85. Where bankers who were the drawees of a check received it direct from another bank which was acting as

agent of the payee for its collection, and the drawees had in their hands sufficient funds of the drawer to pay the check but neglected to pay it and subsequently failed; it was *held*, that the sending of the check direct to the drawee was such negligence in the agent bank as would prevent the payee from recovering the amount of the check from the drawer; it was further *held*, that the status of the parties was not affected by the fact that the drawer, on a misrepresentation of facts by the payee, sent him a duplicate check at his request. *Wagner v. Crook*, 167 P. S. 259.

86. Where a collecting bank received a check for collection through the clearing house upon a Friday, and the check would have been paid if it had been sent to the clearing house on Saturday, but it was not so sent until Monday, when it was returned dishonored, when the assistant cashier of the collecting bank sent the check back to the plaintiff with a full statement of what had been done, and the accounts between the plaintiff and defendant were then adjusted, and the defendant continued to act as plaintiff's clearing house agent for four years more; it was *held*, in an action for the loss brought nearly six years after the original transaction by plaintiff's assignee for creditors, that the defendant was entitled to go to the jury on a question of the authority of the assistant cashier and a subsequent ratification of his act and of the binding effect of a settlement made and acquiesced in for such a length of time. *Farmers' & Mechanics' Bank v. Third National Bank*, 165 P. S. 500.

87. A check given by a joint stock company must contain the full name of the company or else the party signing it will be held individually liable; and this, in the absence of fraud and where all the parties knew that the check was intended as a partnership check. *Baltimore & Ohio R. Co. v. Wilkins*, 10 C. C. 269.

88. The holder of a check is not bound to present it for payment until the day after its date or the day following its re-

ceipt. *Doherty v. Watson*, 29 W. N. C. 32.

89. The drawing of a check against a deposit is not such an appropriation of a fund in the hands of the bank as will defeat an attachment execution served on the bank before the presentation of the check. *Roberts v. Boyle*, 8 York 13.

IX. Suits by and against banks.

90. Where a note has been discounted by a national bank, it is no defence that the bank had discounted paper of another person to an amount exceeding one-tenth of its capital. *Allen v. First National Bank*, 127 P. S. 51.

91. In a suit by an assignee for creditors against a bank to recover the assignor's deposit, the defendant may set off commercial paper obtained by it as endorser, whether for collection or as owner, before the assignment. *Penn Bank v. Farmers' Deposit Nat. Bank*, 130 P. S. 209.

92. The voluntary payment of a note by the payee and endorser of a note with knowledge that his liability has been discharged by the neglect of an agent of the discounting bank to present it for payment, gives him no right of action against such agent. *Oil Well Supply Co. v. Exchange Nat. Bank*, 131 P. S. 100; *Harvey v. Girard Nat. Bank*, 119 Ibid. 212.

X. Insolvency.

93. The payment by an insolvent savings bank to some of its depositors to the exclusion of others of a dividend of ten per cent before assignment, is a lawful preference. *Coopersburg Bank*, 4 Del. 160.

94. The directors of an insolvent savings bank are not required to file in the prothonotary's office within ten days a statement of its affairs. The act of 16 April 1850 (Brightly's Purdon 203) applies to banks of issue only. *Scranton City Bank's Assignment*, 1 Lack. Jur. 157.

95. If the assignee of an insolvent

bank apply to court for authority to make an assessment for unpaid instalments on the stock, he is bound by the terms of the decree, and if he fails to give the stockholder the notice provided by the decree, he cannot recover. *Franklin Savings Bank v. Fatzinger*, 2 Cent. 576.

96. Equity has jurisdiction of a bill by the assignee of an insolvent bank against the president and others, charging that the defendants had withdrawn large sums and used them in gambling in oil, on the ground that the remedy at law, involving the consideration of a mass of complicated accounts, would be inadequate. *Warner v. McMullin*, 131 P. S. 370.

97. Upon the distribution of the insolvent estate of a banking company under the act 13 May 1876, sec. 28 (Brightly's Purdon 174), depositors are preferred creditors and must be paid in full in preference to all other creditors, but balances due to banks and bankers, being the results of mutual accounts, and deposits for a fixed period with interest, are not to be classed as deposits. So, the receiver cannot distribute any money to depositors, who are in any way liable to the bank as drawers or endorsers until such liability is discharged or extinguished; and depositors who are stockholders are not entitled to receive any part of their deposit until all other creditors of the bank are fully paid. *State Bank of Lock Haven*, 13 C. C. 433; s. c. 3 Dist. Rep. 4.

98. Where a party has a deposit in an insolvent bank when it suspends, and the bank holds a note against him which matures about a month later and which he voluntarily pays, he cannot recover back such voluntary payment from the receivers; and this, though he paid the note in ignorance of his legal right of set-off. *Westfield v. Dill*, 12 C. C. 30.

99. Upon the insolvency of a bank, a depositor has the right to set off his deposit against a note owned by the bank, endorsed by the depositor and falling due after the suspension of the bank. *Pigeon v. Dickey*, 11 C. C. 353.

100. A depositor in an insolvent national bank to which he becomes indebted through the endorsement of a note discounted by it and maturing after its failure, can set off the amount deposited to his credit against the amount due on the note. *Yardley v. Clothier*, 1 Dist. Rep. 46.

101. Where a bank made an assignment for creditors and it held money of a trust estate as a trustee; it was held, that upon the execution of the assignment the powers and duties of its officers over its property and effects passed to the assignee, and that an attachment would not be granted against such officers to compel the payment of such trust estate; nor against the assignee pending the audit of his account. *Palm's Estate*, 3 Dist. Rep. 456.

102. Where a bank, which holds a sealed note of the defendant, becomes insolvent, the defendant in an action by its assignee may set off against the note the amount of his deposit in the bank. *Lewis v. Barber*, 8 Lanc. 116.

103. Where two promissory notes were discounted by a bank for the defendants and pledged by the bank with the clearing house (plaintiff) as collateral security, and the bank failed and it appeared that it owed the clearing house a large balance for loan certificates issued to the bank; it was held, that the defendants could not set off against the notes, a sum due them on their deposit account in the bank at the time of its failure. *Philler v. Woodfall*, 32 W. N. C. 183.

104. Where a shareholder in a private bank had purchased his shares in 1881 from the bank, which was then insolvent and had purchased the shares it, self from withdrawing stockholders; it was held, on a bill to adjust the liabilities of the partners, at the time of suspending business in 1884, that the owner of such shares was not entitled to credit for the amount paid for the shares. *Barndollar v. Du Bois*, 142 P. S. 565.

105. Where an executor, with the ac-

quiescence of another executor, bought the stock of a bank of which he was president, with the moneys of the estate, and a third executor was life tenant of the estate and had actual or constructive notice of the purchase, and five days before the suspension of the bank forty shares of the stock were sold to the bank at par, and a certificate of deposit for the price was issued to the life tenant; it was *held*, that the estate had only the rights of a shareholder and could not claim a dividend as against creditors. *Columbian Bank's Estate*, 147 P. S. 422.

106. Where the director of an insolvent bank threatened to resign and to sell his stock at public auction, and the president induced him to refrain from so doing and made an arrangement with him by which he delivered the stock to the president and received for it interest-bearing obligations of the bank, and no person was named as the purchaser of the stock; it was *held*, that the vendor was affected with constructive notice of the fact that the bank was the purchaser of the stock, and also of the fact that the bank was insolvent at the time; and in such a case the vendor could not claim a dividend in the distribution in the bank's assets to the detriment of other creditors. *Columbian Bank's Estate*, 147 P. S. 422.

107. Where a bank delivered to a depositor his account and then made an assignment for creditors and the depositor acquiesced for more than six years in the correctness of the account; it was *held*, that a claim made at the second audit as creditor was barred by the statute of limitations. *Penn Bank's Estate*, 152 P. S. 65.

108. Where, upon the distribution of the assets of an insolvent bank, it appeared that the claimant bank having a check for \$88,000 upon the assigning bank, which the latter was unable to pay in full, agreed to lend the assigning bank \$40,000, the proceeds of the discount of four notes made by the directors of the

assigning bank, and to look to the makers of the notes for payment, and the assigning bank was then to pay the whole amount of the check, and it further appeared that the claimant bank received the four notes and drew checks in favor of the assigning bank for the proceeds, but before they were paid it was found that the assigning bank would not be able to pay the \$88,000 check, and the claimant bank then stopped payment of its checks; it was *held*, that the proceeds of the notes were in equity a partial payment of the \$88,000 check, and that the claimant bank was not entitled to include the amount of the four notes in its claim, and thus receive a dividend on the full amount of \$88,000. *Penn Bank's Estate*, 165 P. S. 548.

109. Where money received by a bank as trustee is mingled with a general mass of money on deposit and used in the general banking business, and there is no means of tracing or ascertaining its identity, the *cestui que trust*, upon the insolvency of the bank, is not entitled to a preference over its general creditors. *Lebanon Trust & Safe Deposit Bank's Estate*, 166 P. S. 622.

BARGAIN AND SALE.

See DEED.

BARRATRY.

See CRIMINAL LAW, XXVII.

BASTARDY.

See CRIMINAL LAW, XXXVI.: DESCENT:
POOR.

- I. Legitimacy.
- II. Rights of bastards.
- III. Support of bastards.

I. Legitimacy.

1. A child born out of wedlock is legitimated by the subsequent marriage and death of its parents; and this, though born prior to the acts of 14 May 1857 and 21 April 1858 (*Brightly's Purdon* 1297), and though its parents were within the prohibited degrees of affinity under the act of 31 March 1860. *Adams's Estate*, 6 C. C. 591.

2. If a child be shown to be the child of a decedent, she is presumed to be legitimate. *Simpson's Estate*, 4 Del. 129; s. c. 1 *Lack. Jur.* 193.

3. A legacy given to an adopted child who stands in place of an heir is subject to the collateral inheritance tax. Effect of legitimation of a bastard child considered. *Comm'th v. Ferguson*, 137 P. S. 595; s. c. 27 W. N. C. 69.

4. The act of 18 February 1871, P. L. (1872) 1250, authorizing John Ferguson to adopt his illegitimate son as his heir, is one of adoption and not one of legitimation. *Comm'th v. Ferguson*, 26 W. N. C. 29.

5. There is no presumption that the man who marries the mother of a bastard child is the father of it. *Janes's Estate*, 147 P. S. 527.

6. Though a husband and wife are alike incompetent witnesses, a mother is competent to prove on the question of her son's legitimacy, that he was born eleven or twelve years before her marriage, and that his father's name was Docherty, and not the man she subsequently married. *Janes's Estate*, 147 P. S. 527.

7. A finding of the orphans' court that a petitioner is not a legitimate son of decedent on the ground that the claim was not sustained by the evidence, will not be overruled by the supreme court except for clear error. *Kates's Estate*, 148 P. S. 471; affirming s. c. 9 C. C. 569.

8. In an issue involving the legitimacy of offspring, admissions by one of the parties that a marriage had taken place, when, in fact, no marriage had been contracted, while greatly weakening the force

of subsequent admissions, will not have the effect of excluding them altogether. *Drinkhouse's Estate*, 151 P. S. 294; affirming s. c. 11 C. C. 144.

9. Where an estate is claimed by first cousins of a decedent, and also by persons claiming as children of his half brother whose legitimacy is denied, there is a presumption of marriage and legitimacy, and this presumption is strengthened by lapse of time and cannot be overcome after ninety years, except by strong, direct and satisfactory proof. *Pickens's Estate*, 163 P. S. 14.

II. Rights of bastards.

10. A legitimate son of the same mother cannot inherit from an illegitimate brother. *Kennedy's Estate*, 47 L. I. 524; s. c. 8 *Lanc.* 197.

11. Under the act 8 April 1833, sec. 17 (*Brightly's Purdon* 1072), an illegitimate child has no right to inherit from his uncle by representation through his mother. *Rees's Estate*, 166 P. S. 498.

12. Under the act 27 April 1855 (*Brightly's Purdon* 1055) a non-resident illegitimate child is entitled to inherit from its mother. *Waesch's Estate*, 166 P. S. 204; affirming s. c. 14 C. C. 387.

13. Where a will devised property to be equally divided among the testator's children, "the issue of a deceased child, if living, to take its parent's share"; it was held, that the word "issue" included illegitimate children, and that an illegitimate son of the testator's deceased daughter was entitled to share in the distribution. *Leedom's Estate*, 4 Del. 418.

See DESCENT.

III. Support of bastards.

14. An agreement to pay to the mother of an illegitimate child a stipulated sum for its maintenance is a valid contract; and this, though it discloses on its face that it is executed to stifle a prosecution

for bastardy. *Rohrheimer v. Winters*, 126 P. S. 253.

15. The moral obligation which rests upon a parent to provide for a bastard child is a sufficient consideration to support a trust declared for such child; where a parent addressed a letter to an illegitimate child asserting that certain premises had been bought by him for the use and benefit of the child to be held in trust for such purposes as long as desirable, and a request to the child to accept as a token of his affection, together with a provision for a reversion to the father in case the child should die before him without issue, and such letter was delivered to the child's mother for the child; it was *held* to be a perfect declaration of trust and enforceable against the heirs or devisees of the father who had taken possession of the premises after his death. *K— X— v. A— Y—*, 34 W. N. C. 145.

See CRIMINAL LAW, XXXVI.

BAWDY-HOUSES.

See CRIMINAL LAW, LIV.

BENEFICIAL SOCIETIES.

See CORPORATION.

- I. Organization.
- II. Constitution and by-laws.
- III. Officers.
- IV. Membership.
- V. Of the certificate.
- VI. Benefits.
- VII. Actions for benefits.
- VIII. Beneficiaries.
- IX. Change of beneficiary.
- X. Proof of loss.
- XI. Forfeiture.
- XII. Dissolution and insolvency.

I. Organization.

1. A corporation will be chartered for the purpose of maintaining a society for beneficial or protective purposes to its members from funds collected therein, said funds to be used in assisting the members in times of sickness or disability, and aiding their families in case of death; and this, although the subscribers are composed entirely of married women. *First Independent Ladies' Aid Society*, 40 P. L. J. 105.

2. Where the constitution of an association provided that its funds derived solely from stated payments by its members, should be applied first to the payment of expenses and sick and accident benefits, and second to the retirement in rotation of membership certificates; it was *held*, that the association was not a beneficial association, and the court of common pleas had no authority to incorporate it. *National Endowment Co.*, 142 P. S. 450.

3. A majority of the members of a subordinate division of a beneficial association cannot carry the division and its property over to another association against the will of the minority. *Gorman v. O'Connor*, 155 P. S. 239.

4. Upon the union in 1882 between the Ancient York Masons and the Free and Accepted Masons, real estate held in trust for certain lodges of the former vested in the Most Worshipful Grand Lodge of Free and Accepted Masons formed by the union, and in the lodges benefited by the trust. *Woolford's Appeal*, 126 P. S. 47.

5. On the subject of benevolent societies and rights of subordinate bodies, see brief of authorities in the notes to *Goodman v. Jedidjah Lodge*, 9 Atlan. 19, and *Maneely v. Knights of Birmingham*, *Ibid.* 44.

II. Constitution and by-laws.

6. The constitution is the fundamental law of a beneficial society, and any by-

law in conflict with the constitution must yield to the latter. *Sherry v. Plasterers' Union*, 139 P. S. 470.

7. Where a beneficial society has become liable for and paid weekly benefits to a member at a rate fixed by its charter, it cannot subsequently by an amendment to its by-laws reduce the amount of the benefits or take away the same entirely. *Becker v. Berlin Beneficial Society*, 144 S. P. 232; s. c. 5 York 75.

8. Upon the incorporation of a mutual aid society, the incorporators have no right to adopt a by-law giving to themselves as officers the right to fill all vacancies in the board of directors and other offices and to fix their own salaries, but where it appeared that such action had been rescinded, the court refused to remove the officers or to close the business of the corporation. *Comm'th v. United Brethren Mut. Aid Society*, 16 C. C. 145.

9. A change in the constitution of a beneficial association does not affect those who were members before such change took place. *Penn Mutual Relief Ass'n v. Patterson*, 1 York 5.

10. The act 11 May 1881 (Brightly's Purdon 1046) excluding the constitution and by-laws of life and fire insurance companies as evidence unless attached to the policy, does not apply to an action upon a benefit certificate in a beneficial society. *Beatty v. Supreme Commandry United Order of Golden Cross*, 154 P. S. 484; *Donlevy v. Shield of Honor*, 11 C. C. 477; *Espy v. American Legion of Honor*, 7 Kulp 134.

11. The act 11 May 1881 (Brightly's Purdon 1046), which requires the application for insurance to be attached to the policy before it can be received in evidence, does not apply to a certificate of membership in a beneficial association. *Dickinson v. Ancient Order of United Workmen*, 159 P. S. 258; *Johnson v. Philadelphia & Reading R. R. Co.*, 163 P. S. 127; *Lithgow v. Knights of the Maccabees*, 165 P. S. 292.

III. Officers.

12. The surety upon the bond of the treasurer of an Odd Fellows' lodge is liable for the balance in his hands at the end of his term; and this, though the treasurer be re-elected and, continuing to have custody of the funds without giving new bond, embezzle the money afterward. *Black v. Oblender*, 135 P. S. 526.

13. Under the act 28 April 1876 (Brightly's Purdon 219) it was held, that a committee were not personally liable upon a contract made by them on behalf of the association, said contract having been authorized at a regular meeting of the association and subsequently ratified at another meeting; that act contemplates all liabilities which are made payable out of the treasury of the association. *Pain v. Sample*, 158 P. S. 428.

IV. Membership.

14. Where a member of an unincorporated beneficial association of barbers was expelled and a bill was filed for his reinstatement, alleging that the expulsion was because the plaintiff had caused the arrest of certain other members for violating the Sunday law; it was held, that it was not necessary that the bill should further allege that the expulsion was illegal. *Manning v. Klein*, 11 C. C. 525. See s. c. 4 Dist. Rep. 599.

V. Of the certificate.

15. A "beneficial association" has no authority to issue contracts of insurance, and upon *quo warranto* it will be enjoined by the commonwealth from so doing. *Comm'th v. Equitable Beneficial Association*, 137 P. S. 412; s. c. 25 W. N. C. 347. See *Northwestern M. A. Ass'n v. Jones*, 154 P. S. 99.

VI. Benefits.

16. Where the constitution and by-laws of a relief association provide that a member shall receive no benefits until he executes a release to his employer, a railroad company, of all damages, the execution of such a release is a bar to an action against the railroad company. *Graft v. Baltimore & Ohio Railroad Co.*, 8 Atlan. 206.

17. A member not being entitled to benefits until after twelve months' membership, if he becomes insane prior to that time, he does not become entitled to benefits after its expiration. An insane member is not one in good standing. *McCullough v. Expressmen's Association*, 133 P. S. 142.

18. Where the constitution provided that a member should be entitled to funeral expenses "provided that he has been a member six months and not more than three months' dues in arrears at the time of his death," and a member was in arrears for May, June and July, and died on August 1, the dues for August being payable on August 2; it was held, that at the time of his death he was not more than three months in arrears. *Sherry v. Plasterers' Union*, 139 P. S. 470.

19. Where the chief officer of a subordinate lodge received from the relief fund the benefits due to the widow of a deceased member of the lodge, and such officer absconded with the money; it was held, that the lodge was bound to make good the benefit to the person entitled to receive it. *Fisher v. Olive Branch Lodge*, 152 P. S. 449.

20. Where a railroad company has contributed to the funds of a relief association composed of its employees, an agreement by a member of the association, that the acceptance of benefits from the relief fund shall operate as a release from all claims for damages against the company, is not contrary to public policy, and does not violate the rule, that a common carrier cannot make a valid contract against his own negligence. *Johnson v. Philadel-*

phia & Reading R. R. Co., 163 P. S. 127; affirming s. c. 2 Dist. Rep. 229. *Ringle v. Pennsylvania R. R. Co.*, 164 P. S. 529.

21. Where it is provided that members shall not be entitled to sick or funeral benefits within five weeks from reinstatement, and a reinstated member dies within that time, there can be no recovery. *Simms v. Baltimore Mutual Aid Society*, 15 C. C. 642.

22. Where the constitution of a beneficial society provided that those persons who were legally entitled to receive the funeral benefit should notify the society of the death; it was held, that the executor was entitled to receive out of the benefits an amount sufficient to pay the funeral expenses. *Oelsen v. Schiller Death Beneficial Society*, 9 Lanc. 113. In such a case the beneficiary could not subsequently recover from the decedent's estate the amount of such funeral expenses, on the ground that the decedent's estate was primarily liable therefor; the doctrine of subrogation does not apply. *Schanbel's Estate*, 12 Lanc. 166.

23. A member not beneficial when taken sick cannot become so during such sickness by paying his arrearages. *Scanlan v. St. Matthew's Catholic Beneficial Society*, 5 Montg. 180.

24. Where the constitution provides that a member shall be entitled to benefits "provided that he is not more than three months in arrears," it means three months' dues, not three months in arrears for any amount. *Scanlan v. St. Matthew's Catholic Beneficial Society*, 5 Montg. 180.

25. A provision in the by-laws of a beneficial society, allowing benefits in case of sickness, extends to cases of bodily injury. *Wegner v. Deutscher Kranken Unterstutzungs Verein*, 4 Northam. 154.

26. Where the makers of the by-laws of a beneficial society kept sick benefits and funeral benefits separate and apart; it was held, that the provisions as to sick benefits would not operate to forfeit funeral benefits. *Owens v. Tamana Council*, 1 Lack. L. N. 163.

VII. Actions for benefits.

27. In an action by a widow for a death benefit, the defence that the deceased member of the association was not in good standing may be sustained by parol testimony, where the minutes show a motion to suspend, but do not show what action was taken on the motion; and, in such a case, members of the association are competent witnesses to show that the husband was not in good standing as a member at the time of his death. *Hamill v. Supreme Council of Royal Arcanum*, 152 P. S. 537.

28. In an action for a death benefit, it is not competent evidence, that it was customary to reinstate defaulting members of the beneficial association upon payment of their arrears. *Dickinson v. Ancient Order of United Workmen*, 159 P. S. 258.

29. In an action on a bond given to hold the obligee harmless from loss or damage by a marriage insurance company failing to pay him certain benefits; it was held, that the validity of the society's charter and the alleged illegality of the business that was transacted by it could not be determined. *Hassinger v. Ammon*, 160 P. S. 245.

30. Upon an interpleader between claimants to a benefit paid into court by a beneficial association, the costs of the whole litigation will be taken out of the fund, and the balance awarded to the rightful claimant. *Northwestern Masonic Aid Ass'n v. Marshall*, 10 C. C. 270.

31. In a suit for sick benefits, if the master finds that the claimant did not receive a fair hearing in the tribunals of the order, the costs are properly put upon the defendants, though the finding be in their favor. *Taylor v. Knights of Pythias*, 4 Del. 153.

32. Where a certificate of membership entitled a wife, her heirs and assigns, ninety days after proof of death, to three thousand dollars; it was held, that the wife's assignee might maintain an action of covenant on the certificate. *Quickel v.*

Prudential Mutual Aid Society, 3 York 150.

33. A member of a benefit society, for a wrong done him as such member, must resort to the tribunals of the society, whose judgment, when resulting fairly from the rules, is final. *McAlees v. Order of Iron Hall*, 13 Atlan. 755.

34. Where the holder of a death benefit is not a member of the society, he is not affected by a provision of the constitution by which redress for wrong is limited in the case of members to the tribunals of the society. *Dobson v. Hall*, 11 C. C. 532; s. c. 30 W. N. C. 305.

35. Where a stipulation assented to by a member of a beneficial society provides that benefits shall be paid to beneficiaries only upon execution by them of a release of all claims against a contributor to the benefit fund, the execution of such release becomes a condition precedent to payment, and where such condition is to be performed by a defendant personally, it cannot be performed by a judgment creditor of such defendant who has attached the sum which would be payable to the defendant upon his performance of the condition. *Kinsloe v. Davis*, 167 P. S. 519; s. c. 36 W. N. C. 258.

VIII. Beneficiaries.

36. If a death benefit be payable to decedent's wife, the amount cannot be recovered by the administrator of the deceased member. *McNeil v. Golden Cross*, 131 P. S. 339. See *Beatty's Appeal*, 122 Ibid. 428.

37. Where a husband designated his wife as beneficiary, and they subsequently executed articles of separation; it was held, that the death benefits went to the wife notwithstanding an attempted transfer by assignment and will. *Jinks v. Banner Lodge*, 139 P. S. 414; affirming s. c. 37 P. L. J. 446.

38. Where, under a benefit certificate issued under the laws of Illinois, the ben-

efits were to be paid to the devisees of the member, or if no will, then to his heirs at law, and a member died without children and left a will by which he appointed an executor but made no specific bequest of the benefits; it was *held*, that the executor was not a devisee within the meaning of the certificate, but that the fund was properly distributable under the intestate laws of the State of Pennsylvania, which was the testator's domicil. *Northwestern Masonic Aid Ass'n v. Jones*, 154 P. S. 99.

39. Where the money, with which the assured paid the premiums, was furnished by the beneficiary, who had no insurable interest in the life of the insured, but the evidence was conflicting as to whether the money was furnished for that express purpose; it was *held*, in an action to determine the ownership of the proceeds, between the executor and the beneficiary, that the case was for the jury. *Chidester v. Yard*, 155 P. S. 483.

40. Where the by-laws provided that any member might make a new direction as to the payment of his benefit certificates, and there was no provision that the beneficiary should be his widow or children, and a member named as beneficiary a person who was not related to him, and who was not a creditor, and the member paid the assessments; it was *held*, that the association was bound to pay the benefits to the beneficiary named. *Mulderick v. Ancient Order of United Workmen*, 155 P. S. 505.

41. Under the laws of the Order of United Workmen, the members have no individual right in the insurance fund, and upon their death their administrators are not entitled to the insurance. So, if a single member names his mother as beneficiary, and she dies before him, and the member marries and dies leaving a widow, and without changing the beneficiary, the widow and not the estate of the mother is entitled to the insurance. *Arthurs v. Baird*, 8 C. C. 67.

42. The same rule applies under the

charter of the Knights of Birmingham. *Arthurs v. Baird*, 8 C. C. 71.

43. A fund created by the contributions of the members and payable to the next of kin of a deceased member of the beneficial association, is not subject to the debts of the member and should not be paid to his administrator, but should be distributed directly to the next of kin, and where an administrator received such a fund and charges himself with it in his account, it will be awarded to the persons so entitled. *Zinn's Estate*, 14 C. C. 33.

44. Where the constitution of a beneficial society provided that in case of the death of all the beneficiaries before the death of the member, and if no other disposition be made, the benefits should be paid to the heirs of the deceased member, and a certificate was issued in which the member's wife was named as beneficiary, and the wife died leaving collateral heirs but no issue, and subsequently the member died leaving collateral heirs but no issue, and having made no change as to the beneficiary, it was *held*, that the heirs of the member were entitled to the fund. *Espy v. American Legion of Honor*, 7 Kulp 134.

45. Where a benefit certificate was payable to the member in case of total disability or on his death to his niece, and the latter died after the date of the policy but before the death of the insured; it was *held*, that the first contingency not having arisen, the proceeds passed to the administrator of the estate of the insured. *Gray's Estate*, 42 P. L. J. 219.

46. Where the constitution provides that the money due upon the death of a member shall be paid to his widow or children, the widow, if any, is first entitled; the children are only entitled where there is no widow. *Penn Mutual Relief Ass'n v. Patterson*, 1 York 5.

47. Where the object of a mutual relief association is a cash payment to the family of the deceased, such payment is for the benefit of his family, and is not subject to the payment of his debts; and this, though the certificate be filled up in

the name of the insured. *Penn Mutual Relief Ass'n v. Patterson*, 1 York 5.

48. Where the by-laws of a beneficial association provide for a fund for the relief of the widows and orphans of its members, the words "heirs and legal representatives" used therein, and in the certificate of insurance will be construed to mean "children." *Meyer's Estate*, 4 York 166.

IX. Change of beneficiary.

49. Where the constitution and by-laws authorized a member to change the beneficiary only by the surrender of the certificate, the issuance of a new certificate and an entry thereof on the records; it was *held*, that a mere indorsement on the certificate of an order to pay to a third person would not entitle the payee to receive the amount from the association. *Jinks v. Banner Lodge*, 139 P. S. 414; affirming s. c. 37 P. L. J. 446.

50. Where a member had power to change the beneficiary, who was his wife, and he obtained the certificate without her knowledge, and surrendered it and took out a new one with his mother named as beneficiary; it was *held*, that the wife could not recover. *Beatty v. Supreme Commandry United Order of Golden Cross*, 154 P. S. 484.

51. Where a beneficial association provided for changes in the beneficiaries by the members only, and confined the class of beneficiaries to the widows, orphans and devisees of deceased members; it was *held*, that an assignment of such a certificate made by the beneficiary in the lifetime of the member, and in favor of one who was not of the specified classes, was void. *Northwestern Masonic Aid Ass'n v. Marshall*, 10 C. C. 270.

52. Where the holder of a beneficiary policy gave instructions to change his beneficiary, and endorsed such change on the certificate, and it then became the duty of the lodge to issue a new certificate, but the lodge declined to approve the change and did not issue a new cer-

tificate; it was *held*, on the death of the member, that the lodge had no discretion, and that the new beneficiaries were entitled to the fund. *Scholl v. Sadoury*, 42 P. L. J. 43.

53. As to the right of a member to change the beneficiary named in his policy, see note to *Knights of Honor v. Watson*, 15 Atlan. 125.

X. Proof of loss.

54. A beneficial association should promptly notify the assured of any defect in the proof of loss; otherwise it will be presumed that the association has waived the defect. *Stambler v. Order of Pente*, 159 P. S. 492.

XI. Forfeiture.

55. Whether the delay of ten days of a mutual aid society in refunding an assessment paid to an agent, amounted to a waiver of a previous forfeiture, was properly left to the jury. *United Brethren Mut. Aid Society v. Schwartz*, 13 Atlan. 769.

56. Where the by-laws of an Odd Fellows' lodge provided that benefits should not be allowed to members residing within visiting limits of the lodge until after they had been reported sick or disabled to the lodge or to the relief committee, and that a member who refused to apply for benefits unless prevented by unavoidable circumstances should forfeit his claim thereto, and the plaintiff's decedent resided within visiting limits and was totally disabled by paralysis, but when visited by the committee several years before his death, he declined to be reported as sick; it was *held*, that his administratrix was not entitled to recover. *Lucas v. Thompson*, 146 P. S. 315.

57. Where the certificate of a beneficial association provides that a failure to pay any assessment within a certain time shall render it null and void, time is of the essence of the contract and a

failure to pay within the designated time will render the certificate void. *Dickinson v. Ancient Order of United Workmen*, 159 P. S. 258.

58. Where it is provided that members will not be allowed to pay back dues when sick or when disabled by accident, and the association receives the money from such sick or disabled member, such receipt will be held to amount to a waiver of the provision; so, when a beneficial association does not insist on the medical examination necessary for reinstatement, such provision will also be held to have been waived. *Simms v. Baltimore Mutual Aid Society*, 15 C. C. 642.

59. The constitution of a beneficial association providing that any member neglecting to make certain payments "after thirty days' notice" should cease to be a member, the time of such notice must be calculated from its actual receipt, not from its date. *Taggart v. Phoenix Mutual Relief Association*, 4 Del. 217.

60. In an action against a grand lodge upon an endowment fund certificate payable on the death of a member's wife, where the grand lodge claimed that the rights of the members of the subordinate lodge had been forfeited by reason of the subordinate lodge not having paid certain assessments; it was held, that a claim upon the endowment fund by any member of the subordinate lodge could only be forfeited by a strict observance on the part of the grand lodge of the methods of forfeiture and suspension of the subordinate lodge pointed out in the constitution. *Young v. Sons of Progress*, 34 W. N. C. 100.

XII. Dissolution and insolvency.

61. Where the certificates of a beneficial association ran for twenty-eight years, and at the end of each period of three and one-half years a member was entitled to receive a sum not exceeding one-eighth of the amount of the certificate; it was held, upon the adjudication of the

account of its assignee for creditors, that members whose certificates were more than three and one-half years old had no preference on distribution over the other certificate holders. *Fraternal Guardians' Assigned Estate*, 159 P. S. 594.

62. Upon a bill to avoid an assignment of a beneficial association for creditors, where the supreme court found the evidence so conflicting and the confusion so great, it was decreed that the whole matter should remain *in statu quo* until the next meeting of the supreme lodge, when new officers could be regularly elected by the body which was acknowledged by both parties to be the rightful governing head of the order. *Order of Solon v. Folsom*, 161 P. S. 225. See *Comm'th v. Order of Solon*, 166 P. S. 33.

63. In a controversy between contending factions of a beneficial association, where the supreme court decreed that matters should remain *in statu quo* until the next session of the supreme lodge, it was not violative of such decree for the commonwealth in the meantime to institute proceedings of *quo warranto* and obtain a judgment of ouster against the corporation; and where the supreme lodge accepts such a decree as final, and adjourns *sine die*, the minority party has no standing to appeal from the judgment of ouster. *Comm'th v. Order of Solon*, 166 P. S. 33.

64. Where the agent of a short term order had paid back money received for dues after he had notice that the order had made an assignment for creditors; it was held, that he might be compelled to pay the same amount to the assignee. *Active Workers v. Sanders*, 28 W. N. C. 321.

65. Where members of a beneficial association anticipate the payment of their dues, the officer receiving them should pay them into the treasury, and upon his doing so, he incurs no responsibility to the members from whom he received them in case of the insolvency of the association before the time at which the dues mature; any equity for their return must be asserted on the settlement

of the account of the assignee. - *Garrett v. Guarantee Trust & Safe Deposit Co.*, 29 W. N. C. 33.

BENEFITS.

See BENEFICIAL SOCIETIES: BOROUGH: MUNICIPAL IMPROVEMENTS: RAILROAD COMPANIES.

BETTING.

See GAMBLING.

BICYCLES.

1. Riding a bicycle upon a sidewalk is an offence within the act 7 May 1889, sec. 3 (Brightly's Purdon 1890), providing for the summary conviction of any person wilfully and maliciously riding or driving any horse or any other animal upon a sidewalk. *Comm'th v. Forrest*, 170 P. S. 40; reversing s. c. 3 Dist. Rep. 797.

2. Bicycles are subject to the payment of toll as two-wheeled carriages. *Geiger v. Perkiomen & Reading Turnpike Road*, 167 P. S. 582; s. c. 36 W. N. C. 233; reversing s. c. 11 Montg. 25.

3. It is not negligence for a wheelman to leave his bicycle on the side of a highway whilst calling upon an abutting owner and one who negligently injures it is liable therefor. *Lacey v. Winn*, 3 Dist. Rep. 811; s. c. 4 Dist. Rep. 409.

BIDS AND PROPOSALS.

See MUNICIPAL CORPORATIONS.

BIGAMY.

See CRIMINAL LAW, LVII.

BILLS OF EXCEPTION.

See APPEAL AND ERROR.

BILLS OF EXCHANGE.

See ALTERATION: BANKS: EVIDENCE, XLIV.: PROMISSORY NOTES.

- I. Effect of a bill of exchange.
- II. Rights of the drawee.
- III. Indorsement.
- IV. Acceptance.
- V. Protest.
- VI. Actions on bills.

I. Effect of a bill of exchange.

1. An ordinary bill of exchange or draft drawn generally and not upon any particular fund, does not, whether accepted or not by the drawee, operate as an equitable assignment. *Comm'th v. American Life Ins. Co.*, 162 P. S. 586.

II. Rights of the drawee.

2. Where an order for the payment of money was made payable by the drawer out of "the fourth payment due me"; it was *held*, to give notice of a contract, and that the drawee was bound to inquire as to the terms thereof. *Cooke v. Midvale Steel Co.*, 3 Dist. Rep. 29.

III. Indorsement.

3. An order on a savings bank payable nine weeks from date to the order of the payee, with the following words printed on it, "Return notice ticket with this order." "Deposit book must be at bank before money can be paid," is not a negotiable instrument. *Iron City Nat. Bank v. McCord*, 139 P. S. 52; s. c. 27 W. N. C. 151.

4. In an action on a bill of exchange, an objection in an affidavit of defence that there was no indorsement by one of the endorsees, is sufficiently answered by an averment in the statement, that the draft was endorsed for collection by the plaintiff, and that when it was protested for non-payment, the endorsee returned it to the plaintiff. *Garden City Nat. Bank v. Fidler*, 155 P. S. 210.

5. Where the holder of a bill of exchange brought suit against the acceptor and drawer, and then agreed with the acceptor that if the latter would pay the costs and pay the bill in instalments, no judgment would be taken; it was *held*, that such an agreement did not release the endorser and drawer from liability. *Trotter v. Phillips*, 14 C. C. 7.

6. The fraudulent misapplication by the payee, of the proceeds of a draft, is

not fraud in the issuing of the draft so as to put the holder, or the holder of a draft given in part payment of the original, on proof of title. *Garden City Nat. Bank v. Fuller*, 155 P. S. 210.

IV. Acceptance.

7. Under the act of 10 May 1881 (Brightly's Purdon 221), the acceptance of a check or bill of exchange for over twenty dollars must be in writing. *Magginn v. Dollar Savings Bank*, 131 P. S. 362.

8. It is not entirely clear whether an assignment to a creditor by a debtor of a claim of money due to the latter by a third person for wages is within the act 10 May 1881 (Brightly's Purdon 221), requiring all acceptances to be in writing; whether it is or not, the objection that the assignment was not in writing can only be raised by the acceptor. *Ulrich v. Hower*, 156 P. S. 414; *Moeser v. Schneider*, 158 P. S. 412.

9. Under the act 10 May 1881 (Brightly's Purdon 221), a bank is not bound by the verbal promise of its president that a check shall be paid if the holder will retain it for a few days. *National State Bank of Camden v. Lindeman*, 161 P. S. 199.

10. Where an order for wages was not accepted in writing by the employer as required by the act 10 May 1881 (Brightly's Purdon 221), and the property of the employer was sold under a subsequent execution; it was *held*, that the laborer was entitled to the amount of his order, and that it was immaterial that he might have agreed to pay the money when drawn over to the same persons in whose favor the order was drawn. *Osborne v. Atkinson*, 15 C. C. 639; s. c. 4 Dist. Rep. 291.

11. Where a draft for a sum exceeding five hundred dollars drawn upon a joint stock company was accepted in the name of the drawee "per Bernard Lauth, chairman," and Lauth was the only man-

ager who signed the acceptance, and the draft was afterwards delivered by another of the managers to the payee, who had it discounted by a bank; it was *held*, that the bank was bound to know that the signatures of two managers were necessary to a valid acceptance; and it was further *held*, that if Lauth signed the acceptance with the understanding that his name was to be one of the two required by the statute, and that it was to be signed also by the manager, by whom it was delivered and placed in his hands for that purpose, then Lauth did not become personally liable by reason of the neglect of his fellow-manager to complete the acceptance. *Mercantile Nat. Bank v. Lauth*, 143 P. S. 53.

12. One who accepts an order as treasurer of a church is not individually liable on such acceptance. *Howarth v. McClure*, 149 P. S. 170.

13. Under the act 5 April 1849 (Brightly's Purdon 1733) the mere acceptance or payment of forged paper is no longer, of itself, a bar to the recovery of the money by the party paying it, but the statute does not dispense with the necessity of care and diligence on the part of the payer nor exempt him from the consequences of his own negligence, if thereby loss would accrue to the other party. Where plaintiff, a bank, received a check on December 19th, paid it to the defendant and entered it on its books and then dismissed it from further attention, and five days afterwards it was discovered that the drawer's name had been forged, and in the meantime the defendant had paid the money out; it was *held*, that the plaintiff had been guilty of want of due diligence and was not entitled to recover back the money. *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 P. S. 46.

14. Where an order is drawn by one person upon another for the payment of money, the drawee is not liable upon the order unless he accepts it, and where the order is an equitable assignment of the fund, judgment will not be entered

against the drawee for want of a sufficient affidavit of defence where he avers that the assignee is largely indebted to him. *Reilly v. Daly*, 159 P. S. 605.

V. Protest.

15. A notice of protest for non-payment need not be served by an endorsee upon the drawee who has accepted the bill. *Garden City Nat. Bank v. Filler*, 155 P. S. 210.

VI. Actions on bills.

16. In a suit upon a conditional acceptance, a subsequent promise to pay by the acceptor is persuasive evidence that at that time the condition had been fulfilled. *Schermerhorn v. Latchaw*, 14 Atlan. 429; s. c. 13 Cent. 225.

17. In a suit by a *bona fide* holder on an acceptance, it is no defence that the defendant was an accommodation acceptor for C., who had also been sued on the draft, and had defended on the ground that a prior holder, an insolvent bank, had money in its possession to pay the draft. *McKirdy v. Hare*, 7 Atlan. 172.

18. A holder of a check cannot maintain an action, in his own name, against the drawees, and this, though the check was for the entire balance due the drawer. *Maginn v. Dollar Savings Bank*, 131 P. S. 362.

19. Where a contractor to build a canal drew an order on his employer in favor of the plaintiff, which order was expressly payable out of his final estimate, and the contractor afterwards failed to complete; it was *held*, that he never became entitled to a final estimate and the plaintiff could not recover on his order. *Hazelton Mercantile Co. v. Union Improvement Co.*, 143 P. S. 573.

20. Upon the building of a church, where the contractor owed the plaintiff for his work as a mechanic, and there was due by the church to the contractor

a large amount, and one of the building committee obtained from the plaintiff an order on the contractor for the amount of the plaintiff's claim, promising to pay the latter that amount in cash, and the committee obtained credit with the contractor for the amount of the order; it was *held*, that the drawee of the order could not refuse to pay it to the plaintiff on the ground that leaks had been discovered which the contractor was bound to repair. *Layton v. Davidson*, 144 P. S. 145.

21. Where a debtor bank at the clearing house failed before it settled on that day the balance against it, and the clearing house required all the banks which presented checks and drafts against the failed bank to take them back and to pay to them the full amount of such checks and drafts instead of the mere balance against the failed bank, and then distributed among the creditor banks; it was *held*, that the clearing house did not render itself liable for the payment of a draft which the failed bank had undertaken to collect through the clearing house for a depositor from one of the banks which was a debtor on the day of settlement, but paid over as its balance a sum greatly in excess of the amount of the failed bank's checks and drafts upon it, including the draft in question. *Crane v. Clearing House Ass'n*, 13 C. C. 550; s. c. 32 W. N. C. 358. See *Crane v. Fourth Street Nat. Bank*, 4 Dist. Rep. 131.

22. Where the plaintiff sent a draft upon one bank to another bank for collection, which duly presented it to the drawee through the clearing house and it was paid and a settlement made by the drawee with the clearing house, but the money, instead of being paid to the collecting bank, which failed after the presentation of the draft, was applied by the clearing house to the payment of debts due the clearing house by the collecting bank; it was *held*, that the payment by the drawee to the clearing house was entirely unauthorized by the plaintiffs and was not an acquittance of the debt due

the plaintiffs. *Crane v. Fourth Street Nat. Bank*, 4 Dist. Rep. 131.

BILLS OF LADING.

See CARRIERS: CONSTRUCTION.

BILLS OF PARTICULARS.

See ELECTION LAW: HUSBAND AND WIFE, XL: PLEADING, X.

BOARD.

See ASSUMPSIT, VI.: INNKEEPERS.

1. The act 8 May 1876 (Brightly's Purdon 2077) does not give a new process for the commencement of an action; an attachment cannot issue as an original process to collect a debt for boarding. *Carden v. Scott*, 1 Kulp 196; *McGinley v. McDonough*, 3 Lanc. 202; *Thatcher v. Beam*, 14 C. C. 109; *McCarty v. Dougherty*, 16 C. C. 86; *Dillon v. Treverton*, 16 C. C. 89; contra, *Smith v. Dingus*, 12 C. C. 299; *Thomas v. Glasgow*, 13 C. C. 167.

2. Under the act 8 May 1876 (Brightly's Purdon 2077), allowing wages to be attached for four weeks' board, a judgment for board cannot be split up and two separate executions issued for four weeks' board. *Hawk v. Rock*, 14 C. C. 490.

3. Where a judgment for board has been regularly obtained under the act 8 May 1876 (Brightly's Purdon 2077), and wages have been regularly attached under such judgment, the defendant is not entitled to claim his exemption under the act 4 April 1889 (Brightly's Purdon 834). *Weisman v. Weisman*, 133 P. S. 89; *McCarty v. Dougherty*, 16 C. C. 86; s. c. 1 Mag. & Con. 39; *Dillon v. Treverton*, 16 C. C. 89; *Thomas v. Glasgow*, 13 C. C. 167.

BOARD OF HEALTH.

1. The board of health of Philadelphia have no power to demand the construction of water-closets and connections, so as to charge the lot owners with a municipal claim. *Philadelphia v. Provident Life & Trust Co.*, 132 P. S. 224.

2. The act 11 May 1893 (Brightly's Purdon 256), to enable boroughs to establish boards of health, is constitutional; the title is sufficient, and the act does not offend against article III., sec. 20, of the constitution, prohibiting the legislature from delegating to any commission power to interfere with any municipal function. *Smith v. Baker*, 14 C. C. 65.

3. Under the act 11 May 1893 (Brightly's Purdon 256), a board of health in a borough has no authority to enter upon the lot of a property owner for the purpose of digging a cesspool thereon as a receptacle for drainage from the property, which collects in pools on the street and becomes stagnant. *Smith v. Baker*, 14 C. C. 65.

4. Under the act 11 May 1893 (Brightly's Purdon 257), the rules and regulations of the board of health in boroughs may be established by the passage of the same over the veto of the chief burgess. *In re Boards of Health*, 14 C. C. 116; s. c. 3 Dist. Rep. 225.

5. There are no officials in townships or unincorporated villages upon which the state board of health can impose the duty or the cost of executing quarantine and sanitary regulations. *State Board of Health*, 15 C. C. 129.

6. In cities of the third class, boards of health may impose a license fee of ten dollars per year on the business of cleaning cesspools. *Meadville v. Hummel*, 15 C. C. 298.

BONA FIDE PURCHASER.

See PROMISSORY NOTES, VIII.: VENDOR AND PURCHASER.

BOND.

See APPEAL AND ERROR: BAIL: CON-
STABLES: DEBT: EXECUTORS: HUSBAND
AND WIFE: INFANT: INSOLVENCY: MU-
NICIPAL CORPORATIONS: OFFICE: POOR,
VI.: REGISTER: REPLEVIN, II., III.:
SHERIFF, III.: SURETY: TAX SALES, V.

- I. Validity of bonds.
- II. Of the condition.
- III. Assignment of bonds.
- IV. Actions on bonds.
- V. Coupons.

I. Validity of bonds.

1. A bond, not filled up at the time of signing, but subsequently filled up in the manner contemplated by the parties, is a valid obligation. *Bugger v. Cresswell*, 12 Atlan. 829.

2. A bond is binding upon him who signs as surety, unless there be a stipulation at the time of signing that it is not to be binding unless signed by others. *Whitaker v. Richards*, 134 P. S. 191; s. c. 25 W. N. C. 540.

3. The signing of a bond in a blank left at the head for the names of the obligors is sufficient; a signature at the foot is not necessary. *Benedict v. Hood*, 134 P. S. 289; s. c. 26 W. N. C. 37.

4. Where a defendant was sentenced to give security for the payment of an order to his wife, gave bond to appear at the next court and then gave the security ordered, such a bond is a legal obligation and is forfeited on failure to appear and give security. *Berkstresser v. Comm'th*, 127 P. S. 15.

5. Whether an obligor against whose name there is no seal, adopted the seal opposite the name of another obligor as his own, is a question of fact; a finding of an auditor upon such fact approved by the court below, will not be disturbed on appeal except for plain error. *Hess's Estate*, 150 P. S. 346.

6. Where a surety signed a bond upon condition made with the principal that two other parties would sign with him,

but the obligee had no notice or knowledge of such representation; it was *held*, that the surety was liable, and it was further *held*, that a seal for an additional name did not charge the obligee with implied notice, and further, that the principal was not the agent of the surety for the purpose of delivery so as to put the obligee upon inquiry as to the secret condition. *Winters v. Robison*, 14 C. C. 264.

II. Of the condition.

7. A bond to pay the obligee \$3000 six months after he "loses his situation" is not forfeited by a voluntary resignation of his situation by the obligee. *Shafer v. Senseman*, 125 P. S. 310.

8. Upon a bond by principal and surety to pay the obligee any balance which may appear to be due after an examination of the books within two months from date, such an examination within two months is not a condition precedent to recovery. *Holmes v. Frost*, 125 P. S. 328.

9. The construction of a bond given by a testator to a son, conditioned that the obligor leave by bequest of will unto the obligee a certain farm with certain stipulations to be put therein, so that the obligee's interest therein shall exceed the amount of his heirship to the amount of \$3000. *Major's Appeal*, 126 P. S. 109; affirming *Major's Estate*, 5 Kulp 163.

10. Neither a ticket agent nor his sureties are liable for a robbery of the till, unless he was guilty of negligence, and that is a question for the jury. *Baltimore & Ohio Railroad Co. v. Jackson*, 3 Atlan. 100.

11. A bond to the husband payable to his heirs or legal representatives within three months of the decease of the mortgagee or his wife or the survivor, is, upon the death, first of the husband and then of the wife, properly payable to the husband's executors. *Briggs v. Briggs*, 134 P. S. 514. The administrator of the wife is not entitled to any of the proceeds. *Good's Estate*, 6 Kulp 71.

12. Where an attachment execution was issued upon a conditional judgment, and the only breach of the bond averred was that the defendant had failed to pay certain overdue premiums, the attachment was properly set aside on payment by the defendant of the overdue premiums and costs. *Scott v. Phillips*, 140 P. S. 51.

13. Where a landlord levied for rent and the defendant executed a bond conditioned that the same should be void if the tenants should retain and keep all their property in the house and remove none before the first of September following, and the goods remained upon the premises until after the expiration of the time named in the bond, but the tenants barred the house and prevented the landlord from levying for his rent; it was held, that the defendant was not liable on the bond. *Crawford v. Evans*, 158 P. S. 390.

14. Where a sheriff had levied upon the goods of the defendant and had permitted him to keep them upon his giving a bond conditioned "that if the defendant shall deliver to the said sheriff paints of like quantity and quality as aforesaid levied upon and now on the cars as aforesaid, when legally required by him to meet the exigency of said execution or any other execution issued on the said judgment, then this obligation is void," and an *alias fieri facias* was placed in the hands of the succeeding sheriff, and the latter made a demand upon the principal and surety for the return of the goods; it was held, that their failure to produce them worked a breach of the condition of the bond, and that the surety was liable. *Stocker v. Dech*, 167 P. S. 212.

15. Where, under the condition of a bond, the principal sum is not payable except at the option of the obligee, who dies without exercising the option, such bond becomes presently payable on his death. *Odenwelder's Estate*, 10 C. C. 591.

III. Assignment of bonds.

16. The assignee of a bond takes it subject to all the equities of the obligor against the obligee unless he first inquire of the obligor whether he has any defence or set-off against it and receive an answer in the negative. *Renoll v. Duba*, 2 York 154.

IV. Actions on bonds.

17. A sum, though expressed in a bond as stipulated damages, if unconscionable, and the real damages can be easily and accurately assessed, will be treated as a penalty merely. *Clements v. Schuylkill River E. S. Railroad Co.*, 132 P. S. 445; s. c. 25 W. N. C. 383.

18. In a suit on a bond conditioned to pay a certain sum in case the obligor should collect another certain sum from a third party, the burden is on the plaintiff to prove a neglect to make reasonable efforts to collect. *Depew v. Depew*, 2 Cent. 611.

19. In a suit on a bond for purchase money, the defendant may show that it was satisfied by a sheriff's sale to the plaintiff in pursuance of a verbal agreement to that effect. *McCauley v. Cremeux*, 132 P. S. 22.

20. Upon conviction of the licensee of a violation of the liquor laws, the district attorney should enter up judgment, by virtue of the warrant attached to the bond, against him and his sureties for the amount of the fine and costs imposed only; if judgment be entered for the full penal sum the court will strike it off for the excess, but the bond will stand for the use of all persons interested therein. *Comm'th v. Johnson*, 8 C. C. 378.

21. In a suit on a bond by an executor against the testator's son, an auditor's report that the instrument was a debt and not an advancement does not establish a defence. *Bittle v. Bittle*, 2 Mona. 17.

22. Where a sales agent gave a bond and warrant of attorney to truly account for all moneys coming into his possession,

and judgment was confessed by the obligee's attorney, not for the penal sum but for an indebtedness that arose prior to the date of the bond; it was not error to strike the judgment from the record. *Bennett v. Haley*, 142 P. S. 253.

23. Where the bonds of a joint stock company are secured by a mortgage and the bondholders, through a trustee designated by them, purchase the mortgaged premises subject to the mortgage, they cannot afterwards proceed upon the bond and collect the amount thereof from the company or from the defendants as individuals. *Cock v. Bailey*, 146 P. S. 328.

24. Upon a covenant by an assignee of a mining lease to indemnify the assignor against claims of a third party and against damages to the neighbors by the operation of washing, the recovery will not be limited to the amount named in the bond which contains the covenant. *Keck v. Bieber*, 148 P. S. 645.

25. Where a person who had money in his hands derived from the estate of an intestate, executed a bond to the widow conditioned to pay to her, her executors, administrators or assigns, the said sum with legal interest payable semi-annually and the principal of the fund belonged to the decedent's children; it was *held*, that after her death her administrator could bring suit on the bond, and evidence was inadmissible that the giving of the bond was in pursuance of an agreement with the children that the interest should be paid to the mother for life, and at her death the principal to the children, and that some of the children had arranged with the defendant to settle severally concerning their respective shares. *Young v. Patterson*, 165 P. S. 423.

26. In an action on twenty-four railroad bonds, where it appeared that the bonds were found in a desk in the testator's room in a sealed and stamped envelope addressed to the defendant company, and that they were fourteen years overdue and that only the first coupon had been removed, and that

shortly after their original issue the company had authorized their bonds to be pledged for the payment of the personal notes of the directors, and that twenty-four bonds had been pledged to a bank to secure testator's notes, which notes had been paid by the company and the bonds delivered to the testator; it was *held*, that there was sufficient evidence from which a jury might infer that the bonds belonged to the company. *Philadelphia Trust Co. v. Philadelphia & Erie R. R. Co.*, 160 P. S. 590.

27. No right of action upon a contract lies by a stranger to it; where one railroad company leased another for a certain number of years and covenanted to run the road and apply the surplus to the payment of coupons of certain mortgage bonds previously issued by the lessor, and if such surplus was not sufficient, then to advance money to buy the said coupons and hold them as security for such advances; it was *held*, that this did not constitute a contract of guaranty, and that the holder of such bonds or coupons had no right of action thereon. *Freeman v. Pennsylvania R. R. Co.*, 3 Dist. Rep. 733.

28. In a suit on a guardian's bond in case of recovery by the plaintiff, the judgment is for the commonwealth in the penalty of the bond and for the plaintiff in the amount of the damages proven; not decided whether interest on the penalty can be recovered where the amount averred to be due is greater than the penalty. *Comm'th v. Julius*, 8 York 89.

V. Coupons.

29. Where coupons have not been detached from bonds the statute of limitations cannot be set up to prevent a recovery upon them; in such a case nothing can avail to defeat a recovery but the presumption of payment at the end of twenty years, and such a presumption may be rebutted by evidence of non-payment. It was not decided

whether the statute may be pleaded against coupons detached from bonds and in the hands of another than the holder of the bonds. *Philadelphia Trust Co. v. Philadelphia & Erie R. R. Co.*, 160 P. S. 590.

30. In an action against a corporation to recover on coupons, evidence is inadmissible that the plaintiff entered into a written agreement with other creditors that they would take stock in the company for the principal of their debt. *Roberts v. Iron Car Equipment Co.*, 161 P. S. 348.

31. In an action upon coupons where no affidavit has been filed denying proper execution as provided by rule of court, evidence will not be admitted that the coupons were not properly executed. *Roberts v. Iron Car Equipment Co.*, 161 P. S. 348.

32. An action lies upon coupons signed by the vice-president of a corporation although the mortgage accompanying the bond provides that the bonds should be signed by the president. *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 161 P. S. 391.

33. In an action upon coupons, it is not necessary to prove the execution of the mortgage, particularly where a rule of court providing for an affidavit denying the execution of a writing sued upon has not been complied with. *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 161 P. S. 391.

BOOK ENTRIES.

See EVIDENCE, XXIII.: PRACTICE, V.

BOOM COMPANIES.

See TIMBER.

1. A lumber exchange authorized by a large number of owners of logs set adrift by flood, may maintain a bill against all persons jointly having such logs in their possession. *West Branch Lumbermen's Exchange v. Enterline*, 1 Northum. 269.

2. Logs carried adrift by high flood continue to be the property of him who owned them, who may take them wherever found, unless taken up and a list lodged with the nearest justice within thirty days, and duly advertised. The act of 11 December 1866 (Brightly's Purdon 1243) and the compensation to be charged for taking up, considered. *West Branch Lumbermen's Exchange v. Enterline*, 1 Northum. 269.

BOROUGHES.

See MUNICIPAL CORPORATIONS.

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I. Incorporation of boroughs.

1. It is no objection to the incorporation of a borough that certain of its boundaries are the middle of a township road, and the middle of certain streets in a contiguous village. *Edgewood Borough*, 130 P. S. 348.

2. The application of a single freeholder to exclude his farm land from the boundaries of a borough under the act of 1 April 1863 (Brightly's Purdon 231), can be made only at the time of incorporation. If made afterwards the remedy is under the act of 1 April 1834 (Brightly's Purdon 230), upon an application signed by a majority of the freeholders. *Wilkinsburg Borough*, 131 P. S. 368.

3. The certificate of the grand jury need not be annexed to the application for the incorporation of a borough, though it speaks itself of such annexation. *Pennsburg Borough*, 11 Cent. 842; affirming s. c. 3 *Ibid.* 187.

4. Upon an application for the incorporation of a borough the court may permit the plan or plot to be attached to the application *nunc pro tunc*. *Jeanette Borough*, 129 P. S. 567.

5. Sufficiency of the publication of notice for thirty days of an application for the incorporation of a borough. *Ibid.*

6. Any defect in the published notice of an application for the incorporation of a borough is cured by the persons objecting filing exceptions to the report of the grand jury. *Edgewood Borough*, 130 P. S. 348.

7. An appeal and *certiorari* does not lie to review a final decree incorporating a borough if the same be taken more than two years after the decree and by less than three persons aggrieved thereby. *Wilkinsburg Borough*, 131 P. S. 365.

8. Under the act 1 April 1863 (Brightly's Purdon 231), authorizing the exclusion of farm lands from the bound-

daries of a proposed borough, it must appear, in order that lands so used may be excluded, that they do not properly belong to and constitute a part of the village or town. *DuQuesne Borough*, 147 P. S. 58.

9. Under sec. 2 of the act 1 April 1834 (Brightly's Purdon 230), the boundaries of a proposed borough are sufficiently described by a description of the line along the river, and extending "thence by low-water line and down said river ten thousand two hundred and thirty-one feet." *DuQuesne Borough*, 147 P. S. 58.

10. Manufacturing establishments were properly included within the borough limits where the natural boundaries of the proposed borough embraced the land in question and a result of their exclusion would be to deprive the borough of access to a large portion of a river front. *DuQuesne Borough*, 147 P. S. 58.

11. Under the act 2 June 1871 (Brightly's Purdon 231), in order to sustain a judicial incorporation of a borough, it must appear upon the record that the application for it was signed by the petitioners within the three months immediately preceding its presentation to court, and that they were a majority of the freeholders residing within the limits of the town or village proposed to be incorporated; the court will not infer that the petition was signed within three months preceding its presentation, from a date upon the plot accompanying the petition. *Versailles Borough*, 159 P. S. 43.

12. Parties who appear and contest upon an application for the incorporation of a borough are estopped from subsequently objecting to the form of the published notice of intention to apply for incorporation. *Taylor Borough*, 160 P. S. 475.

13. It is within the discretion of the grand jury and of the quarter sessions to determine what territory shall be included within the limits of a proposed borough, and the supreme court will not

review such discretion in the absence of abuse. *Taylor Borough*, 160 P. S. 475.

14. Several villages and the intervening farm lands may be included within one borough if the situation of the territory renders a single municipal government desirable. *Taylor Borough*, 160 P. S. 475.

15. A village and adjacent territory will be incorporated into a borough where it appears that the advantages to the whole people as a community will overbalance the disadvantages. *Prospect Park Borough*, 166 P. S. 502; s. c. 6 Del. 137.

16. The report of the grand jury upon the necessity or expediency of granting a borough charter will not be sent back to them for further consideration where no irregularity appears upon the record or is alleged by remonstrants. *Millville Borough*, 10 C. C. 321.

17. Where the mansion house of a farm is properly a part of a village, it may be included within the limits of a borough; and this, although the greater part of the farm is excluded. *Tullytown Borough*, 11 C. C. 97.

18. The quarter sessions may, in its discretion, grant a charter for a borough even though it includes lands used exclusively for farming purposes, but where such lands do not properly belong to the borough they should be excluded; truckmen are not farmers within the meaning of the act. *Tullytown Borough*, 11 C. C. 97.

19. It is sufficient that a petition for the incorporation of a borough should be signed by a majority of persons residing within the territory; the signers will not be permitted to withdraw their names after the petition has been presented to the court and referred to the grand jury. *Tullytown Borough*, 11 C. C. 97.

20. A petition for the incorporation of a borough should particularly describe the borough lines not only by metes and bounds but by courses and distances, and where that is not done, and there is a

doubt as to whether certain lands are within the borough limits, the costs of an application to amend the decree will be put upon the borough. *Ridley Park Borough*, 11 C. C. 108; s. c. 4 Del. 597.

21. The failure of a borough to record the decree of its incorporation is fatal to its legal existence, and such a defect may be taken advantage of by a property owner to defeat proceedings to condemn a street. *Wintergreen Alley*, 11 C. C. 126.

22. Two villages will not be established into a borough where a considerable portion of the territory between the villages consists of farm land not connected by buildings or improvements with either of the villages. *Larksville Borough*, 13 C. C. 351.

23. Three centres of population may be incorporated into a single borough if they virtually constitute one village and the lands between are not exclusively farm lands but are in part divided into building lots. *Yeadon Borough*, 14 C. C. 290.

24. The court cannot incorporate a part of a village into a borough; there is no jurisdiction unless a majority of the freeholders residing within the limits of the village ask for the incorporation; a majority of half the village is not a compliance with the act. *Narberth Village*, 16 C. C. 29; s. c. 11 Montg. 18; *Narberth Village*, 16 C. C. 32; s. c. 11 Montg. 22.

25. The act 1 April 1834 (Brightly's Purdon 230), providing for the incorporation of boroughs, makes no distinction between male and female freeholders; widows and single or married women, if freeholders, may sign the petition for incorporation and should be counted in computing a majority as well as in ascertaining the whole number of resident freeholders. *Akron Borough*, 12 Lanc. 172.

II. Change of name.

26. The court will not approve the change of the name of a borough where

it will be misleading or confusing; a change from East Stroudsburg Borough to Penn City was refused. *East Stroudsburg Borough*, 9 C. C. 529.

III. Annexation of territory.

27. The acts of 11 June 1879 and 17 May 1883 (Brightly's Purdon 232), providing for the annexation of adjacent territory to boroughs, are constitutional. *Pottstown Borough Extension*, 4 Montg. 29; affirming s. c. 1 Ibid. 189.

28. The court of quarter sessions has no power to embrace within the bounds of one borough, territory covered by the charter of another borough already incorporated. *Darby Borough v. Sharon Hill Borough*, 2 Cent. 521.

29. To change the lines of a borough an application must be signed by a majority of the freeholders residing within its limits; due notice must be given according to law and it must be approved by the grand jury and confirmed by the court. *Darby Borough v. Sharon Hill Borough*, 2 Cent. 521.

30. Under the act 11 June 1879 (Brightly's Purdon 232) a number of contiguous properties may be annexed to a borough in one proceeding; and this, though some of them do not adjoin the borough. Notice of the application need not specify the lands proposed to be annexed. *Camp Hill Borough*, 142 P. S. 511.

31. No appeal on the merits lies to the supreme court in proceedings to annex adjacent territory to a borough under the act 11 June 1879 (Brightly's Purdon 232). *Camp Hill Borough*, 142 P. S. 511.

32. In a proceeding to annex adjacent land to a borough, the certificate of the grand jury should set forth that after a full investigation, the jurors find that the conditions prescribed by law have been complied with and that they believe it is expedient to grant the prayer of the petition; a mere certificate that the application is approved is not sufficient. The notice of such an application should name

the date when it will be presented. *Freeland Borough*, 13 C. C. 399.

33. The act 3 April 1851, sec. 30 (Brightly's Purdon 232), providing for the annexation of adjacent property to boroughs, was *held* not to apply to the borough of York. *Kraber's Appeal*, 1 York 47.

34. The act 3 April 1851, sec. 30 (Brightly's Purdon 232), relating to annexation of territory to boroughs, was not repealed by the acts 11 June 1879 and 17 May 1883 (Brightly's Purdon 232). *Plymouth Borough*, 167 P. S. 612.

35. In proceedings to annex territory to a borough, where it appeared that a grand juror had interests in the borough and had stated to the court under oath that he was opposed to the annexation and he had previously declared that he would do all he could against it; it was *held*, that he was properly excluded from participation in the proceedings. *Plymouth Borough*, 167 P. S. 612.

IV. Division of boroughs.

36. Upon the erection of a seceding borough, under the act 29 May 1889 (Brightly's Purdon 235), an adequate method of adjusting the rights and liabilities of the old borough and its creditors is provided by the act 1 June 1887 (Brightly's Purdon 233). An appeal from the decree of incorporation is given by the act 9 May 1889 (Brightly's Purdon 231). *Sharon Hill Borough*, 140 P. S. 250; affirming s. c. 4 Del. 252.

37. Where a borough is created out of a part of the territory comprised in another borough, the quarter sessions has jurisdiction under the act 1 June 1887 (Brightly's Purdon 233) to appoint an auditor to report upon the proper adjustment of the property and indebtedness of the school districts in the two boroughs; and the supreme court on appeal is limited to the jurisdiction of the court below and the regularity of its proceedings. *Darby Borough School District's Appeal*, 160 P. S. 79.

38. Under the act 1 June 1887 (Brightly's Purdon 233), upon the division of a borough a special tax by the new borough to meet a part of the indebtedness of the old borough must be preceded by the decree of the court; but where the court has failed to authorize a tax, and the councils of the new borough subsequently pass an ordinance providing for such a tax, the quarter sessions may amend its decree *nunc pro tunc*. *Wade v. Oakmont Borough*, 165 P. S. 479.

39. Where farm lands have been included in a borough without objection, the court, on a subsequent application to create a new borough from a portion of the old one, has no jurisdiction to entertain a petition to exclude the farm lands from the new borough. *Collingdale Borough*, 11 C. C. 105.

40. The act 29 May 1889 (Brightly's Purdon 235), providing for the incorporation of a borough out of an existing borough, must be construed *in pari materia* with the act 2 June 1871 (Brightly's Purdon 231); an application for such an incorporation must be advertised in one or more newspapers of the proper county for not less than thirty days immediately preceding its presentation to court. *Throop Borough*, 15 C. C. 131.

V. Division into wards.

41. In a proceeding to divide a borough ward, the petition should simply ask for a division into a specific number of wards. The details should be left to the judgment of the commissioners. *Shamokin Borough Division*, 6 C. C. 573.

42. Where commissioners appointed to divide a borough into wards met after due notice, it will be presumed that an adjournment was public, and their report need not show that formal notice of the adjourned meeting was posted. *Lansford Borough*, 141 P. S. 134.

43. Where an appeal was taken from a decree of the quarter sessions dividing a borough into wards and ordering an

election therein, and a *certiorari* was issued; it was held, that an election held under the decree appealed from, before the dismissal of the appeal by the supreme court, was valid. *Comm'th v. Kistler*, 149 P. S. 345.

44. In a proceeding under the act 14 May 1874 (Brightly's Purdon 237), relating to a division of a borough into wards, notice of the proceedings should be directed by the court, and the character of the notice to be given should be embodied in the order, and the report should certify specially what notice was given; the mere posting of small hand-bills in ten or twelve of the hotels of the borough was held to be an insufficient notice where the borough contained twelve thousand inhabitants and had several daily and weekly newspapers. *Columbia Borough*, 163 P. S. 259; reversing s. c. 11 Lanc. 9.

45. In a proceeding to divide a borough into wards, it is desirable to follow the exact language of the act of assembly, but mere captious exceptions and niceties of grammatical construction in the petition will not prevent the court from assuming jurisdiction, when it can be fairly and reasonably inferred from the words and context. *Dickson City Borough*, 1 Lack. L. N. 131.

VI. Council and officers.

(a) Borough council.

46. In boroughs where the chief burgess is one of six members of councils, the act 1 June 1883 (Brightly's Purdon 245) does not authorize at the first election after the incorporation, the election of certain members for the term of three years; in such case the chief burgess must be elected annually, and at the first election two of the councilmen must be elected for one year and three for two years. *Young's Appeal*, 153 P. S. 34; affirming s. c. 39 P. L. J. 307; 11 C. C. 209.

47. Where the decree of incorporation provides that the chief burgess shall be a

member of the council, the burgess is one of the six members intended by the acts 2 June 1871 and 1 June 1883 (Brightly's Purdon 245). *O'Reilly v. Craft*, 153 P. S. 36.

48. Members of a borough council must be residents of the ward which they represent; when a member moves out of his ward his seat in council is vacated, and he will be ousted therefrom upon *quo warranto*. *Comm'th v. Yeakel*, 13 C. C. 615.

49. Under the act 10 May 1878 (Brightly's Purdon 238), where additional wards are created in a borough, councilmen must be elected by the people at the next election; the quarter sessions has no jurisdiction to appoint councilmen in such a case. *Tyrone Borough*, 13 C. C. 651.

50. Upon a division of a borough into wards a separate election must be held by each ward for the election of an equal number of councilmen and school directors in each ward. See the act 13 May 1889 (Brightly's Purdon 237), which amended the act 16 February 1883, P. L. 5. *Comm'th v. Taylor*, 159 P. S. 451; *Gormley v. Campbell*, 34 W. N. C. 53.

51. Where a borough is organized under the general borough law 3 April 1851, the town council may elect a secretary who is not a resident or elector of the borough; the 18th section of that act (Brightly's Purdon 245) does not apply to such a case. *Comm'th v. Newhart*, 6 Del. 4.

(b) Burgess.

52. Sec. 8 of the act 1 April 1834, providing that the burgess shall be president of the town council, is superseded by the act 2 June 1871 (Brightly's Purdon 245). See *Zane v. Rosenberry*, 153 P. S. 38; affirming s. c. 12 C. C. 382. See *Darrach v. Kenney*, 12 C. C. 391; act 23 May 1893 (Brightly's Purdon 248).

53. An injunction will issue to prevent the burgess of a borough acting as president of councils without any color of right; but where a person is a *de facto*

member of councils, the proceedings should be by *quo warranto*. *Carline v. Shallenberger*, 13 C. C. 145. See *Comm'th v. Kempsmith*, 13 C. C. 667, and see act 23 May 1893 (Brightly's Purdon 248).

54. The act 23 May 1893 (Brightly's Purdon 248), providing for the election of a chief burgess for three years, repeals the act 12 March 1869, P. L. 344, regulating the election of burgess and town council of the boroughs of Indiana and Brookville. *Comm'th v. Weir*, 165 P. S. 284; it also repeals the act 27 February 1851, P. L. 115, regulating the election of burgess of the borough of Bridgeport in Montgomery county. *Comm'th v. Schneipp*, 166 P. S. 401.

55. The act 23 May 1893 (Brightly's Purdon 248), providing for the election of a chief burgess for three years, does not apply to the borough of Towanda, in which, under the special act of 8 April 1851, the burgess is selected by the board of councilmen from among their number. *Comm'th v. Angle*, 14 C. C. 538.

56. The act 23 May 1893 (Brightly's Purdon 248), regulating the election of chief burgess, applies to all boroughs, whether incorporated under general or special laws, and the burgess is no longer a member of councils and has no right to preside over its meetings. *Bridgeport v. Schneipp*, 15 C. C. 150.

57. The act 23 May 1893 (Brightly's Purdon 248), providing for the election of a chief burgess for a term of three years, repeals all special laws to the contrary; since the passage of that act the chief burgess does not preside over councils but has the right to approve or veto all ordinances, and the office of assistant burgess is abolished and such officers must be designated as councilmen and have the powers and duties of the same. *Huntingdon Borough*, 3 Dist. Rep. 435.

58. The legislature has the power to abolish or change offices which are legislative only and not constitutional; it may enact a law, the effect of which will be to deprive the chief burgess of a borough of a portion of his term of office. *Comm'th*

v. *Weir*, 165 P. S. 284; *Comm'th v. Schneipp*, 166 P. S. 401.

59. Where a newly elected burgess was also a school director for the borough; it was *held*, that the court had no authority upon petition to decide upon the incompatibility of the offices and to appoint a new burgess in case it found the office to be incompatible; the proper remedy in such a case is by *quo warranto*. *Bomberger's Petition*, 11 Lanc. 222.

60. The chief burgess upon witnessing a disturbance of the peace, has a right to issue a warrant for the arrest of those engaged in it, and such constable holding such warrant may call upon another to assist him. If such other makes the arrest he cannot be convicted of assault and battery because not physically in possession of the warrant. *Comm'th v. Black*, 12 C. C. 31.

61. A burgess is personally liable for the tearing down and burning of a house alleged to be a public nuisance, if, in fact, the house is not a public nuisance; but if the house is a public nuisance he is not liable, although he acted without an order of council. *Reed v. Seely*, 13 C. C. 529.

62. Under the act 11 May 1893 (Brightly's Purdon 257) the rules and regulations of the board of health in boroughs may be established by the passage of the same over the veto of the chief burgess. *In re Boards of Health*, 14 C. C. 116; s. c. 3 Dist. Rep. 225.

63. The act 13 April 1876 (Brightly's Purdon 248), giving borough councils the right to fix the salary of a burgess, does not repeal the local act 2 April 1831, P. L. 389, fixing the fees of the burgess of Norristown. *Norristown v. Shaffer*, 9. Montg. 98.

(c) Borough treasurer.

64. A borough treasurer was *held* liable for special funds appropriated by him to the payment of general borough expenses. *Olyphant Borough v. Flynn*, 1 Lack. Jur. 205.

65. Where a warrant is in proper

form, and is presented to a borough treasurer, it is no part of his duty to inquire into the consideration, and he is fully protected in paying it, even though it turn out that it was for an illegal consideration; if, however, the illegal consideration be expressed on the face of the warrant or he has actual notice of its fraudulent purpose, it is his duty to refuse payment. *Wolf v. Oiler*, 16 C. C. 235.

(d) Constables and policemen.

66. A borough may elect both a constable and high constable. The latter is not bound to execute a warrant issued by a justice, but he is the executive officer of the burgess and town council to serve their notices and execute their legal mandates. *Comm'th v. Schaffer*, 7 C. C. 24.

67. A high constable of a borough is not a court or county officer, and the quarter sessions has no jurisdiction to approve his bond unless the charter of the borough so provides. *Doylestown's High Constable*, 16 C. C. 90.

68. The high constable provided by the act 10 May 1878 (Brightly's Purdon 238) for boroughs divided into wards is a constable within the meaning of the act 14 February 1889 (Brightly's Purdon 373), and must be elected for three years. *Comm'th v. Atticks*, 16 C. C. 147.

69. Under the act 6 June 1893 (Brightly's Purdon 250) councils have the sole power to appoint borough policemen; such appointment is not legislation requiring the passage of an ordinance or resolution which must be submitted to the burgess. *Comm'th v. Miller*, 15 C. C. 404.

70. Special policemen appointed by borough councils at a nominal salary are not entitled to the fees of constables for the service of criminal process issued by the mayor or aldermen; such fees are to be collected by the mayor and paid monthly into the city treasury. They may, however, charge and receive fees for the service of subpoenas put into their

hands by the district attorney. *Knecht v. Northampton County*, 4 Northam. 399.

(e) **Borough auditors.**

71. A borough incorporated under the general borough law 3 April 1851 (Brightly's Purdon 230), is entitled to three borough auditors. *New Salem Borough*, 6 York 63.

72. The court will not appoint a borough auditor upon the petition of the voters of the borough alone; under the act 24 March 1877 (Brightly's Purdon 246) councils must join in the application. *Williamstown's Borough Auditor*, 15 C. C. 311.

73. A vacancy in the office of borough auditor must be filled by the quarter sessions under the act 15 April 1834 (Brightly's Purdon 201), and the term of the appointee is fixed for the unexpired term of the person whose place is vacant, by the act 11 March 1842 (Brightly's Purdon 904), which was extended to borough auditors by the act 3 March 1847, sec. 10, P. L. 200. *Jayne v. Smith*, 9 C. C. 494.

See PUBLIC ACCOUNTS.

(g) **Assistant assessors.**

74. The office of assistant borough assessor is abolished by the act 14 February 1889 (Brightly's Purdon 721). *Wood v. Armstrong County*, 12 C. C. 289.

(h) **Board of health.**

75. The act 28 January 1873, P. L. 100, entitled "an act authorizing the town council of the borough of Carlisle to establish a board of health" violates the provision of the constitution of 1838, which declared that "no bill should be passed containing more than one subject, which should be clearly expressed in the title." That act is unconstitutional so far as it imposed the duty of paying the expense incurred by the board of health of the borough of Carlisle upon the taxpayers of the county, and it was repealed

by the general act 11 May 1893 (Brightly's Purdon 256). *Quinn v. Cumberland County*, 162 P. S. 55; reversing s. c. 13 C. C. 602.

VII. Borough streets.

(a) **Opening and change of grade.**

(1) **Jurisdiction.**

76. If a street be wholly within a borough the quarter sessions cannot appoint viewers to lay it out. The borough authorities must lay out the street; viewers can only fix the damages. *Street in Elizabethtown*, 7 Lanc. 76.

77. A road leading from one terminus in a borough to a terminus in a township must be laid out and opened under the general road law. *Winter Street*, 6 Montg. 24.

78. The town council of a borough may open a street laid down in the general plan of the town, though it thereby closes up a street not on the said plan, but which has become a highway by being the bed of an abandoned turnpike. *Comm'th's Appeal*, 9 Atlan. 524.

79. A borough may locate a street upon another street already opened but not accepted by the borough. *Fisher v. Lynch*, 2 Northam. 330.

80. In a proceeding to open a street or alley in boroughs the duty of fixing the width devolves upon the municipal authorities and not upon the court. *Fleetwood Street*, 8 C. C. 210; *Womelsdorf Alley*, 8 C. C. 207.

81. The power of a borough of its own motion to open or widen a street under the act 3 April 1851 (Brightly's Purdon 252), is not impaired by the act 16 May 1891 (Brightly's Purdon 1399), providing for the passage of ordinances for such purposes on a petition of the majority of the property owners; and when a borough has properly passed an ordinance under the act of 1851 for the widening of a street, the proceedings to carry it out can be had under the act of 1891. *Frederick Street*, 150 P. S. 202; reversing s. c. 11

C. C. 114; *Fourth Street*, 158 P. S. 469; *Locust Street*, 10 Lanc. 206.

82. The exclusive power of the authorities of a borough to regulate roads, streets and alleys under the act 3 April 1851 (Brightly's Purdon 252) does not extend to public roads laid out to a point within the borough limits where only a part of the road is within the borough. *Palo Alto Road*, 160 P. S. 104; affirming s. c. 13 C. C. 537.

83. The borough authorities alone have power to open a public alley in a borough incorporated under the borough act of 3 April 1851, but the jurisdiction to open a private road or alley in such a borough, is in the quarter sessions, under the act 13 June 1836 (Brightly's Purdon 1888). *Selinsgrove Road*, 9 C. C. 611. See *Road in Huntingdon*, 11 C. C. 119.

84. Where the record of a proceeding to assess damages for the opening of a borough street does not show personal notice to the property owners of the passage of the ordinance laying out the street, or of the view, or that said ordinance has been published, the report of viewers will be set aside and quashed. *Taylor Avenue*, 146 P. S. 638.

85. An objection to an ordinance providing for the opening of a street on the ground that it was passed in the interest of one landowner only, must be made by an appeal to quarter sessions; such an objection cannot be raised on exceptions to the report of viewers appointed to assess damages. *Frederick Street*, 155 P. S. 623; affirming s. c. 12 C. C. 577.

86. Where a borough ordinance for the opening of an alley described the first course as "south one-half degrees east—feet"; it was held to be such a misdescription of the locality as to be fatal to the proceedings. *Newton Alley*, 5 York 45.

87. After the passage of an ordinance opening a borough street, the owner may abandon the land to the borough, and upon notice thereof, and demand in writing upon the proper authorities, he may proceed to have his damages ascertained and paid. *Fifth Street*, 14 C. C. 400.

88. Where the centre line of a proposed street is the boundary line between two boroughs and the landowners in one of the boroughs have dedicated twenty-five feet for the street, the other borough has authority to ordain the opening of the street of an equal width. *Butler Street*, 6 Kulp 488.

89. Where a borough passed an ordinance designating a street as four rods wide and the property owners applied for a restraining order to prevent the authorities from tearing up the sidewalks and shade trees, in answer to which, the borough averred a dedication of a width of four rods before the incorporation of the borough; it was held, that the quarter sessions had no jurisdiction and that the remedy of the property owners was by an action of trespass. *Camp v. Port Allegany*, 11 C. C. 122.

90. Under the act 22 April 1856 (Brightly's Purdon 253), the jurisdiction of the quarter sessions as to damages and benefits in laying out a borough street is exclusive unless a majority in number and interest of the owners of abutting property petition for the improvement in the manner required by the act 16 May 1891 (Brightly's Purdon 1399). The act of 1856 is not repealed by the act of 1891. *Sewickley Borough v. Jennings*, 12 C. C. 75. See *Pennsburg Alley*, 12 C. C. 213; *Jenkintown Borough v. Firmstone*, 12 C. C. 219.

91. Where a borough street is laid out and opened by the borough council and not upon the petition of property owners, the jurisdiction for the assessment of damages is in the quarter sessions under the acts 3 April 1851 and 22 April 1856 (Brightly's Purdon 253), and not in the common pleas under the act 16 May 1891 (Brightly's Purdon 1399). *Speakman v. Coatesville*, 2 Dist. Rep. 386.

92. Where a street was ordained by a borough council to be opened prior to the approval of the act 16 May 1891 (Brightly's Purdon 1399); it was held,

that the jurisdiction of proceedings to assess damages for such opening was vested in the quarter sessions under the act 22 April 1856 (Brightly's Purdon 253), and not in the common pleas as provided by the act of 1891; the act of 1856 was not repealed by the act of 1891. *Reynolds Street*, 6 Kulp 479.

93. The act 24 May 1878 (Brightly's Purdon 253) does not apply to the opening of a new borough street or to the extending of an old street; in such cases the jurisdiction still remains in the court of quarter sessions. *Pine Street*, 1 York 21.

94. A proceeding to open a street or to widen and extend an existing street in a borough, is properly brought under the act 22 April 1856 (Brightly's Purdon 253); the act 24 May 1878 (Brightly's Purdon 253) applies only to change of grade. *South Street*, 5 York 45. *West Broadway Street*, 5 York 46.

95. The general borough law of 3 April 1851 (Brightly's Purdon 252) does not repeal the act 13 June 1836 (Brightly's Purdon 1888), authorizing the court of quarter sessions to lay out private roads. *Private Road in Huntingdon*, 149 P. S. 133.

96. The general borough act of 3 April 1851 (Brightly's Purdon 252) does not repeal the general road law of 13 June 1836 (Brightly's Purdon 1888), authorizing the quarter sessions to lay out private roads; and this, although such private road be entirely within the borough limits. *Palo Alto Road*, 160 P. S. 104; affirming s. c. 13 C. C. 537.

97. The act 24 May 1878 (Brightly's Purdon 253), providing for damages for change of grade in boroughs, is repealed by the act 16 May 1891 (Brightly's Purdon 1399). *Whittaker v. Homestead Borough*, 13 C. C. 647.

(2) Petition for viewers.

98. The law does not authorize the joining in a single proceeding the opening of a "street and alley" in a borough. *Fleetwood Streets*, 8 C. C. 210. See *Street in Hanover*, 3 York 213.

99. In a proceeding to open a borough street, the petition must set forth the courses and distances of the street, describe the lots, give the numbers and also the names of the owners, have a draft attached showing such facts, and also have attached the borough ordinance. *Harbaugh Avenue*, 10 C. C. 440.

100. Where the petition for the appointment of viewers gave the first course as "south," and this did not agree with a stone placed in the ground by the borough authorities to mark the terminus, the variance was held to be fatal to the proceedings. *South Street*, 5 York 45. See *South Main Street*, 5 York 45.

101. Under the act of 24 May 1878 (Brightly's Purdon 253) the burgess and town council may apply for the appointment of viewers to assess damages for change of grade of a borough street. *In re Viewers*, 6 Kulp 13; s. c. 4 Del. 298.

(3) Viewers.

102. Seven freeholders must be appointed to assess damages and contributions upon the application by the burgess and council of a borough. The act of 8 May 1889 (Brightly's Purdon 1875) does not apply. *In re Road and Bridge Viewers*, 8 C. C. 557; s. c. 2 Northam. 237.

103. Under the act 22 April 1856 (Brightly's Purdon 253) no right of action accrues to a property owner until a borough street is actually opened or widened, and the appointment of viewers to assess damages before such actual widening or opening is premature. *Fifth Street*, 14 C. C. 400.

104. Where the borough authorities lay out a street, and petition for viewers under the act 22 April 1856 (Brightly's Purdon 253), it is not necessary for the court to appoint viewers from adjoining townships to determine whether the street is necessary or not; there is nothing for the viewers to do except to determine the question of damages to property injured, and to assess contribution for that benefit. *Pine Street*, 2 York 5; affirmed in *Pine*

Street, 2 York 49. See *Pine Street*, 2 York, 109. See *In re Viewers*, 6 Kulp 13.

105. Where several petitions were presented for the extension of a street and the widening of three alleys in a borough, and but one set of viewers was appointed, and the reports of the viewers were filed together as though they constituted but one proceeding; it was held, that as the street and alleys were in different and distant parts of the borough, the appointment of but one set of viewers was fatal to the proceedings. *Street in Hanover*, 3 York 213. See *Fleetwood Streets*, 8 C. C. 210.

106. An owner of property on a street proposed to be opened in a borough, though not on the parts of the street affected by the borough ordinance, is incompetent as a viewer, and such incompetency may be taken advantage of, even though it was known before the view. *Street in New Salem*, 5 York 175.

107. Viewers to assess damages for the change of grade of a borough street should be selected outside the borough. *In re Viewers*, 6 Kulp 13; s. c. 4 Del. 298.

(4) Notice of view.

108. A notice by advertisements put up in the vicinity of a contemplated borough road at least five days before the meeting of the viewers is sufficient. *Womelsdorf Alley*, 8 C. C. 207.

109. Under the local act 8 April 1848, relating to the location and opening of streets, the owner is entitled to the notice provided by the act with all the accompaniment of time and circumstances that the statute prescribes in his favor; notice of the opening of the street will not answer for notice of its location. *Verona Borough v. Allegheny Valley R. R. Co.*, 152 P. S. 368.

(5) Reports of viewers.

110. Viewers of a borough street need not report that they endeavored to procure releases; it is presumed to have been done unless the contrary appears. *Womelsdorf Alley*, 8 C. C. 207.

111. In a proceeding to open a borough street, the report should set forth the lines of the street and each lot from which a part is taken, and it should specifically describe the part taken and should have attached a draft showing the lot in the original condition and as affected by the opening of the street. *Harbaugh Avenue*, 10 C. C. 440.

112. In proceedings to open a borough street where the report does not precisely ascertain whether or not there be damages and benefits, and the amount of the same and the names of the property owners so damaged or benefited, it is an imperfect performance of the office of viewer and a mandamus execution will not issue upon such a report unless specific amounts are assessed against or in behalf of certain persons. *Pringle Street*, 167 P. S. 646; s. c. 36 W. N. C. 314; reversing s. c. 7 Kulp 346; 6 Del. 14.

113. In a proceeding under the act 24 May 1878 (Brightly's Purdon 253), to assess damages for a change of grade of a borough street, exceptions to the report must relate to errors or irregularities in the proceedings or report; if no such exceptions be filed and no appeal be taken, exceptions filed as to matters of fact which require the service of a jury to determine will be dismissed and judgment entered upon the report. *Nahf v. Tamaqua Borough*, 14 C. C. 142.

114. Under the act 22 April 1856 (Brightly's Purdon 253), in a proceeding to open a borough street, the court has power to refuse to approve and confirm the report; it may either set aside the report or in a clear case of injustice may modify it by diminishing or increasing the damages awarded. *Pine Street*, 1 York 133.

115. Upon exceptions to the report of viewers on the opening of a borough street, the court has no jurisdiction over the action of the borough council. *Street in New Salem*, 5 York 175.

116. A plan of streets adopted by a borough and filed in the quarter sessions will answer for a new borough covering

territory included in the plan filed. *Fourth Street*, 158 P. S. 469.

(6) **Damages.**

117. Damages to a lot owner in the opening of a borough street are to be ascertained as of the time of the opening; where the same person owned three lots A B and C and an ordinance was enacted establishing a new street occupying the whole of lot A, and afterwards the owner sold lot B, and retained lot C; it was *held*, upon a subsequent opening, that the owner was entitled to the value of lot A, undiminished by benefits or advantages to lots B and C; and this, though he obtained an increased price for lot B. *Whitaker v. Phoenixville*, 141 P. S. 327.

118. The right to demand a review of the decree of confirmation of a borough street accorded by the act of 3 April 1851 was impliedly repealed by the act of 22 April 1856 (Brightly's Purdon 253). A review cannot be made for the purpose of reassessing the damages nor to extend the time for taking an appeal, but only for the correction of some formal error or because of an omission of statutory requisite. *Lincoln v. Birdsboro Borough*, 7 C. C. 539.

119. The act of 11 February 1854, extended to Berkes county by the act of 19 April 1856, does not apply to streets in boroughs. So the act of 14 May 1874 (Brightly's Purdon 1877) is not to be deemed a part of the act of 3 April 1851. *Ibid.*

120. Where a change of grade was authorized by councils and actually completed before the passage of the act 16 May 1891 (Brightly's Purdon 1399); it was *held*, that that act was not retroactive and that the damages were payable by the borough and could not be assessed against the property owners. *Morton v. Homestead Borough*, 15 C. C. 646; s. c. 42 P. L. J. 328.

121. Where a jury of view laid out a public road and awarded damages to an owner who appealed and obtained a verdict in the common pleas, and afterwards

and before the road was opened, a borough was incorporated including all the land through which the road ran; it was *held*, upon a rule to show cause why execution should not issue, that until the borough authorities adopted a plan of streets including the road, the court would not order the road to be opened, and until it was opened execution could not issue. *Hibberd v. Delaware County*, 5 Del. 493.

122. A borough street laid out by commissioners under a special act is only to be considered opened from the date of the opening ordered by the court, and the statute of limitations only begins to run against a claim for damages from that date. *Bush Street*, 5 Montg. 196.

123. The act 16 May 1891 (Brightly's Purdon 1399) does not repeal the special act 7 April 1845, P. L. 328, applicable to Montgomery county, under which the expense of a view for opening a borough street must be paid by the petitioners. *Egypt Street*, 11 Montg. 94.

(7) **Benefits.**

124. Upon the opening of an additional portion of a borough street, property owners on the whole line of the street are liable to be assessed for benefits. *Main Street*, 137 P. S. 590; s. c. 38 P. L. J. 127.

125. In opening a borough street the total benefits assessed cannot exceed the total amount of damages allowed. *Wilbur Street*, 8 C. C. 477; s. c. 2 Northam. 226. See MUNICIPAL IMPROVEMENTS.

(8) **Appeal.**

126. In a proceeding to assess damages for a change of grade of a borough street under the act 24 May 1878 (Brightly's Purdon 253), the only appeal from the judgment of the common pleas is to the supreme court. *Brown v. Beaver Borough*, 12 C. C. 313.

127. Where in a proceeding under the act 24 May 1878 (Brightly's Purdon 253) to assess damages for a change of grade of a borough street, an appeal is taken to the common pleas from the award of

viewers under the act 13 June 1874 (Brightly's Purdon 772) such appeal is not too late if filed after the entry of judgment on the award but within thirty days from the filing of the award. *Brown v. Beaver Borough*, 12 C. C. 313.

128. In proceedings to assess damages for the opening of a borough street under the act 16 May 1891 (Brightly's Purdon 1399), if a lot owner fails to appear before the viewers to raise questions of fact in which he wishes to be heard, he will be *held* to have waived them; but where an appeal is taken by him from the award but the defendant makes no motion to quash but joins issue and proceeds to trial, he will be *held* to have waived such an objection. *DuBois Opera House Co. v. DuBois Borough*, 16 C. C. 210.

(b) Widening streets.

129. Equity will restrain the widening of a borough street by the taking, without proceedings, a strip of ground not within the corporate limits as originally established, but which lay along a turnpike, and was brought into the borough by a later act extending its limits. *Curwensville Borough's Appeal*, 129 P. S. 74.

130. Where the plaintiff's grantors were the trustees of a church, and eight months before they executed the deed to the plaintiff, they passed a resolution to sell the lot to him on the condition that he remove the house and widen the alley fourteen feet, but the deed did not contain any such reservation, and after the conveyance the plaintiff moved back his line eight feet, and the borough subsequently widened the alley by taking six more feet of the plaintiff's land; it was *held*, that the evidence was insufficient to show any agreement on the part of the plaintiff to donate the six feet. *Evans v. Lititz*, 162 P. S. 561; affirming s. c. 11 Lanc. 109.

131. In a proceeding to widen and grade a borough street, the borough has a right to appeal under the act 13 June 1874 (Brightly's Purdon 772); and this,

though no right of appeal be given by the act 16 May 1891 (Brightly's Purdon 1399). Such appeal must be taken within thirty days from the ascertainment of the damages which is the time of the filing of the report of the viewers in court. *Bechtel v. Bechtelsville*, 3 Dist. Rep. 713.

132. Under the act 16 May 1891, sec. 6 (Brightly's Purdon 1400), a citizen of a borough, who has no interest in the land taken, has no authority to file exceptions to the report of the viewers in a proceeding to widen a street. *Cedar Street*, 9 Lanc. 169.

133. Where the width of the roadway and sidewalks of a street have been regularly established, an ordinance changing the same must be published as prescribed by the act 3 April 1851, sec. 3, clause 4 (Brightly's Purdon 247), before it can take effect. *Reich v. Ashley Borough*, 7 Kulp 163.

134. The town council of a borough may discontinue proceedings for widening a street at any time before taking possession under completed proceedings; and this, though improvements have been made on the faith of such widening. *Keller Street*, 25 W. N. C. 524.

135. For the practice regarding the assessment of damages caused by a change of lines, etc., of a borough street, see *Thornton v. Ashley Borough*, 5 Kulp 509.

(c) Vacating.

136. The court cannot determine whether an ordinance vacating a borough street is unreasonable or unjust; that is for the borough authorities. *Gay Street*, 7 C. C. 217.

137. Under sec. 27 of the act of 3 April 1851 (Brightly's Purdon 252) a person aggrieved by the vacation of a borough street has until the next term of quarter sessions after the vacating ordinance takes effect in which to appeal to that court. *Ibid.*

138. If an ordinance vacating several borough streets be void as to one of the streets for want of notice, it is void as to

all the streets. A party in actual business on the street and who daily uses it is entitled to notice. *Ibid*.

(d) Paving and curbing.

139. The costs of macadamizing intersections, under the act of 23 April 1889 (Brightly's Purdon 254), must be apportioned among all the abutting property owners. Manner of estimating the feet frontage. *Kennett Square v. Entriken*, 7 C. C. 469.

140. If a borough desires to make each property owner pay for curbing his own property, the proceedings should be under the act of 3 April 1851. If under the act of 23 April 1889 (Brightly's Purdon 254) the cost must be apportioned among all the owners, though some had already curbed. *Ibid*.

141. The act of 23 April 1889 (Brightly's Purdon 254), authorizing boroughs to pave streets, applies to all boroughs with special charters. *Greensburg v. Laird*, 138 P. S. 533; affirming s. c. 8 C. C. 608.

See MUNICIPAL ASSESSMENTS.

(e) Repairing.

142. If a borough street has been originally macadamized at public expense, the cost of repaving or repair cannot be charged against abutting owners. *Greensburg v. Laird*, 138 P. S. 533; affirming s. c. 8 C. C. 608.

(g) Use and obstruction.

143. Upon the question of public user of a borough street a map not proven by the surveyor who made it, nor accompanied by the original draft, was improperly admitted in evidence. *Comm'th v. Switzer*, 134 P. S. 383; s. c. 26 W. N. C. 46.

144. A manufacturing company cannot, by lease from a railroad company, acquire the right to construct and operate a railway upon the streets of a borough even with the consent of the authorities of the borough. *Barker v. Hartman Steel Co.*, 129 P. S. 551. See s. c. 23 W. N. C. 109.

145. A borough will not be restrained from removing a stone wall which is built upon and is an obstruction to a street, merely because its removal will injure private property. *Walsh v. Olyphant Borough*, 7 C. C. 124.

(h) Sewers.

146. A borough is not bound to furnish a system of drainage which will prevent the flow of surface water upon property below the grade of a street. *Lafferty v. Girardville*, 1 Mona. 513; s. c. 17 Atlan. 17. See *Buchert v. Boyertown*, 1 Mona. 577; s. c. 17 Atlan. 577.

147. Borough authorities have no right to open a drain through a lot owner's property, which had been legally closed by the latter, because of its illegal use by another lot owner to drain his cesspool; and this, though the closing of the drain caused a public nuisance on the streets of the borough. *Crosland v. Pottsville*, 126 P. S. 511.

148. A borough which permits a public culvert, of sufficient capacity in itself to be extended through private property reduced to an insufficient capacity, is liable to a property owner for the resulting injuries. *Haus v. Bethlehem*, 134 P. S. 12; s. c. 26 W. N. C. 348.

149. In an action against a borough for injuries caused by an overflow of surface water into the plaintiff's cellar, where there was evidence that a sewer was not only imperfectly constructed, but was negligently allowed to become clogged; it was held, that if the sewer was stopped up or out of repair, its capacity was immaterial. *Markle v. Berwick*, 142 P. S. 84.

150. A borough council which has power to build sewers and drains, has power to grant permission to a citizen to lay a drain pipe in the street to lead off the surface or refuse water from his building; such a drain is not a nuisance *per se*, and an injunction for its removal cannot be granted until after the right had been established in an action at law

where the evidence is conflicting as to whether it is a nuisance in fact. *Wood v. McGrath*, 150 P. S. 451.

151. Where a board of water commissioners was created for the borough of Sewickley and the money to erect the water works was to be furnished by the borough by an issue of bonds, the interest to be paid out of the water rent, and the commissioners were to report annually to the councils, and to pay over semi-annually all the moneys in their hands; it was *held*, that the commissioners had no interest in the water works and the borough could, without their consent, use the water to sprinkle the streets and to lay sewers. *Sewickley Water Works Commissioners v. Sewickley Borough*, 159 P. S. 194.

See MUNICIPAL ASSESSMENTS: MUNICIPAL CORPORATIONS.

(4) Sidewalks.

152. Under the act of 3 April 1851, upon the failure of a property owner in a borough to repair his sidewalk after notice, the borough may repair it and file a lien for the cost with twenty per cent. penalty added. *Beltzhoover Borough v. Maple*, 130 P. S. 335.

153. The owner of a lot fronting on a borough street, who, for a consideration, assumes to keep the sidewalk in repair, is liable over to the borough for damages paid by it by reason of his neglect to do so. They are not joint wrong-doers. *Brookville v. Arthurs*, 130 P. S. 501.

154. Under the borough act of 3 April 1851 a demand on, and refusal by, the property owner to make a sidewalk, are not necessary to sustain a lien for the same. *Mt. Pleasant v. Baltimore & Ohio Railroad Co.*, 138 P. S. 365; s. c. 27 W. N. C. 177; 38 P. L. J. 225.

155. The owner of property abutting upon a new street of a borough is not bound to pay for the grading of the footway. *Steelton Borough v. Booser*, 162 P. S. 630.

See MUNICIPAL CORPORATIONS.

(k) Bridges.

156. Where property in a borough is damaged by a change in the location of the abutments of a bridge, which is part of a public highway, the remedy is by the appointment of viewers, under the act 24 May 1878 (*Brightly's Purdon* 253), and not by action of trespass. *Power v. Ridgway Borough*, 149 P. S. 317.

See HIGHWAYS.

(l) Street crossings at railroads.

157. A borough incorporated under the general borough law has no authority to enact an ordinance compelling railroad companies to erect gates, or keep watchmen at street crossings. *Archbald Borough v. Delaware & Hudson Canal Co.*, 3 Lack. Jur. 189.

VIII. Gas and electricity.

158. A borough may, by ordinance, under a penalty, prohibit the drilling of a natural gas or oil well within 150 feet of any house, stable or other building; so, the council may abate a well which is being drilled and is a public nuisance, endangering the lives and property of its citizens. *Agnew v. Washington*, 7 C. C. 180.

159. A natural gas company which has laid its pipes in a borough prior to the act of 29 May 1885 without permission, will not, since the passage of that act, be enjoined at the suit of the borough from using said pipes. *Butler Borough's Appeal*, 5 Cent. 669.

160. A borough has no power to lay gas in the streets to supply citizens with gas, and an ordinance authorizing a private citizen to lay pipes is inoperative. *Ransberry v. Keller*, 2 Northam. 305.

161. A mere resolution of council which is not recorded, signed by the burgess nor published, is not sufficient authority to the president to bind the borough by an irrevocable contract for street lighting for a definite period at a certain price. *Comm'th v. Buchanan*, 6 Kulp 217.

162. A borough has the right to contract for the lighting of its streets by electricity or otherwise, without first having submitted the question to a vote of the taxpayers; it is only when the general fund of the borough, raised by the usual taxation, is not sufficient to defray the expense of lighting, and a special tax is necessary for the purpose, that a vote of the taxpayers is requisite. *Severs v. Winton Borough*, 1 Lack. L. N. 103.

163. The act 20 May 1891 (Brightly's Purdon 242), authorizing boroughs to manufacture electricity for commercial purposes, is constitutional; it is not in conflict with article IX., sec. 7, of the constitution. *Linn v. Chambersburg Borough*, 160 P. S. 511.

IX. Licenses.

164. A non-resident cracker-baker, who supplies local dealers from a wagon, cannot be compelled by borough authorities to take out a license. *Mt. Joy v. King*, 6 Lanc. 345.

165. A non-resident wholesale confectioner who supplies local dealers, taking orders and filling them directly from his wagon in the original package, cannot be compelled by the borough to take out a license. *Mt. Joy Borough v. Hartman*, 8 Lanc. 242.

166. A borough ordinance forbidding non-residents to engage in a particular business in the borough is invalid. *Wilcox v. Knoxville*, 12 C. C. 641.

167. The act 6 February 1830 (Brightly's Purdon 1657), forbidding the peddling of clocks without a license, does not interfere with interstate commerce, and is not in violation of the constitution of the United States. *Comm'th v. Harmel*, 166 P. S. 89.

168. The act of 22 March 1870 (P. L. 522), authorizing borough authorities of Conshohocken to exact a license from travelling vendors, will not sustain a borough ordinance imposing a license fee upon milkmen daily selling upon the streets the milk produced on their farms. *Conshohocken v. Nippes*, 5 Montg. 137.

169. Under the general borough act of 3 April 1851 (Brightly's Purdon 239) a borough may impose a license fee on hawkers, peddlers, etc., but an exception as to citizens of the borough is void because of discrimination. The act of 24 May 1887, empowering cities and boroughs to license foreign dealers, did not apply to citizens of this state. *Sansford Borough v. Brode*, 7 C. C. 221.

170. A city ordinance requiring the payment of a license fee from all persons soliciting orders, was *held*, in its operation upon an agent for a business house in Chicago, to be a tax upon interstate commerce; the subject-matter of such an ordinance is not within the limitation of the police power of the state. *Brennan v. Titusville*, 153 U. S. 289; reversing s. c. 143 P. S. 642.

171. The ordinance of the borough of Warren of 13 April 1894, regulating vending, hawking and peddling in the borough, is manifestly in restraint of legitimate trade and cannot be justified as a police regulation. *Warren Borough v. Lewis*, 16 C. C. 176.

172. The act 10 May 1893 (Brightly's Purdon 1325), authorizing cities, boroughs and townships to impose a license fee upon all persons engaging in a transient retail business but excepting those engaged in a permanent business, does not allow a tax to be imposed upon non-residents having their permanent business place out of the state but employing an agent to do a transient business in the state; such a tax would be a tax upon interstate commerce. *South Bethlehem v. Hackett*, 4 Northam. 381; s. c. 12 Lanc. 196.

173. A borough has the right to demand license fees for telephone poles erected on its highways; the granting of permission to a telephone company to occupy its streets, the company contracting to put in and maintain a telephone for the borough, will not preclude the subsequent imposition of such license fees. *Bethlehem Borough v. Pennsylvania Telephone Co.*, 4 Northam. 389.

174. The act 22 April 1889 (Brightly's Purdon 242), authorizing boroughs to levy a license tax on hacks, is not unconstitutional; an ordinance to apply to all vehicles used in carrying persons or property within the borough or between points within the borough and other points or places, whether the owner resides or the vehicles be kept within the borough or not, is valid and enforceable; on failure to pay the license, suit for the recovery thereof may be brought before a justice of the peace. *Washington v. McGeorge*, 146 P. S. 248.

175. The act 22 April 1889 (Brightly's Purdon 242), authorizing boroughs to levy and collect a license tax on hacks, is constitutional; an ordinance imposing a license tax of five dollars on a vehicle drawn by one horse, eight dollars on one drawn by two horses and twelve dollars on one drawn by three or more horses, is not unreasonable. Nonresidents who carry on such a business are liable for the tax except such as haul directly through the borough to and from points outside thereof. *Gibson v. Coraopolis Borough*, 8 Lanc. 359.

176. A borough ordinance providing for a pedler's license which does not apply to persons holding a mercantile license within the borough, is invalid as a trade regulation. *West Pittston v. Dymond*, 8 Kulp 12.

X. Taxes.

177. The act of 25 June 1885, regulating the collection of state, county and other taxes in boroughs, not cities, is, as to state and county taxes, in violation of article III., sec. 1, of the constitution. It is valid, however, so far as it relates to local taxes. *Comm'th v. Swab*, 8 C. C. 111.

178. In a proceeding in the quarter sessions under the act of 22 April 1887 (Brightly's Purdon 251), to compel the collection of a special tax to pay a borough's indebtedness, if the borough files an answer that the treasury is empty and that the revenues in any one

year are inadequate to pay the debt, the petitioner is entitled to a decree. *Hower's Appeal*, 127 P. S. 134.

179. In a proceeding in the quarter sessions under the act of 22 April 1887 (Brightly's Purdon 251), to compel the collection of a special tax, citizens and taxpayers who have been refused a right to intervene have no standing to be heard in the supreme court on appeal. *Ibid.*

180. In proceedings to increase the debt of a borough, a remonstrance of citizens and taxpayers to the statement filed will be stricken off as irrelevant. *Laird v. Greensburg*, 8 C. C. 621.

181. A borough ordinance which provided that all persons selling liquors within the borough should, in addition to other licenses, pay the treasurer for a saloon twenty-five dollars, and for peddling with a wagon fifty dollars annually, and that any person selling liquor within the borough without paying said tax should be fined fifty dollars for each offence, was held to be invalid as imposing a tax for revenue. *DuBoistown v. Rochester Brewing Co.*, 9 C. C. 442.

182. Where a borough was authorized by an act of assembly to erect water works with power to fix the rates for the use of the water, and some of the water was used in the building of a new school-house in the borough; it was held, that the school district was not liable for water charges for the water so used. *Emaus Borough v. Emaus School District*, 12 C. C. 349.

183. The act 25 June 1885 (Brightly's Purdon 1992), providing for the election of borough and township tax collectors, is constitutional; its title gives sufficient notice of its contents, it is not a local or special enactment and does not violate the constitutional requirements of uniformity in the levy and collection of taxes. *Comm'th v. Lyter*, 34 W. N. C. 393; *Bennett v. Hunt*, 148 P. S. 257; overruling *Comm'th v. Commissioners of Lackawanna*, 7 C. C. 173; *Evans v. Witmer*, 2 C. C. 612, and *Hannick's Bond*, 4 C. P. 38. See *Comm'th v. Lyter*, 162 P. S. 50.

XI. Indebtedness.

184. Though borough bonds issued without complying with the provisions of sec. 10, article IX., of the constitution, and of sec. 2 of the act of 2 April 1874, are void, yet if the debt be a lawful one and the money is applied to an existing valid indebtedness, the borough is liable, and the money can be recovered on a count upon the simple contract for money loaned. *Rainsburg Borough v. Fyan*, 127 P. S. 74; affirming *Fyan v. Rainsburg Borough*, 5 C. C. 443.

185. Upon the secession of a part of an existing borough, under the act 29 May 1889 (Brightly's Purdon 235), a proper proportion of the debt must be assumed by the new borough. The indebtedness includes a bond not yet due. *Sharon Hill Borough*, 140 P. S. 250; affirming s. c. 4 Del. 252.

186. Upon a bill to restrain a borough from undertaking the erection of an electrical plant on the ground that the borough indebtedness would be increased beyond the constitutional limit, the burden is on the plaintiff to prove that the indebtedness would be necessarily increased to an amount exceeding the legal limit. *Linn v. Chambersburg Borough*, 160 P. S. 511.

XII. Suits against boroughs.

187. The right of a citizen and taxpayer to become a party to a suit against a borough, under the act of 23 March 1877 (Brightly's Purdon 437), exists only where the proceedings are in the court of common pleas. *Hower's Appeal*, 127 P. S. 134.

XIII. Actions for penalties.

188. A burgess has no jurisdiction to collect a penalty imposed by an ordinance against drilling oil-wells, by a summary conviction under the act of 3 April 1851 or 19 May 1887 (Brightly's Purdon 249). *Agnew v. Washington*, 7 C. C. 180.

189. A borough under the general borough law has the right to impose license

fees, but such parts of a borough ordinance as direct the arrest and imprisonment of those who fail to comply with the provisions thereof, are not valid. *Egger v. Stine*, 12 C. C. 316.

BOUNDARY.

See BOROUGH: DEED: ESTOPPEL: EVIDENCE, XXX.

1. The act 4 May 1871 (P. L. 539), providing that the western boundary of the city of Wilkes-Barre shall be the low, water mark of the Susquehanna river, is repealed by the act 24 May 1887 (Brightly's Purdon 260), which provides that whenever any township, borough or city is bounded by the nearest margin of any navigable stream and the opposite township, borough or city is also bounded by the nearest margin of the same stream, the middle of such stream shall be deemed and taken to be the boundary line. *Gilchrist v. Strong*, 167 P. S. 628.

BOUNTIES.

1. A supervisor has no authority to bind a township by his agreement to pay a bounty for enlistment in the United States service. *Bearce v. Fairview Township*, 9 C. C. 342; s. c. 27 W. N. C. 212.

2. The act 8 May 1889, P. L. 123, authorizing soldiers or sailors to bring suit against any county borough or township to recover the money they may be entitled to by reason of being accredited, was held to be unconstitutional as a local act not applying to cities. *Bearce v. Fairview Township*, 9 C. C. 342; s. c. 27 W. N. C. 212.

3. The act 8 June 1891 (Brightly's Purdon 260), providing that soldiers and sailors who re-enlisted to fill quota may sue for bounty, was held to be unconstitutional as violating article III., sec. 21, of the constitution, that no act shall prescribe any limitation of time within which suits may be brought against corporations different from a limitation fixed in actions against natural persons;

that section is broad enough to include not only corporations but also municipal corporations and quasi-municipal corporations. *Cole v. Economy Township*, 13 C. C. 549.

BREACH OF PROMISE.

See HUSBAND AND WIFE, XIV.

BREAKING AND ENTERING.

See CRIMINAL LAW, XXXIX.

BRIBERY.

See CRIMINAL LAW, LX.

BRIDGE COMPANIES.

See HIGHWAYS, XX.

1. The provisions of the act of 29 April 1874 and of 14 March 1876 (Brightly's Purdon 265), prohibiting a bridge or ferry company from exercising its corporate franchises within three thousand feet of any other bridge or ferry in actual use, were repealed by the act 17 May 1876 (Brightly's Purdon 264). *Bridgewater Ferry Co. v. Sharon Bridge Co.*, 145 P. S. 404.

2. A bridge company authorized to erect a bridge over a navigable river has a right to fix the number and location of its piers at its discretion; it may be responsible for an injury resulting from a wanton abuse of the right, but otherwise it is not liable in damages. *Jutte v. Keystone Bridge Co.*, 146 P. S. 400.

3. The power to construct a bridge carries with it the right to elevate the bridge to a sufficient height to avoid the danger of ice and floods; such elevation may be changed to the extent that experience shows to be necessary, and such right carries with it the right to construct reasonable and proper approaches, and the elevation over a highway will not be enjoined as a public nuisance where the public convenience is increased thereby and public travel

is not interfered with to any appreciable extent. *Comm'th v. Pittston Ferry Bridge Co.*, 148 P. S. 621. See s. c. 8 Kulp 29.

4. Under the act 29 April 1874, P. L. 90, as amended by the act 17 April 1876, P. L. 34 (see further amendment 6 May 1887, Brightly's Purdon 263), a bridge company cannot charge in addition to the toll for vehicles, a toll for passengers carried by the vehicle. Where five such payments were collected from the plaintiff; it was held, that the defendants could only be subjected to five penalties and not to a penalty for every passenger carried and paid for during the period of such charges. *Porter v. Dawson Bridge Co.*, 157 P. S. 367.

5. The right to free a toll bridge by the exercise of the right of eminent domain is not relinquished by a provision in the charter of a bridge company by which the legislature reserved the right to purchase the bridge after the expiration of twenty years. In such a proceeding, evidence is admissible as to the erection and maintenance of free bridges a short distance below the one in question. *Lock Haven Bridge Co. v. Clinton County*, 157 P. S. 379.

6. A bridge company has power to issue such a number of free passes as in the sound discretion of the directors will inure to the best interests of the stockholders; the constitutional prohibition applies only to railroad companies. *Hasson v. Venango Bridge Co.*, 11 C. C. 383.

7. The directors of a bridge company have power to contract for the use of the bridge for the purposes of a street railway, provided such use does not interfere with the use of the bridge by the public. *Hasson v. Venango Bridge Co.*, 11 C. C. 383.

8. A strip of land purchased by a bridge company to widen the approach to its bridge, and intended for the sole use of passengers and vehicles, is not liable to city taxation. *Monongahela Bridge Co. v. Pittsburgh*, 12 C. C. 87.

9. A municipal lien for the cost of paving a street cannot be filed against a

bridge company possessing only a right of way over land abutting on a street in the borough. *Warren Borough v. Pleasant Bridge Co.*, 16 C. C. 44.

BRIDGES.

See **BOROUGHs: HIGHWAYS, XX.:** **MUNICIPAL CORPORATIONS: RAILROADS.**

1. Where a bridge spans a stream which is a boundary line between a city and a county, the city will be restrained by the court of the adjoining county from interfering with the laying of the tracks of a passenger railway company upon the portion of the bridge belonging to the adjoining county, where it appears that the consent to the laying of the railway has been given by the supervisors of the township and the commissioners of the county, and the officers of the city have been made parties defendant to the bill. *Delaware County and Philadelphia Electric Railway Co. v. Philadelphia*, 164 P. S. 457.

BROKERS.

See **AGENCY: BAILMENT, VIII.:** **CONTRACT, X.:** **FACTORS: TAXES, III.**

BUGGERY.

See **CRIMINAL LAW, XXX.**

BUILDING ASSOCIATIONS.

See **TAXES, III.**

- I. Officers.
- V. Borrowers.
- VI. Withdrawing members.
- VII. Fines.
- IX. Dues.
- X. Value of stock.
- XI. Expiration and winding up.

I. Officers.

1. A building association will not be permitted to plead the improper act of its own treasurer as a bar to a recovery

against it. *Beethoven Building Association v. Weber*, 5 Atlan. 235.

2. Where the evidence as to the authority of the solicitor of a building association to receive a check in satisfaction, was partly written and partly oral, it was proper to submit the question of authority to the jury. *Home B. & L. Ass'n v. Kilpatrick*, 140 P. S. 405.

V. Borrowers.

3. A borrowing stockholder sued upon his bond may show that, if the profits were divided, the stock would have matured and the debt be extinguished. *Charles Tyrrell Loan & Building Association v. Haley*, 139 P. S. 476; s. c. 27 W. N. C. 244.

4. Where a member of a building association assigns his stock as collateral for the payment of a loan for which he has given a judgment on his real estate, he cannot afterwards assign his title to the stock to another person and direct that the payments on his stock shall not be applied to the payment of his indebtedness, but that the same shall be collected from his real estate. *Wadlinger v. Washington German Building & Loan Ass'n*, 153 P. S. 622.

5. Where a member of a building association borrowed upon five shares of stock and received eight hundred dollars, giving his bond and mortgage for one thousand dollars, and subsequently the association made an assignment for creditors, at which time defendant had paid all his dues and was able and willing to continue payment; it was held, that his liability upon the bond and mortgage was simply to return the money borrowed, with legal interest thereon. *State Saving and Loan Ass'n v. Carroll*, 15 C. C. 522.

6. It is usury for an unincorporated building association to deduct premiums from the principal of a mortgage executed to a trustee in its behalf, and in an action by the building association after incorporation upon such a mortgage, the defence of usury may be set up by the mortgagor

or his assignee for creditors. *Roland's Estate*, 2 York 122.

VI. Withdrawing members.

7. A member of a building association cannot be a withdrawal stockholder so long as his stock is held in pledge by the association. *Wadlinger v. Washington German Building & Loan Ass'n*, 153 P. S. 622.

8. Where certain orders for withdrawals were signed by the president and attested by the secretary and paid in good faith by the treasurer to the secretary, who was in the habit of receiving money for the members and who absconded with the money; it was *held*, that there was not sufficient evidence of negligence on the part of the treasurer to submit to the jury. *Hibernia Building Ass'n v. McGrath*, 154 P. S. 296.

VII. Fines.

9. Upon the distribution of an assigned estate, a building association will not be allowed penalties and fines imposed by it after the date of the assignment, but only simple interest. *Boyer's Estate*, 1 York 193.

IX. Dues.

10. Where the by-laws of a building association make it the duty of the secretary to file security and to receive and account for weekly dues, a payment to the secretary not made at a stated meeting is not a mispayment. *Schutte v. California Premium B. & L. Association*, 146 P. S. 324.

X. Value of stock.

11. Where a building association issues a number of shares of stock, the proper way to ascertain the value of any particular share at a given time is to add to the amount paid on the share a proportion of

the profits ascertained by dividing the annual profits among all the shares in proportion to the amount paid on each share; and where an association used a different plan for many years, it was *held*, that a stockholder, by failure to object, was not estopped from requiring a change in the methods. *Charles Tyrrell Loan & Building Ass'n v. Haley*, 163 P. S. 301.

XI. Expiration and winding up.

12. A building association which declares that the shares have matured is liable for their full value. It cannot adopt a rule compelling matured stockholders to pay a premium for preference. *Mechanics' and Workingmen's Building Association's Appeal*, 7 Atlan. 728.

13. When a series in a building association has run out, the non-borrowers cannot be required to accept payment of their stock in other assets of the company or a less sum in cash than the par value of the other assets. *Mercer v. Amber Building & Loan Ass'n*, 10 C. C. 51.

14. Where the shares in a foreign building association were redeemable in cash after a certain number of payments had been made; it was *held*, that the word "redeemable" should be construed to mean, at the option of the association. *Peters v. Granite State Provident Association*, 12 C. C. 192.

15. Under the act of 17 April 1876 (Brightly's Purdon 272) a building association, even after its charter has expired, must be regarded as having a qualified corporate existence, and a bill will lie against it for the purpose of winding up its affairs. If liquidating trustees are not appointed on such dissolution, the court will appoint a receiver for such purpose. *Morrison v. Carbondale Building Association*, 1 Lack. Jur. 437.

BUILDING CONTRACTS.

See ARBITRATION: CONTRACT.

BUILDINGS.

See PARTY-WALLS: PHILADELPHIA.

1. The open space or curtilage required by the act of 21 April 1855 (Brightly's Purdon 1443) for each dwelling-house in Philadelphia must be entirely clear from the ground upward. *Philadelphia v. Brown*, 9 C. C. 670; s. c. 48 L. I. 57.

2. Equity will not interfere by way of a mandatory injunction to restrain the maintenance of structures upon an adjoining lot in violation of restrictive conditions in a deed, when there has been long-continued delay in asserting the right and a remedy exists at law. *Orne v. Fridenberg*, 143 P. S. 487.

3. The violation of a building restriction in a deed may not be restrained where there has been a change of surroundings in the neighborhood, in the character of the improvements, and in the purposes to which they are applied. *Orne v. Fridenberg*, 143 P. S. 487.

4. Where land was subject to a covenant that no manufactory, work-shop, steam-engine house, smith-shop, or other building for offensive purposes or occupation, or building of any kind to be used for any purpose other than as and for a genteel cottage or dwelling-house, stable or coach-house, should ever be built on the land, and the lessees of defendant in September 1887 built on the land a boat-house, club-house and a carpenter-shop for repairing boats, and notice to remove the same was not given until January 1889, the court refused a mandatory injunction; a mandatory injunction will not be issued where complainant's rights are not clear. *Gatzmer v. St. Vincent School Society*, 147 P. S. 313.

5. In a proper case, equity will restrain by injunction the erection of a frame building in violation of a city ordinance within the fire limits of a city. *Wilkesbarre v. Frauenthal*, 6 Kulp 444.

6. The act of 11 April 1872, prohibiting the erection of frame buildings in

certain portions of the city of Reading, is not repealed by the municipal act of 23 May 1874. *Reading v. Wanner*, 1 Wilcox, 282.

7. The erection of a wooden building not constituting a nuisance, will not be restrained by injunction though such erection be prohibited by city ordinance. *Lancaster v. Shaub*, 7 Lanc. 340.

BURDEN OF PROOF.

See EVIDENCE, XXXIII.: NEGLIGENCE: NOTARY PUBLIC.

BURGLARY.

See CRIMINAL LAW, XXXIX.

BURIAL.

See CEMETERIES.

BY-LAWS.

See CORPORATIONS, XVII.

CANALS.

1. Land seized by and appropriated to the use of the state for the purpose of a reservoir for the Pennsylvania canal vests in the commonwealth in fee. *Delosier v. Pennsylvania Canal Co.*, 11 Atlan. 400.

2. The state took an estate in fee on the land acquired for the permanent use of her canals, and the sale under the act of 21 April 1858 passed a similar title to their vendees. The Philadelphia and Erie Railroad company cannot be restrained from laying their railroad tracks over and across the streets traversed and crossed by the portion of said canal of which they are the owners. *Williamsport v. Pennsylvania Railroad Co.*, 8 C. C. 350.

3. The confirmation of a report of viewers laying out a road across a canal confers no authority to erect a bridge that will obstruct its navigation. *Road in Lehigh*, 1 Northam. 220.

4. Where supervisors without an order of court made a fill upon a towpath in

laying out a public road across the same, and such fill interfered with the convenient and lawful use of the towpath by the canal company; it was *held*, that the latter's employees were not indictable for peaceably removing the obstruction. *Comm'th v. Ruddie*, 142 P. S. 144.

5. Where a canal company places upon its dam permanent splashboards, which raises the water and increases the area of the dam, it is liable to a property owner for the injury resulting from the consequent increased overflow of his land occasioned by this enlargement of its works. *Fredericks v. Pennsylvania Canal Co.*, 148 P. S. 317.

6. Under the act 10 April, 1826 sec. 1 (Brightly's Purdon 285), the taking of cattle to the bank of a canal for the purpose of watering, is an offence punishable by fine and imprisonment. *Philadelphia & Reading R. R. Co. v. Reading & Pottsville R. R. Co.*, 12 C. C. 513; s. c. 2 Dist. Rep. 857.

CANCELLATION.

See EQUITY, XIV.

CAPIAS.

See ARREST: BAIL: EXECUTION, IV.: SLANDER.

CARLISLE TABLES.

See NEGLIGENCE.

CARRIERS.

See CONSTITUTIONAL LAW, IX.: NEGLIGENCE, IV.: OMNIBUSES: PENAL STATUTES: RAILROAD COMPANIES: TELEGRAPH COMPANIES.

II. Of the bill of lading.

IV. Responsibilities of carriers.

(a) General rules.

(d) Connecting carriers.

V. Limitation of responsibility.

VI. Rights and duties of common carriers.

(a) Freight charges.

(b) Manner of shipment.

VII. Carriers of passengers.

(a) Passenger contracts.

(b) Regulations of carriers.

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II. Of the bill of lading.

1. A bill of lading is a contract *inter partes*, it is not a mere memorandum, and oral testimony is not receivable to show the real contract. *Hostetter v. Baltimore & Ohio Railroad Co.*, 11 Atl. 609.

2. The fraudulent assignee of a bill of lading has no right superior to those of the assignor for the purpose of defeating the consignor's right of stoppage *in transitu*. *Hermann v. Philadelphia Lumber Co.*, 6 Montg. 42.

3. Where the holder of a bill of lading has a lien for advances, his title is not affected by a foreign attachment issued at the suit of the shipper's creditors. *Harrison v. Mora*, 150 P. S. 481.

4. The delivery of a bill of lading to the order of a factor vests the title of the goods in the factor, as between the vendor and third persons. *Harrison v. Mora*, 150 P. S. 481.

5. Where the bill of lading is attached to a draft as security for its payment and transferred for a valuable consideration, it is an appropriation of the property contained in the bill. *Bache v. Philips*, 155 P. S. 103.

6. Where a bank received a bill of lading made out to the order of the consignors with a draft attached, drawn on the purchasers of the carload of goods, and in the bill of lading was a direction to notify the purchasers; and the purchasers drew a new draft upon a person to whom they proposed to sell the goods, and the bank discounted the new draft and passed the amount of it to the purchaser's credit, who then drew a check upon this deposit for the amount of the original draft and delivered the check to the bank; and the purchasers failing to sell the goods to the person upon whom

the second draft was drawn, sold them to other parties to whom they directed the railroad company to deliver the car, and the bank never notified the railroad company of its possession of the bill of lading and the company had no knowledge of its existence, and the purchasers subsequently failed and did not pay the second draft; it was *held*, in an action by the bank against the railroad company for a wrongful delivery of the goods, that the railroad company was not liable. *National Bank of Phoenixville v. Philadelphia & Reading Railroad Co.*, 163 P. S. 467.

7. The delivery of bills of lading without indorsement, or with improper indorsement, is sufficient when made, accepted and intended as a pledge and security for the sum advanced or paid on the draft to which they are attached; after such a delivery the holder must be deemed and taken as the owner for the accomplishment of the purpose for which the goods were pledged. *Richardson v. Nathan*, 167 P. S. 513; s. c. 36 W. N. C. 242.

8. Where goods in the hands of a bailee are seized under foreign attachment, the property represented by the bills of lading is in the custody of the law and cannot lawfully be sold without an order of court, but after the attachment is dissolved the rights and powers of the pledgee of the bill of lading are the same as before the seizure, subject only to the duty of retention imposed by the bond given on the dissolution of the attachment. *Richardson v. Nathan*, 167 P. S. 513; s. c. 36 W. N. C. 242.

IV. Responsibilities of carriers.

(a) General rules.

9. Goods in the hands of a common carrier for transit to a purchaser are at the latter's risk, in the absence of special arrangements to the contrary. *Bolton v. Ackerman*, 8 C. C. 549; s. c. 1 Lack. Jur. 337.

10. As to the liability of a common carrier for the malicious assault of its servant upon a passenger, see note to *Central Railway Co. v. Peacock*, 14 Atlan. 709.

11. The act 13 June 1874 (Brightly's Purdon 166), that carriers shall not be liable for the value of goods taken from them by legal process, does not excuse an express company from liability for loss occasioned by its negligence. *Tochterman v. Adams Express Co.*, 1 York 165.

12. Where plaintiff's goods delivered to the express company in this state were seized under a domestic attachment in another state before delivery, and the company's agent erroneously informed the plaintiff that he would have thirty days in which to claim his goods, by reason whereof he lost the same; it was *held*, that such erroneous statement was such negligence on the part of the express company as entitled the plaintiff to recover their value. *Tochterman v. Adams Express Co.*, 1 York 165.

(d) Connecting carriers.

13. As to connecting lines of railroad and the limitation of responsibility by contract, see note to *Harris v. Grand Trunk Railway Co.*, 5 Atlan. 307.

V. Limitation of responsibility.

14. A common carrier cannot protect itself from liability for negligence beyond an agreed value as expressed in the receipt. *Weiller v. Pennsylvania Railroad Co.*, 134 P. S. 310; s. c. 26 W. N. C. 27.

15. In a suit against a carrier for failure to deliver perishable goods in a reasonable time, a condition in the bill of lading that the carrier should not be liable for damages to perishable property occasioned by delay of any kind is no defence. *Pennsylvania Railroad Co. v. Wilson*, 3 Cent. 915.

16. As to the right of common carriers to limit their common-law liability, see

note to *Pennsylvania Railroad Co. v. Riordon*, 13 Atl. 327.

17. Where a railroad company issues a through bill of lading, in which its liability is limited to an agreed valuation, and which declares that the carrier's responsibility is to cease upon delivery, in good order, at its terminus to a connecting carrier, and an accident results while the property is in the hands of a connecting carrier, the limitation of liability applies in favor of the carrier in whose control the property is injured. *Fairchild v. Philadelphia, W. & B. R. R. Co.*, 148 P. S. 527.

18. Where a clause in a bill of lading provided that the carrier should not be liable for loss or damage from causes beyond its reasonable control by riots; it was *held*, that this did not relieve the carrier for the loss of goods stolen in open daylight, in the presence of the carrier's employees, who made no offer to resist the thieves and protect the goods, and the measure of damages in such a case was not limited to the valuation in the bill of lading. *Lang v. Pennsylvania R. R. Co.*, 154 P. S. 342; affirming s. c. 12 C. C. 432.

19. A carrier of live stock cannot by special contract relieve himself of the consequences of his own negligence. *Armstrong v. United States Express Co.*, 159 P. S. 640.

20. In an action against a carrier it was *held*, that a release of liability was properly excluded where erasures appeared on the face of the release, and it appeared that such erasures were made by the carrier's agent, and there was no evidence that the paper was shown or read to the shipper after the erasures were made. *Armstrong v. United States Express Co.*, 159 P. S. 640.

21. A release of a carrier from all liability for damages resulting from "any cause not the result of collision, or of cars being thrown from the track," does not restrict the plaintiff to proof of such gross negligence as would result in either collision or derailment. *Phoenix Pot*

Works v. Pittsburgh & Lake Erie Railroad Co., 139 P. S. 284; s. c. 27 W. N. C. 321.

22. A carrier of goods may limit his liability except as against his own negligence, and in such case the liability depends upon the proof of negligence in fact. *Buck v. Pennsylvania R. R. Co.*, 150 P. S. 170.

23. Where a railroad company has contributed to the funds of a relief association composed of its employees, an agreement by a member of the association that the acceptance of benefit from the relief fund shall operate as a release from all claims to damages against the company, is not contrary to public policy and does not violate the rule, that a common carrier cannot make a valid contract against its own negligence. *Johnson v. Philadelphia & Reading R. R. Co.*, 163 P. S. 127; affirming s. c. 2 Dist. Rep. 229; *Ringle v. Pennsylvania R. R. Co.*, 164 P. S. 529.

24. A common carrier cannot stipulate for a release from the consequences of his own negligence or fraud; a clause in a bill of lading was *held* to be void which stipulated that the owner and consignee should cause the goods to be insured and look only to compensation from said insurance, and in case of loss the carrier should have the benefit of such insurance if such loss should occur from any cause which should be held to render the carrier liable therefor. *Willock v. Pennsylvania R. R. Co.*, 166 P. S. 184.

25. Where the loss or damage has been occasioned by the negligence of the carrier, the measure of damages for the loss of the goods is their value at the point of destination; and this, notwithstanding a stipulation in the bill of lading that the damages should be computed at the value of the property at the time and place of shipment, and though the point of destination be not on the line of the carrier whose negligence caused the loss. *Ruppel v. Allegheny Valley R. R. Co.*, 167 P. S. 166.

VI. Rights and duties of common carriers.

(a) Freight charges.

26. The act of 4 June 1883 (Brightly's Purdon 1815), forbidding discriminations by common carriers in rates and facilities for transportation, is unconstitutional so far as it undertakes to regulate interstate commerce. *Wigton v. Pennsylvania Railroad Co.*, 8 C. C. 191.

27. A recovery cannot be had under the act 4 June 1883 (Brightly's Purdon 1815) for three times the amount of the difference between the charges, unless the amount of the difference is actually equal to the amount of injuries suffered. *Hoover v. Pennsylvania R. R. Co.*, 156 P. S. 220.

28. Under the act 4 June 1883 (Brightly's Purdon 1815) a railroad company may charge a lower rate of freight for coal transported to a manufacturing establishment from which it obtains manufactured products for transportation, than to a coal dealer whose business with the company is limited to the coal transported. *Hoover v. Pennsylvania R. R. Co.*, 156 P. S. 220.

29. The act 4 June 1883 (Brightly's Purdon 1815) is not in conflict with article III., sec. 7, of the constitution, forbidding any special law regulating labor, trade, mining or manufacturing. *Hoover v. Pennsylvania R. R. Co.*, 156 P. S. 220.

30. In a suit against a railroad company for discrimination, where the plaintiff filed a bill of particulars setting forth a list of the names of the parties in whose favor discrimination was alleged, which list included nearly all the companies having dealings with the defendant; it was held, that the facts being largely within the knowledge of the defendant, this was not such an amended statement as required to be supported by affidavit. *Crow v. Pennsylvania R. R. Co.*, 1 Dist. Rep. 82. See *Logan v. Pennsylvania R. R. Co.*, 132 P. S. 403.

31. A common carrier may be compelled in an action for money had and received, to repay an excess over the freight which

lawfully may be charged, but to entitle him to recover for discrimination under the act 4 June 1883 (Brightly's Purdon 1815) it must appear that the discrimination was made for like service and under like conditions in all material respects, and the burden of proof is upon the plaintiff. *Paine v. Pennsylvania R. R. Co.*, 14 C. C. 38.

32. In calculating tonnage per mile a railroad company is entitled to a reasonable amount for switching service and terminal facilities. *National Tube-Works Co. v. Baltimore & Ohio Railroad Co.*, 8 Atlan. 6.

33. The Pittsburgh and Connellsville Railroad Co. by its act of incorporation of 3 April 1837 is authorized to charge for the transportation of freight a maximum rate of ten cents per ton per mile; this rate was not reduced by the act of 17 April 1846. *Ibid.*

34. If the title to the goods passes to the consignee when the bill of lading is signed, the carrier cannot hold them for a debt of the consignor; and this, though a condition to that effect be printed on the bill of lading. *Bacharach v. Chester Freight Line*, 133 P. S. 414; s. c. 26 W. N. C. 18; affirming s. c. 4 Del. 83.

35. One who is engaged to haul organs for an agent of the manufacturer has a lien upon an organ for the freight charges upon it, but not for services with reference to other organs. *Rienæhl v. Worcester Organ Co.*, 6 Lanc. 289.

36. In a suit upon a contract to carry freight, where the statement alleged negligence by the carrier; it was held, that an affidavit of defence was sufficient which not only denied the negligence but went further and gave the particulars of the accident. *Ross v. Philadelphia, Wilm. & Balto. R. R. Co.*, 35 W. N. C. 510; s. c. 3 Dist. Rep. 791; 4 Northam. 322.

(b) Manner of shipment.

37. A bill of lading containing no condition that the goods were to be shipped all-rail, the carrier has the option to ship

by any proper route. *Hostetter v. Baltimore & Ohio R. R. Co.*, 11 Atl. 609.

38. The sending of an ordinary dray ticket without any designation that the freight was to go by an all-rail route was held to be a revocation of a previous telephone contract for an all-rail route. *Ibid.*

39. A railroad company which, in disregard of instructions, forwards merchandise by steamer instead of by rail, is responsible on the contract if the same be lost by fire on the steamer; the question of proximate cause is immaterial. *Philadelphia & Reading R. R. Co. v. Beck*, 125 P. S. 620.

40. Where a railroad company deviates from a contract to transport live stock by passenger service, by shipping it by freight service, the company cannot avail itself of the stipulations in the contract relieving it from liability as insurer at common law; but such a deviation will not relieve a shipper from a provision in his contract requiring him to notify the company of his claim for damages within five days. *Pavitt v. Lehigh Valley R. R. Co.*, 153 P. S. 302.

41. In an action against a carrier to recover damages for the loss of a horse, where there was evidence that the stall in the car was negligently constructed and the injury happened in consequence thereof, the case was properly submitted to the jury. *Armstrong v. United States Express Co.*, 159 P. S. 640.

42. Where the plaintiff had a carload of potatoes consigned to him at Pittsburgh from New Orleans, and they were about six days on the way, and before their arrival he had ordered the car to be transferred to the defendant's road for shipment to Buffalo, where it arrived on the fifth day after leaving Pittsburgh, and the potatoes were then much decayed, and it appeared that the car was not inspected at Pittsburgh, and was delayed about three days en route to Buffalo on account of being out of repair, and there was evidence of experienced dealers that the decay had commenced within three days prior to their

arrival at Buffalo; it was held, that there was sufficient evidence of negligence to go to the jury. *Ruppel v. Allegheny Valley R. R. Co.*, 167 P. S. 166.

43. If goods be carefully packed when delivered to the carrier, and badly damaged when they arrive, the reasonable inference is that they were not transported with due care; it is a question for the jury. *Phoenix Pot Works v. Pittsburgh & Lake Erie R. R. Co.*, 139 P. S. 284; s. c. 27 W. N. C. 321.

44. Where the evidence showed a shipment of fragile goods in good order, and a delivery in bad order, and that the goods were carefully packed and there was no collision or wreck in the course of transportation; it was error for the court, while leaving the whole case to the jury, to charge that unless the carrier showed how the accident occurred, the legal presumption arose that it was liable; the absence of such distinct proof did not deprive the defendant of the right to have the question of negligence considered upon all the testimony. It seems that where the goods are of a fragile character, that fact may be considered as evidence to rebut the presumption of negligence. *Buck v. Pennsylvania R. R. Co.*, 150 P. S. 170.

VII. Carriers of passengers.

(a) Passenger contracts.

45. If a railroad company issues a proper ticket and the conductor compels the person to get off, the plaintiff is entitled to damages; and this, though it was through an honest mistake of another of the company's agents. *Baltimore & Ohio Railroad Co. v. Bambrey*, 16 Atl. 67.

46. A passenger offering a ticket to a station at which the train does not stop, must pay his fare to the next station at which it does stop, or he may be ejected. *Caldwell v. Lake Shore & M. S. Railroad Co.*, 8 C. C. 467.

47. Under the act 6 May 1863 (as amended by the act 10 April 1872,

Brightly's Purdon 311), providing that carriers of passengers shall provide for the redemption of tickets or coupons not used, it was *held*, that where a commuter did not use the whole of his ticket but the usual fare for the number of trips actually made exceeded the amount paid for the ticket, the plaintiff was not entitled to recover. *Smith v. Philadelphia & Reading R. R. Co.*, 11 C. C. 555.

48. Where a passenger on a street car received a transfer ticket to another line on the margin of which was punched the hour of 9 A.M. and the hour of 7.30 was also punched on it, and the conductor of the other car refused to take the ticket, alleging that it was two hours old, and plaintiff was ejected from the car; it was *held*, that the company was liable and that the plaintiff was entitled to substantial damages for the inexcusable trespass. *Laird v. Pittsburgh Traction Co.*, 166 P. S. 4.

49. A drover riding upon a drover's pass entitling him to return on a passenger train is a passenger, and the railroad company is liable for an injury sustained by him through its negligence. *Anthony v. Hanover Junction R. R. Co.*, 3 York 71.

(b) Regulations of carriers.

50. A regulation of a railroad company requiring the payment by passengers, neglecting to procure tickets, of ten cents in addition to the regular fare, to be refunded at the ticket office, is valid. *Reese v. Pennsylvania Railroad Co.*, 131 P. S. 422.

51. A railroad company was not responsible for injuries to a person who was travelling in a postal car which he knew was not provided for the transportation of passengers, and in which was a notice prohibiting unauthorized persons to remain. The relation of passenger and carrier did not exist; and this, though a mileage book was found on his person. *Bricker v. Philadelphia & Reading Railroad Co.*, 132 P. S. 1; s. c. 25 W. N. C. 204.

(c) Responsibility for baggage.

52. In an action against a common carrier for loss of baggage, it is a complete defence, that the baggage was destroyed by a flood of such unprecedented character as amounted to an act of God; the destruction of the day express on 31 May 1889, by the Johnstown flood, was an act of God; in such a case there is no presumption of negligence which will shift the burden of proof upon the carrier to show that he was not negligent. *Long v. Pennsylvania Railroad Co.*, 147 P. S. 343.

CASE.

See TRESPASS ON THE CASE.

CASE STATED.

See PRACTICE, XXIX.

CEMETERIES.

See CHARITY: DEDICATION.

- I. Cemetery companies.
- II. Of cemeteries generally.
- III. Cemetery lots.
- IV. Removal of dead.

I. Cemetery companies.

1. The act 29 April 1874, sec. 2, clause 7 (Brightly's Purdon 405), is mandatory; the court has no right to refuse a charter to a cemetery company if the instrument is in proper form and the purpose not injurious to the community. *Oakland Cemetery Co.*, 12 C. C. 145.

2. Upon a devise to trustees of land, formerly part of a cemetery, to sell lots therein, and to contribute to its maintenance, the intention being to make the lot-holders members of the cemetery company; the latter, having made expenditures for maintenance, are entitled to an account from the trustees to determine whether or not they shall contribute. *Smith's Estate*, 8 C. C. 581; s. c. 47 L. I. 342.

II. Of cemeteries generally.

3. The act 8 June 1891 (Brightly's Purdon 274), prohibiting the establishment of certain cemeteries within one mile from any city of the first class, is a local law in violation of article III., sec. 7, of the constitution. *Philadelphia v. Westminster Cemetery Co.*, 162 P. S. 105; affirming s. c. 34 W. N. C. 17.

4. The act 6 June 1893 (Brightly's Purdon 362), authorizing the taking of certain public burying-grounds for school purposes, is unconstitutional as a local act, and passed evidently for the purpose of taking a certain burial-ground in the city of York, and it is also unconstitutional as impairing the obligation of a deed from John Penn to John R. Coates for the burial-ground in question, dedicating it to the purpose of a public burying-ground. *In re Potter's Field*, 8 York 145.

5. Where three members of a church congregation purchased for the church a lot of ground, which was conveyed to them in trust for the use of the church as a cemetery, and subsequently there was a split in the congregation, and the courts decided that the section represented by the plaintiffs were the true congregation, and the other section then withdrew and formed a separate body, but kept control of the cemetery; it was *held*, that a bill would lie by the plaintiffs for a reconveyance of the property to them, and for an account of moneys received for the sale of burial lots, and that the plaintiffs were entitled to the moneys so received during the six years preceding the suit less the sum spent for repairs. *Seibert v. Dreisch*, 12 Lanc. 137.

6. The decision of the commissioners appointed under the act of 15 June 1887, acting in conjunction with the survivors, as to the proper site on the battle-field of Gettysburg for a monument to a Pennsylvania command, is not subject to a revision and reversal by the Gettysburg Battle-field Memorial Association. Equity will enjoin the refusal to prevent the erec-

tion. *Reed v. Gettysburg Battle-field Memorial Association*, 129 P. S. 329.

7. Under the act 5 April 1849 (Brightly's Purdon 277), forbidding the opening of streets through cemeteries, a cemetery company has no right to close an alley because it has purchased ground on both sides of it. *DuBois Cemetery Co. v. Griffin*, 165 P. S. 81.

8. For a list of law literature of burial-grounds, burials, etc., see *Burial Law*, 6 Lanc. 302.

III. Cemetery lots.

9. The opening of Diamond, Norris and Twenty-third streets through the Odd Fellows' Cemetery having made it necessary for the squaring of the cemetery lots to make a replotting of the portion of the cemetery affected, the company under its charter had a right to lay out a new avenue upon and across the plaintiff's lot upon offering to plaintiffs the right to select another portion of the cemetery for burial purposes. *Root v. Odd Fellows' Cemetery Co.*, 148 P. S. 494.

10. A grant of the exclusive right of interment in certain burial lots, subject to the regulations of a cemetery company, conveys no such interest in the land as will support an action of ejectment. *Hancock v. McAvoy*, 151 P. S. 460.

11. Where four brothers purchased a burial lot and erected a monument thereon at their joint expense, and on each side of the monument inscribed the name of one of the brothers and set apart the space opposite each name for such brother's family; it was *held*, that no one of the brothers could permit the interment in his portion of the lot without consent of the other owners of any person not a member of the family; and where the executors of the widow of one of the brothers cut off the raised letters on one face of the monument, it was *held*, that a court of equity would, by a mandatory injunction, require an entirely new monument to be erected at the expense

of the widow's estate. *Lewis v. Walker*, 165 P. S. 30.

12. The proceeds of cemetery lots conveyed to the decedent his heirs at common law and assigns, and sold under the order of the orphans' court, will be distributed as real estate. *Holbrook's Estate*, 1 Dist. Rep. 259.

13. Under the act 26 May 1891 (Brightly's Purdon 274) a bequest to be used to keep a burial lot in order is a bequest for a charitable use and is not subject to the rule against perpetuities. *Tierney's Estate*, 13 C. C. 446.

IV. Removal of the dead.

14. The word "may" in the act of 12 May 1887 (Brightly's Purdon 276), for the removal of the dead from burying-grounds, should not be read "shall"; a discretion is vested in the court. *Zion German Reformed Congregation's Appeal*, 1 Mona. 635.

15. No appeal lies from the quarter sessions to a decree dismissing proceedings under the act of 12 May 1887 (Brightly's Purdon 276), for the removal of the dead from burying-grounds. *Ibid.*

16. A husband will not be restrained by injunction from removing the body of his deceased wife from one burial lot to another lot owned by him; and this, though she was a Roman Catholic and was buried in a Roman Catholic cemetery, and the cemetery to which her husband desires to remove her body is not a cemetery of that church. *Cooney v. Lawrence*, 11 C. C. 79.

CENSUS.

1. The population of a county must be determined by the last Federal census in the absence of any legislative provision for otherwise ascertaining the fact. *Guldin v. Schuylkill County*, 149 P. S. 210; reversing s. c. 10 C. C. 601; *Comm'th v. Comrey*, 149 P. S. 216.

CERTIORARI.

See APPEAL AND ERROR: COSTS, XI.:
CRIMINAL LAW, XI.

I. At common law.

- (a) When a *certiorari* lies.
- (c) Of the writ.
- (e) Hearing and practice.

II. To justices' courts.

- (a) When a *certiorari* lies.
- (b) Of the affidavit.
- (c) Service.
- (d) Of the recognizance.
- (e) Exceptions.
- (g) Admissibility of parol evidence.
- (h) Practice.
- (i) Cause of reversal.
- (k) Judgments by default.
- (l) Penal actions.
- (m) Appeal.

I. At common law.

(a) When a *certiorari* lies.

1. The plaintiff may review on *certiorari* the quashing of a warrant of arrest, but he is restricted to the regularity of the proceedings as they appear of record; the opinion of the judge may be used to show that there was no hearing on the merits. *Grieb v. Kuttner*, 135 P. S. 281; s. c. 26 W. N. C. 323.

2. The approval by the quarter sessions of the bond of a township tax collector is not reviewable on *certiorari*. *Erie County's Appeal*, 14 Atlan. 44; s. c. 12 Cent. 571.

3. Pending an appeal from an award of damages for a lateral railroad, a *certiorari* to the supreme court is premature. *Macrum v. Jones*, 11 Atlan. 317; s. c. 10 Cent. 280.

4. A *certiorari* to a decree confirming a report of viewers laying out a public road must be taken out within two years after final confirmation, or it will be quashed; and this, notwithstanding a futile attempt to open the decree. *Road in Wilkins*, 5 Cent. 701.

5. A *certiorari* in a road case must issue within two years of the confirmation of the report of viewers. *Saucon Township v. Broadhead*, 9 Atlan. 63. See *Broadhead v. Saucon Township*, 2 L. V. 381.

6. An order dissolving an attachment under the act 17 March 1869 (Brightly's Purdon 70) is not reviewable by the supreme court in the absence of anything to show an abuse of the discretion of the court below. *Hoppes v. Houtz*, 133 P. S. 34.

(c) Of the writ.

7. A rule of court making a *certiorari* returnable within twenty days is invalid; it is not authorized by the act of 20 March 1810, or 11 June 1879. *Overseers of North Beaver v. Overseers of Big Beaver*, 7 C. C. 340.

(e) Hearing and practice.

8. The supreme court on *certiorari* is strictly confined to the record. *Darby Borough v. Sharon Hill Borough*, 2 Cent. 521.

9. Upon *certiorari* to the laying out of a public road the supreme court is wholly confined to the record. *Road in Moon*, 6 Atlan. 762; s. c. 8 Cent. 837.

10. The supreme court has no authority to review the facts on *certiorari* to a road case; it is confined to the record. *Schweitzer's Appeal*, 7 Cent. 631.

11. The supreme court has no authority to review the facts on *certiorari* in a contested election case. *Yonkin's Appeal*, 12 Cent. 371; affirming *Yonkin's Contested Election*, 2 C. C. 550.

12. A *certiorari* to the setting aside of an attachment, under the act of 17 March 1869 (Brightly's Purdon 70), does not bring up the evidence, and the supreme court cannot pass judgment on the reasons which influenced such a decision. *Black v. Oblender*, 15 Atlan. 708.

13. After a trial and acquittal of the charge set forth in the information the supreme court will not, on *certiorari* at

the instance of the commonwealth, inquire whether the court below erred in requiring the prosecution to elect as to which count in the indictment they would proceed on. *Comm'th v. Seeman*, 14 Atlan. 329; s. c. 12 Cent. 571.

14. Upon *certiorari* to the record of a warrant of arrest the supreme court will simply determine whether the affidavit is sufficient. They will not examine the subsequent proceedings. *Hart v. Cooper*, 129 P. S. 297.

15. Upon an allegation that a fair and impartial trial cannot be had in the proper county, the supreme court may, upon *certiorari*, remove a criminal cause to another county for trial. *Comm'th v. Balph*, 3 Cent. 123. See *Comm'th v. Balph*, 111 P. S. 365.

16. An appeal, since the act of 9 May 1889 (Brightly's Purdon 700), from a decree setting aside the satisfaction of a judgment was treated as a writ of *certiorari*, and it was held that depositions in support of the rule constituted no part of the record. *Rand v. King*, 134 P. S. 641; s. c. 26 W. N. C. 81.

17. A writ of *certiorari* lies to bring up the proceedings of a burgess against a defendant for violating a borough ordinance, and no special *allocatur* is required. *West Pittston v. Dymond*, 8 Kulp 12.

II. To justices' courts.

(a) When a *certiorari* lies.

18. If a justice's record fails to show jurisdiction, a *certiorari* may issue after the expiration of twenty days. *Moore's Appeal*, 3 Cent. 586; *Conlan v. Hirsch*, 5 Kulp 395.

19. If the justice had no jurisdiction a *certiorari* may issue within twenty days of notice of the proceedings. *Nutz v. Union National Bank*, 4 Montg. 213.

20. *Certiorari* to a justice must be issued within twenty days after notice of the judgment, and this must be set forth in the affidavit. *Smith v. Snyder*, 6 Lano. 321.

21. A justice's record failing to show a service on the defendant, the defect may be taken advantage of on *certiorari*, though more than twenty days elapse before the writ is taken out. *Duffy v. Millett*, 1 Lack. Jur. 208; *Mt. Jessup Coal Co. v. Loftus*, 1 Lack. Jur. 110.

22. That the record does not show the hour when judgment is taken by default, cannot be taken advantage of, where the *certiorari* was not taken out until after twenty days. *Spade v. Drum*, 5 Kulp 221. See *Courtright v. Harringar*, *Ibid.* 372.

23. A *certiorari* to a justice is too late if issued more than five years after the entry of judgment. *Strause v. Scheurman*, 13 C. C. 332.

24. The limitation of twenty days for the taking out of a *certiorari* does not apply where the justice had no jurisdiction either of the parties or of the subject-matter. *Nalen v. Burke*, 12 C. C. 490; *Marvel v. Jones*, 7 Kulp 508.

25. Where the judgment of a justice is void on the face of the record, a *certiorari* issued more than twenty days after the execution will be sustained. *Montgomery v. Souder*, 8 Lanc. 185. See *Worst v. Souder*, 8 Lanc. 187.

26. The twenty days' limitation does not apply where the justice had no jurisdiction, but the writ should be applied for within twenty days from the time the defendant learns of the entry of the judgment. *Neal v. Duncan*, 9 Montg. 93.

27. A *certiorari* will be allowed after twenty days where the justice had no jurisdiction of the subject-matter, or where the summons was never legally served, or where there was fraud in obtaining the judgment. *Hartman v. Kottcamp*, 2 York 215. See *Neff v. Gallagher*, 16 C. C. 219.

28. Where a justice agreed to discontinue a case upon the receipt of a sum of money which was paid, he was without jurisdiction to proceed further in the cause; such want of jurisdiction could be taken advantage of at any time, and the court allowed a special *allocatur* directing

a *certiorari* to issue although the twenty days had expired. *Simpson v. Musser*, 7 York 74.

29. Where the defendant in a suit before a justice paid the costs to the justice upon his promising to enter a non-suit, and the justice subsequently entered judgment for the plaintiff; it was held, upon *certiorari*, that the payment of the costs was an end to the action and the alderman was without jurisdiction to proceed further, and such judgment being invalid, a *certiorari* could be issued within a reasonable time and the facts could be established by parol. *Reisinger v. Simpson*, 14 C. C. 526; s. c. 7 York 177.

30. An answer of the garnishee denying his indebtedness to the defendant prevents the justice from giving judgment against the garnishee where the plaintiff does not demand an issue. Where the garnishees took out a *certiorari* more than twenty days after such a judgment had been entered against them, but within twenty days of the issuing of execution, the court set aside the execution, with an intimation that the defendants should ask for a rule to appeal *nunc pro tunc*. *Winters v. Homsher*, 8 Lanc. 137.

31. A *certiorari* to a judgment entered more than sixteen years before the issuing of the *certiorari* will be stricken off where the defendant does not set forth that he was not aware of the judgment having been entered and does not deny his indebtedness. *Watson v. Wehrly*, 9 Lanc. 179. See s. c. 10 Lanc. 97; 5 Del. 217; 11 Lanc. 49.

32. Where a justice has jurisdiction, a defective statement of the cause of action cannot be taken advantage of, unless the *certiorari* is sued out within twenty days. *Baltimore Mutual Aid Society v. Keely*, 6 Kulp 450.

33. Where the record of a justice shows on its face that he did not act within the scope of his authority, his whole proceedings are void and a *certiorari* will lie although more than twenty days have elapsed since the rendition of the judgment. *Hoff v. Hoke*, 1 York 207.

34. A writ of *certiorari* will not be allowed after the expiration of the twenty days where there has been a legal service of the summons. *Gillen v. Haas*, 2 York 40.

35. Upon the hearing of a *certiorari*, the defendant must show affirmatively that the writ was issued within twenty days after he had notice of the judgment; upon his failing to do so the writ will be quashed. *Nailie v. Keagy*, 2 York 43.

36. The limitation in the act 20 March 1810, sec. 21 (Brightly's Purdon 794), applies only to civil cases; a *certiorari* may be issued in a suit for a penalty after the expiration of twenty days. *Pittsburgh v. Madden*, 14 C. C. 120.

(b) Of the affidavit.

37. Upon *certiorari* taken by a county to a justice's judgment, the affidavit may be made by the clerk to the county commissioners. *Lehigh County v. Yingling*, 6 C. C. 594.

38. A *certiorari* will be quashed where it appears to have been taken upon the affidavit of a person not a party to the suit, and more than twenty days after judgment or execution. *Fenner v. McDaid*, 10 C. C. 262.

(c) Service.

39. Where a *certiorari* is not served within five days after it was issued, the writ will be quashed. *Richcreek v. Richcreek*, 2 York 98. See *Central Railroad of New Jersey v. Megargel*, 1 Lack. L. N. 172.

(d) Of the recognizance.

40. Though a recognizance be defective in form, if the defendant in error treat it as valid, neither the principal nor surety can evade liability on the ground of such informality. *Erdman v. Hartman*, 7 C. C. 609.

41. On *certiorari* to a judgment of a justice against husband and wife, the

recognizer is liable, though the judgment be reversed as to the wife. *Ibid*.

(e) Exceptions.

42. Jurisdictional objections to a justice's record need not be made the subject of special exceptions. *Andreas v. Keller*, 2 Northam. 209.

43. The court will note a fatal error in the proceedings, though not embodied in the exceptions. *Ackerman v. Stoner*, 7 Lanc. 73.

44. Exceptions alleging matters of fact going to the jurisdiction of the justice will be overruled, if not supported by depositions, or are not apparent on the record. *McManaman v. Klock*, 9 C. C. 302.

(g) Admissibility of parol evidence.

45. On *certiorari* to a justice, his record showing four days' service, evidence is admissible that there was in fact but three days' service. *Diehl v. Stetler*, 6 Lanc. 324.

46. A foreign insurance company should be served with process upon its authorized state agent. That it has an authorized state agent may be shown by parol on *certiorari* to a justice's judgment. *Metropolitan Life Insurance Co. v. Keating*, 5 Kulp 357.

47. That the plaintiff on cross-examination, before a justice, refused to answer, and was sustained by the justice, saying that answering the question would not change the result in his mind, such fact may be shown by depositions, on *certiorari*, and is good ground for reversal. *Bachman v. Siglin*, 7 C. C. 112.

48. A constable's return of service upon the agent of a non-resident defendant cannot be contradicted on *certiorari* by proof that the party named was not defendant's agent. *Link v. Repple*, 7 C. C. 138.

49. Upon *certiorari* to a judgment for less than \$5.33, extraneous proof to reverse must be strong and clear. *Kaniper v. Kreidler*, 9 C. C. 91; s. c. 2 Northam. 291.

50. Upon *certiorari* to a judgment of a magistrate, on proceedings to obtain possession of demised premises, only the regularity of the proceedings as it appears by the record can be examined. The court cannot consider the terms of the lease not part of the record, and it is improper to allow depositions to be taken to be read upon the hearing. *Wilmington Steamship Co. v. Haas*, 151 P. S. 113.

51. Where, upon *certiorari*, the justice denied under oath that there was a material interlineation in a summons after it was served, and his testimony was corroborated by the constable; it was held, that the presumption in favor of the honesty of the justice and the correctness of his record would prevail over the oath of the defendant to the contrary. *Fitzgerald v. Campbell*, 10 C. C. 396.

52. Upon *certiorari* to a justice's judgment, parol evidence is not admissible to contradict the record by proving want of jurisdiction. *Ritter v. Keller*, 12 C. C. 239.

53. Upon *certiorari* to a justice's judgment, it may be shown by depositions that the judgment was entered without evidence. *Baker v. Richart*, 12 C. C. 318.

54. Upon *certiorari* to a justice, depositions which relate wholly to the facts of the case and not to what was claimed or shown before the justice, cannot be read for the purpose of showing that the justice did not have jurisdiction. *Carle v. White Haven Ice Co.*, 15 C. C. 546.

55. Where, on *certiorari* to a justice, the name by which the defendant was sued imports that it is a corporation, the proceedings will not be set aside upon proof that there is, in fact, no such corporation. *Carle v. White Haven Ice Co.*, 15 C. C. 546.

56. Where a justice's record shows a valid service of the summons as returned by the constable under oath, the court will refuse to permit the record to be contradicted on *certiorari* by parol proof; the remedy of the defendant is against the constable for a false return. *Bankert v. Sauft*, 6 York 157; s. c. 5 Del. 225.

57. After a justice has entered judgment, he cannot issue a new summons and enter an additional judgment against the defendant for the same cause of action; upon *certiorari* to the second judgment, it may be shown by depositions that the cause of action in both cases was the same. *Beynon v. Peterson*, 7 Kulp 259.

58. The court will not, upon *certiorari*, consider parol proof in contradiction of the justice's record, where the depositions do not show corrupt or wilful misconduct on the part of the justice or clear want of jurisdiction. *Hill v. Scouton*, 7 Kulp 345.

59. Upon *certiorari* to a justice's judgment, his record may be impeached for fraud, but the evidence of the defendant alone is not sufficient to warrant the court in setting aside the proceedings fifteen years after the judgment was entered. *Smith v. Wehrly*, 9 Lanc. 202.

60. Upon *certiorari* to a justice where the record shows a valid service, the constable's return cannot be contradicted by parol testimony and the proceedings set aside for non-service. *Simpson v. Musser*, 7 York 74.

61. Where the justice's record shows four days' service of the summons, evidence is admissible on *certiorari* that there was in fact but three days' service. *Neff v. Gallagher*, 16 C. C. 219.

(h) Practice.

62. A justice's mistake in judgment cannot be corrected on *certiorari*; an appeal is the proper remedy. *Quigney v. Quigney*, 1 Northam. 20.

63. Upon a *certiorari* to a justice the court cannot go into the merits of the case. *Lake v. Pearce*, 1 Lack. Jur. 264.

64. The court will apply a stricter rule to a justice's record, where no appeal lies. *Dauphin County Mut. Live Stock Insurance Co. v. Pidgeon*, 7 C. C. 448.

65. On *certiorari* to a justice, an appeal taken at the same time will not operate as a waiver of the defendant's

privilege from service. *Ross v. Brown*, 7 C. C. 142.

66. If the defendant sues out a *certiorari* and removes the justice's record, an appeal cannot be taken, neither will the court allow it. *Finley v. Smith*, 7 C. C. 661.

67. A defendant has no right to a *certiorari* after he has perfected an appeal, but such appeal must be made effective by filing the transcript in court. *Wilcox v. Knoxville*, 12 C. C. 641.

68. A justice may amend his record to correspond with the facts even after he has given a transcript, and upon a *certiorari*, the case will be decided upon the record as returned by the justice, although it does not correspond with the transcript previously furnished. *Moore v. Messersmith*, 12 C. C. 575.

69. After the time for suing out a writ of *certiorari* has been allowed to pass, every reasonable presumption consistent with the record will be made in favor of the jurisdiction of the justice and the regularity of the proceedings. *Carle v. White Haven Ice Co.*, 15 C. C. 546.

70. Where a justice's record has been brought before the court by *certiorari* and the plaintiff's name is not correct, it is not necessary to formally amend the record in that respect. *McCarty v. Dougherty*, 16 C. C. 86; s. c. 1 Mag. & Con. 39.

71. Where the plaintiff in error has reason to believe that the transcript has been altered, his remedy is to rule the justice to produce his docket in court for inspection. *Davenport v. Mahon*, 6 Kulp 350.

72. Although a court cannot directly review the judgment of a justice rendered outside of its jurisdiction, yet when a transcript of such a judgment is delivered to a justice within the jurisdiction and judgment is entered thereon a writ of *certiorari* will lie to the latter, and if it be found that the original judgment is void, the latter judgment will be reversed. *Montgomery*

v. Souder, 8 Lane. 185. See *Worst v. Souder*, 8 Lane. 187.

73. Where a judgment was obtained before a justice in Sullivan county against a non-resident and a transcript of the same was entered before a justice in Schuylkill county; it was held, upon *certiorari* to the latter judgment, that the common pleas of Schuylkill had power to inquire into the validity of the original judgment. *Rea v. Titman*, 14 C.C. 651.

74. A judgment in trespass against two persons will not be reversed on *certiorari* for that reason; the proper remedy is an appeal. *Lehr v. Knauss*, 4 Northam. 372.

75. Upon the hearing of a writ of *certiorari*, amendments of the record which would have been allowed if the case were upon appeal will be considered as made. *Tombler v. Buzzard*, 4 Northam. 379.

76. After the return of a writ of *certiorari* and the removal of the record, it is not competent to make amendments founded upon depositions to show that proper service of the summons was made, especially when several months have elapsed and the time for an appeal has passed. *Burgan v. Miner's Mills*, 7 Kulp 561.

77. Where a judgment against a defendant is reversed by the common pleas on *certiorari*, he is not entitled to execution for costs. *Alexander v. Figley*, 12 C. C. 316.

78. Upon the reversal by the common pleas on *certiorari* of the judgment of a justice, no judgment for costs should be entered: a rule of court providing therefor is invalid. *Metz v. Ebersole*, 3 Dist. Rep. 672.

79. Upon a judgment of the common pleas reversing upon *certiorari* a justice's judgment, an execution will not be allowed for costs. *Leone v. Hammond*, 41 P. L. J. 368.

(4) Cause of reversal.

80. Where the transcript shows that the justice had no jurisdiction in such a

matter for the reason that the injury was properly suable for in an action on the case, the judgment will be reversed on *certiorari*. *Davies v. Rosser*, 6 Kulp 268.

81. Where the justice's record shows the cause of action sufficiently to enable the court to ascertain the cause of the controversy and that the justice had jurisdiction, the proceedings will not be reversed on *certiorari*. *Dobson v. Hull*, 10 Lanc. 169.

82. Upon *certiorari* to a justice there can be no presumption in favor of the justice's jurisdiction; the record must show affirmatively that the justice had jurisdiction, and the court will not look beyond the transcript. *Harding v. Imperial Slate Co.*, 3 Northam. 199; *Ritter v. Keller*, 3 Northam. 304.

83. A justice's judgment against a partnership will not be reversed on *certiorari* because the record fails to give the names of the individual partners of the defendant firm. But a summons against J. Link & Co. will not support a judgment against J. H. Link & Co. *Link v. Repple*, 7 C. C. 138.

84. It is not obligatory upon a justice to make his summons returnable between certain hours; a judgment will not be reversed on *certiorari* because the summons was returnable at a fixed hour. *Metzgar v. Shetter*, 4 York 7.

85. Where the constable's return is defective in not showing a legal service upon a company defendant, the judgment will be reversed on *certiorari*. *Lewis Lumber & Mfg. Co. v. Lewis*, 6 Kulp 422.

86. Upon *certiorari* to a justice where the record showed that the plaintiff through his agent appeared, but did not show upon what day such appearance was made or when the judgment was entered; it was held, that the record was fatally defective. *Gwinner v. Brendt*, 6 Kulp 532; s. c. 5 Del. 174.

87. Upon *certiorari* to a justice's judgment where the record shows that the defendant appeared and filed an affidavit, but does not show that the plaintiff appeared either in person or by agent, or

that he offered any evidence, the judgment will be reversed; and this, although the record also states that the judgment was entered after hearing the proofs and allegations. *Young v. Abbey*, 1 Dist. Rep. 43.

88. A judgment of a justice will be reversed on *certiorari* where the record shows that the only evidence offered for plaintiff before the justice was a sworn book account for goods sold and delivered. *Sauter v. Carroll*, 11 C. C. 192.

89. A judgment will not be reversed on *certiorari* where the record shows that there was evidence submitted in support of the plaintiff's claim and that letters of the defendant, admitted to be his, were offered in evidence; and this, though the record does not show that any witness was sworn. *Rupp v. Labows*, 2 Dist. Rep. 340.

90. A judgment will be reversed where the record fails to show that evidence was given in support of the plaintiff's claim, but does show that judgment was entered because the defendant refused to make a defence. *Chambers v. Reynolds*, 2 Dist. Rep. 402.

91. Upon *certiorari* to a justice's judgment, the only inquiry is, whether the proceedings were regular and the demand within the jurisdiction of the justice; the court will not inquire whether the evidence was sufficient to sustain the judgment. *Reap v. Maloney*, 6 Kulp 236; *Haggerty v. Wurzbarger*, 6 Kulp 416.

92. Upon *certiorari* to a justice's record the transcript must show that there was either proofs or allegations offered in support of the plaintiff's demand; otherwise the proceedings will be reversed. *Sipple v. Guldin*, 7 Kulp 100; s. c. 5 Del. 304.

93. Upon *certiorari* to a justice's judgment, the record should show that testimony was taken, and that the case was heard, but it is not necessary for the justice to set out in full the testimony of the witnesses, or to copy at length upon his docket, documentary evidence. *Hill v. Scouton*, 7 Kulp 345.

94. Where a defendant before a justice submits his defence, and does not make oath that the title to land will come in question, he cannot afterwards, on *certiorari*, have the judgment set aside on the ground that the evidence showed that the title to land did come into question. *Dobson v. Hull*, 10 Lanc. 169.

95. Where the record does not show that the judgment was given by default, it will not be reversed merely because it does not show that evidence was heard at the hearing. *Ott v. Snyder*, 3 Northam. 113.

96. Upon *certiorari* to a justice's judgment, a statement that judgment was given after investigating the plaintiff's claim was held to be equivalent to a statement that proof was made. *Hartman v. Kottcamp*, 2 York 215.

97. Where a justice gives judgment without hearing the proofs of the defendant, the judgment will be reversed on *certiorari*. *Pfaltzgraff v. Eisenhour*, 3 York 132.

98. A justice has no right to open a judgment without notice to the defendant, and to subsequently enter another judgment for a larger sum; if he does so, the proceedings will be reversed on *certiorari*. *Carlin v. Holland*, 11 C. C. 20.

99. Where a justice reserves his decision, and adjourns the court without day, he cannot subsequently enter judgment without notice to the parties; such a judgment will not be sustained upon *certiorari* by a memorandum on the record that a postal-card was sent to the defendant. *Leslie v. Innes*, 15 C. C. 178.

100. A justice's judgment will not be reversed on *certiorari* because the record fails to state that the judgment was given publicly; that will be presumed. *Hartman v. Kottcamp*, 2 York 215.

101. The record of an attachment execution before a justice need not show strict accuracy in every little detail, and need not show the hour at which judgment against the garnishee was entered. *Weisman v. Weisman*, 133 P. S. 89.

102. The record of a justice need not

show at what hour of the day the hearing was had; it will be presumed on *certiorari* that the hearing was had and the judgment entered at the hour stated in the summons. *Fronheiser v. Werner*, 14 C. C. 522.

103. A justice's judgment will not be reversed on *certiorari* merely because a transcript does not show the hour at which the judgment was entered. *Cope v. Buck*, 3 Northam. 54.

104. Upon *certiorari* to a justice's judgment in trespass, it was held, that the transcript was insufficient where it did not set forth the character of the alleged injury with sufficient clearness to indicate that the justice had jurisdiction. *Fitzgerald v. Campbell*, 10 C. C. 396.

105. Where upon *certiorari* to a justice the transcript shows no judgment, but simply states that the parties appeared, waived a hearing and took an appeal, the *certiorari* will be dismissed. *Comm'th v. Craine*, 12 C. C. 286.

106. A judgment for wages will not be reversed on *certiorari* because the record does not set forth by whom or when the work was done or the kind of evidence by which the claim was sustained. *Shultz v. Slaymaker*, 11 Lanc. 148.

107. Where it appears that injustice would otherwise be done, the court will, of its own motion, reverse for errors appearing on the face of the record. *Hallman v. Vickers*, 8 Montg. 96.

108. Upon *certiorari* to a justice's judgment, where the justice stated the claim to be for "balance on book account for mason work," the judgment was reversed where the record did not show who contracted the debt or for whom the work was done. *Hallman v. Vickers*, 8 Montg. 96.

109. Where the judgment of a justice is insensible it will be reversed on *certiorari*. *Strauss v. Weaver*, 3 Northam. 87; c. c. 4 Del. 564.

110. A judgment of a justice will not be reversed on *certiorari* because of an irregularity on the face of the record where

it appears that such irregularity was not adhered to, but was followed by a trial with both parties present and submitting. *Weaver v. Markley*, 5 York 196.

111. If the bond for an attachment under the act of 12 July 1842 (Brightly's Purdon 67) contains but one surety, the proceedings will be quashed on *certiorari* to the common pleas. The bond cannot be amended by adding another surety. *Spettigue v. Hutton*, 9 C. C. 156.

112. If the defendant in an attachment execution before a justice on the day of the hearing claims the exemption, it is the duty of the justice to allow it; otherwise the proceedings will be reversed. *Stern v. McHale*, 5 Kulp 387.

113. Where an attachment is laid upon money in the hands of a garnishee, it is the duty of the constable to take the money or demand a bond conditioned for its production as required by the act 12 June 1842, sec. 29 (Brightly's Purdon 1137); where he failed to adopt either course, the proceedings were reversed on *certiorari*. *McNamara v. Roderick*, 6 Kulp 366.

114. The record of a justice for assessments on a live stock insurance policy must show that the defendant was insured in the company, and state that it was for an assessment to pay losses and for what period of time; otherwise the judgment will be reversed on *certiorari*. *Dauphin County Mut. Live Stock Insurance Co. v. Pidgeon*, 7 C. C. 448.

115. Upon *certiorari* to a justice's judgment, where it appeared that two of the sureties on a note were minors at the time of signing, and judgment was erroneously entered against them together with the other defendants; it was *held*, that the judgment must be reversed as to all of the defendants, that it could not be reversed as to the minors and affirmed as to the others. *Hoff v. Hoke*, 1 York 207.

116. The record of a justice on the award of referees will be reversed on *certiorari* where it fails to show that the referees were sworn or affirmed before they entered upon the performance of

their duties. *Curry v. Lilley*, 9 C. C. 590. See *Temple v. Myers*, 16 C. C. 232.

117. A husband is not entitled to his wife's earnings since the act of 3 June 1887; so a justice's judgment in favor of the husband for the same will be reversed on *certiorari*. *Frey v. Reinsmith*, 7 C. C. 115.

118. If the record of a justice's judgment against a married woman fails to disclose her liability, the proceedings will be set aside on *certiorari*. *Genter v. Van Winkle*, 4 Montg. 165.

119. Since the passage of the act 3 June 1887, the record of a judgment against two persons apparently husband and wife for necessities will not be reversed on *certiorari*, although the fact of the marriage and the purchase by the wife or at her instance and request are not formally set forth on the record. *Burnes v. Maloney*, 7 Kulp 341.

120. The three months' notice to quit required by the act 14 December 1863 (Brightly's Purdon 1165) may be waived, but the record of the justice must show such waiver, or the proceedings will be quashed on *certiorari*. *Mill Creek Coal Co. v. Andrukus*, 12 C. C. 314.

121. Upon *certiorari* to the record of a justice in a proceeding against strays, it will be presumed in the absence of evidence to the contrary that they viewed the trespass and had due regard to the sufficiency of the fences of the enclosure; the court will not review an error of judgment of the justice in rendering judgment for a greater sum than the valuation rendered by the appraisers; so errors in the form of the execution will not be reviewed on *certiorari*. *Kerr v. Lowry*, 2 Dist. Rep. 371.

122. Where a defendant has been served with a long summons instead of a short summons, and he appears in response thereto and has the hearing postponed and subsequently makes defence, he will be presumed on *certiorari* to have waived the irregularities. *Temple v. Myers*, 16 C. C. 232.

123. Where a justice's record fails to

show that the arbitrators were sworn or that judgment was entered upon the award, the proceedings will be reversed on *certiorari*; the justice and two persons who have been subpoenaed as witnesses may act as arbitrators. *Temple v. Myers*, 16 C. C. 232.

124. Where a justice's record set forth that the action was "summons in trespass not exceeding three hundred dollars. Claim is for damages"; it was *held*, that under the act 7 July 1879 (Brightly's Purdon 1128) such statement did not sufficiently indicate a cause of action of which the justice had jurisdiction. *Geist-white v. Bentzel*, 8 York 181.

(k) Judgments by default.

125. Where a judgment is entered against a defendant by default, it will be reversed on *certiorari* unless everything necessary to sustain the judgment appears affirmatively upon the justice's record. *Robbins v. Curley*, 15 C. C. 428.

126. Where a judgment is entered by default, it is necessary upon *certiorari* that the jurisdiction of the justice over the person of the defendant be made to appear by the record. *Rea v. Titman*, 14 C. C. 651.

127. If judgment be by default the record of the justice must show that the plaintiff appeared at the hour named. *Courtright v. Harringer*, 5 Kulp 372.

128. Where the defendant employed an attorney who went to the justice's office before the time fixed for the hearing and left upon ascertaining that the summons had not been served in time; it was *held*, that there was no sufficient appearance to cure the defect in the service, and a judgment by default was reversed on *certiorari*. *Adams v. Anderson*, 1 York 12.

129. If judgment be by default, the record must clearly show a legal service of the summons, or it will be reversed on *certiorari*. *Schuetzen Verein and Benevolent Association v. Schubach*, 6 Kulp 136.

130. Where a summons was issued against "Mr. Vasser, superintendent of

the Imperial Slate Company"; it was *held*, that a return of service on "the defendant" was insufficient to sustain a judgment by default, and such judgment was reversed on *certiorari*. *Dotendorf v. Vasser*, 3 Northam. 82.

131. Upon *certiorari* to a justice's judgment, proceedings will be reversed where the judgment was by default and the record fails to show that judgment was entered at the hour fixed in the summons, or, if at a later hour, that the defendant did not appear at the proper time. *Clarke v. Vielkoonis*, 7 Kulp 61.

132. A judgment by default will be presumed on *certiorari* to be given directly upon evidence; but if the record shows that no evidence was produced, the judgment will be reversed. *McCowan v. Ward*, 5 Kulp 385.

133. Where the judgment before the justice was given by default, it was reversed on *certiorari* where the record did not show that witnesses were examined or other evidence produced. *Hallman v. Vickers*, 8 Montg. 96.

134. Where the defendant fails to appear, judgment cannot be entered against him by default without due proof under oath of the service of the summons; judgment without such proof will be reversed on *certiorari*. *Neal v. Duncan*, 9 Montg. 93.

135. Where the judgment was by default and the transcript fails to show that any evidence was taken at the hearing, the judgment will be reversed on *certiorari*. *Eilenberger v. Bush*, 3 Northam. 284.

136. A justice's judgment by default will be reversed on *certiorari* where the record fails to show that the plaintiff's proofs and allegations were heard before the rendition of the judgment. *Swartzbaugh v. Lau*, 1 York 207.

(l) Penal actions.

137. A *certiorari* to a burgess to bring up proceedings before him for the collection of a fine for the breach of a borough ordinance, may issue without a special

allocatur. Edwardsville v. Rice, 7 Kulp 432.

138. Upon *certiorari* to a criminal proceeding, the complaint and warrant should be returned by the justice; the transcript cannot supply what has been omitted in the information so as to make out an offence. *Gelbert v. Comm'th*, 3 Lack. Jur. 374; s. c. 6 Del. 90.

139. Upon *certiorari* to a summary conviction, it is the duty of the justice to send up every part of the record, including the complaint, warrant and all the relevant acts of the justice and parties, and also a full record of all the proceedings had by and before him. *Comm'th v. Schall*, 5 York 187.

140. Upon *certiorari* to a justice's judgment for a penalty, the court will take judicial notice of the divisions of the county into boroughs and townships. *Stroudsburg Borough v. Brown*, 11 C. C. 272.

141. Upon *certiorari* to an alderman in a suit for a penalty, it was *held*, that the mis-recital of the date of the act in the record was of no consequence. *Blessington v. Comm'th*, 14 Atlan. 416; s. c. 12 Cent. 512.

142. In an action for a penalty under a borough ordinance, the judgment will be reversed on *certiorari* where the justice's record does not set out the evidence or the substance of it, nor the ordinance or the substance of it. *Stroudsburg Borough v. Brown*, 11 C. C. 272.

143. Where a defendant was improperly convicted of peddling before a justice who refused to take bail, and the defendant then paid the fine under protest and in order to save himself from going to jail; it was *held*, that such payment was under duress and did not estop the defendant from contesting the proceedings on *certiorari*. *Comm'th v. Horn*, 12 C. C. 284.

144. Upon *certiorari* to a justice's judgment for a penalty imposed for the violation of an ordinance, the judgment was reversed where the record failed to refer affirmatively to the ordinance or to show

that the judgment was entered publicly or after due notice to the defendant. *Pittsburgh v. Madden*, 14 C. C. 120.

145. A conviction under the act 22 April 1794 (Brightly's Purdon 1950) for selling on Sunday will not be sustained on *certiorari*, where the information and warrant fails to affirmatively set forth that the offence was committed in the county in which the action is brought. *Comm'th v. Phelps*, 3 Lack. Jur. 409.

146. Where a defendant is convicted before a justice of an offence against the Sunday laws, the information, in addition to the day of the month, must state that it was Sunday and not merely mention a day found to be Sunday by the calendar, otherwise the conviction will be reversed on *certiorari*. *Gelbert v. Comm'th*, 3 Lack. Jur. 374; s. c. 6 Del. 90.

147. Upon *certiorari* to a summary conviction the proceedings will be set aside where the record does not show that the magistrate had jurisdiction both of the subject-matter and the place where the offence was committed; the record should also specify the law which has been violated, and if the penalty is to be paid to any person, the suit should be instituted in the name of such person. *Comm'th v. Flinchbaugh*, 1 York 1.

148. In a proceeding under the act 13 June 1836, sec. 70 (Brightly's Purdon 1897), for the penalty for crossing a wooden bridge faster than a walk, the act must be specifically set forth in the proceedings, and it must also appear on the face of the proceedings that the notice required by the 63d section of that act (Brightly's Purdon 1892) was placed upon the bridge on which the alleged offence was committed; otherwise the proceedings will be set aside on *certiorari*. *Dosch v. Strayer*, 2 York 113.

149. A judgment upon a summary conviction will be reversed on *certiorari* where mere reference is made to the act of assembly under which the relator was convicted, by setting forth the date of its approval without setting forth any of its provisions, its title or even the

page of the pamphlet laws where it is to be found. *Comm'th v. Senft*, 8 York 65; s. c. 6 Del. 37.

150. Upon *certiorari* to the judgment of a burgess for a penalty for the violation of a borough ordinance, the proceedings will be reversed where the record fails to show that the offence was committed within the limits of the borough, and where it does not appear that any process was issued against the defendant. *Plymouth Borough v. Penkok*, 7 Kulp 101.

151. In an action for a penalty before a justice, the record should show whether the plaintiffs were charged with manufacturing, selling or offering oleomargarine for sale, or simply with having it in their possession with intent to sell it; if the record does not show what the plaintiffs were charged with, the judgment will be reversed on *certiorari*. *Hess v. Monier*, 40 P. L. J. 44.

152. Upon *certiorari* to the judgment of a justice in a suit against a railroad company for a penalty for the violation of a borough ordinance, prohibiting a railroad company from running trains without erecting gates and providing watchmen, the judgment will be reversed where the justice's record fails to show over what street or streets the company ran its trains. *Winton Borough v. Delaware & Hudson Canal Co.*, 11 C. C. 167; s. c. 2 Lack. Jur. 210.

(m) Appeal.

153. No appeal lies from the judgment of a court of common pleas upon a *certiorari* to a justice of the peace. *Jacobs v. Ellis*, 156 P. S. 253.

CHALLENGES.

See JURY, V.

CHAMPERTY AND MAINTENANCE.

1. A conveyance by a person of lands of which he is not in possession and

which are held adversely to him is not illegal in Pennsylvania. *Murray's Estate*, 13 C. C. 70.

CHANCERY.

See EQUITY.

CHARACTER.

See CRIMINAL LAW, XVII.: EVIDENCE, XXXI.

CHARGE OF THE COURT.

See APPEAL AND ERROR: PRACTICE, XXIII.

CHARGE ON LAND.

See COVENANT, VI.: LEGACY, V.

1. Where a conveyance was made by a husband and wife to their son under and subject to the payment of an annual sum to the husband during his life and of a less sum annually to the wife during widowhood, and the payment of the purchase money is provided for without interest one year after the death of the husband and the death or remarriage of the wife, such a conveyance creates a fixed lien or charge upon the land which will not be divested by a subsequent sheriff's sale. *Rohn v. Odenwelder*, 162 P. S. 346.

2. Where an annuity was charged upon land, it was *held*, that the remedy of the annuitant against a subsequent vendee of the land, was an action of assumpsit, but that the judgment would be *de terra*. *Rohn v. Odenwelder*, 162 P. S. 346.

3. Where a testator directed his executors "to advance by way of loan" to his son a sum of money on the arrival of the son at a certain age, and the son reached the said age in his father's lifetime, when the father gave him the said sum and took the son's note therefor, and the father by a codicil directed that such note should bear interest to be deducted from the son's income under the will

during his mother's lifetime, and at the latter's death the principal should be deducted from the share then payable to the son; it was *held*, that the transaction was a loan and not an advancement; and where the testator had blended his whole estate until partition be made by a trustee and the son was bequeathed a share of the blended estate; it was *held*, that the loan became a charge on his whole estate, including the real estate. *Hardy's Estate*, 167 P. S. 552; s. c. 36 W. N. C. 265.

CHARITABLE USES.

See CHARITY.

CHARITY.

See CHURCHES: TAXES.

- I. General principles.
- II. Charitable uses.
- III. Mortmain.

I. General principles.

1 The statutory maintenance of the poor is a purely public charity. *Armstrong County v. Overseers of Kittanning*, 15 Atl. 392.

2 A college whose charter provides that persons of every religious denomination shall be eligible as trustees; that no person shall be refused admission on account of religious belief; and that it shall be subject to visitation by the state; if founded, endowed, and substantially maintained by charity, is a purely public charity, and exempt from taxation under the act of 14 May 1874 (Brightly's Purdon 1986); and this, though a small portion of its annual expenses may be paid by tuition fees received from students. *Northampton County v. Lafayette College*, 128 P. S. 132.

3 The Friendship Liberal League, composed of a body of men and women who used the league in effect as their church, and whose services were intended to give expression to their peculiar views

about religion, and in some way to aid in the social, intellectual and moral elevation of themselves and others, was *held* to be an association for a religious use within the meaning of the act 26 April 1855 (Brightly's Purdon 2104). *Knight's Estate*, 159 P. S. 500; affirming s. c. 2 Dist. Rep. 523; 10 C. C. 225; 13 C. C. 405.

4. A charity must be for the use of persons who are indefinite and uncertain, a gift to individuals by name or description, although of a class, is not a charity; the gift to the city of Philadelphia under the will of Benjamin Franklin for the purpose of affording loans at interest to young married artificers who have served an apprenticeship, to aid them in setting themselves up in business, was *held* to be a charity. *Franklin's Administratrix v. Philadelphia*, 13 C. C. 241.

5. An ordinary beneficial association whose benefits are confined to its own members is not a charity; but the Philadelphia Fire Department Relief Association was *held* to be a charity because its permanent fund is held not only for the relief of its members, but also for the benefit of the city in preventing the families of firemen from becoming a charge thereon. *Jeanes's Estate*, 14 C. C. 617; s. c. 34 W. N. C. 190.

6. As to the effect of a subscription to a charity, see notes to *Gans v. Reimensnyder*, 2 Atl. 428, and *Osborn v. Crosby*, 3 Ibid. 431.

II. Charitable uses.

7. The members of a charitable organization, such as a voluntary fire company, having no title to or interest in its property, cannot maintain a bill for injunction to prevent the distribution of such property. *Hoffman v. Hartman*, 7 Lanc. 137.

8. A legacy to a charity may be reduced by a codicil executed within a month of testator's death. *Simpson's Estate*, 37 P. L. J. 492.

9. Upon a devise to the trustees of a Presbyterian church for charitable and

religious use, and a subsequent dissolution of the church, and a conveyance to the Presbytery, the property does not revert to the heirs of the deviser. *Jones v. Renshaw*, 130 P. S. 327.

10. If the payment of a bequest to a charity be made dependent on the certificate of the bishop that the intent and purpose of the testator, with respect to the charity, have been consummated; the court will, on the presentation of such certificate, order the payment by the executors to the designated persons. *Seagrave's Appeal*, 125 P. S. 362; affirming *Stewart's Estate*, 45 L. I. 184.

11. Upon a devise to pastors to collect rents and pay over to certain societies to be distributed in charity, and upon failure to so apply the trust was revoked and the property devised to the testator's four sons; it was held, that upon the failure of the pastors and societies to act, the property vested in the four sons. The act of 26 April 1855, sec. 10 (*Brightly's Purdon* 298), to prevent the failure of a charity for want of a trustee, did not apply. *Seitz v. Seitz*, 1 Mona. 626; s. c. 17 Atlan. 229.

12. Where there is no charitable institution with the exact name of the language of the will, the latent ambiguity may be explained by parol testimony. *Dugan's Estate*, 24 W. N. C. 287.

13. Upon a devise or bequest for a charitable use, where the person or corporation is incapable of taking or holding the legal title, the court of common pleas in the exercise of its equity powers may appoint a trustee to enforce the trust. *Frazier v. St. Luke's Church*, 147 P. S. 256; affirming s. c. 10 C. C. 53.

14. Upon a bequest to be appropriated to foreign missionary work, the court may carry out the intent of the donor under the act of 26 April 1855, sec. 10 (*Brightly's Purdon* 298), so far as the same may be ascertained. *Presbyterian Board of Foreign Missions v. Culp*, 151 P. S. 467.

15. Upon a bequest to the trustees of such free library which may be established in the city of Philadelphia east

of the river Schuylkill, and south of Market street; it was held, that the fund was properly distributed to a corporation known as the Free Library of Philadelphia, which was formed after the testator's death; and this, though prior to the testator's death there were three free libraries in Philadelphia situated within the said limits. *Pepper's Estate*, 154 P. S. 331; affirming s. c. 11 C. C. 257.

16. A charitable bequest is valid, no matter how vague, indefinite and uncertain the object, provided there is a discretionary power vested in some one over its application to those objects; a gift to executors to distribute among such charitable institutions, and in such proportions as they in their discretion deem proper, is valid. *Kinike's Estate*, 155 P. S. 101; affirming s. c. 11 C. C. 232.

17. Upon a bequest of one thousand dollars "to any institution in Philadelphia that will give shelter to homeless people at night, irrespective of creed, color or condition," the fund was awarded to the Philadelphia Society for Organizing Charity, upon proof that it had established wayfarer's lodges, at which shelter had been provided, and would continue to be provided for homeless people at night, irrespective of color, creed or condition. *Croxall's Estate*, 162 P. S. 579; affirming s. c. 7 York 35.

18. Where a fund was started in 1810 to erect to the memory of George Washington "a monument in the city of Philadelphia"; it was held, that the site of the monument need not be within the corporate limits of the city of Philadelphia as they were in 1810; and it was further held, that the society of the Cincinnati had all the powers of the original committee, and had authority to select any site within the city of Philadelphia, and that so much of a decree made in 1880 as interfered with the free exercise of their discretion and assumed to fix the site in Fairmount Park, was improvidently made and should be rescinded. Such an erection in Independence Square was held not to violate the act 11 March

1816, authorizing the sale of the square to the city of Philadelphia, and providing that no part to the southward of the State House shall be made use of for erecting any sort of buildings thereon, but that the same shall be and remain a public green and walk forever. *Cincinnati Society's Appeal*, 154 P. S. 621; modifying s. c. 12 C. C. 172.

19. A conveyance of land to trustees and their successors in office forever, in trust for a charitable use to continue perpetually, will pass a title in fee simple notwithstanding the absence from the deed of any words of inheritance. Such a conveyance does not create a conditional estate, but a trust for the charitable use, and is not liable to be defeated by nonuser or alienation in the absence of an express condition to that effect. *Sellers Church's Petition*, 139 P. S. 61.

20. Where a charitable institution has sold its property and holds the proceeds under sec. 10 of the act 26 April 1855 (Brightly's Purdon 298), subject to the order of the court, the wishes and recommendations of the contributors are not absolutely controlling; a decree awarding the fund to an incorporated society whose objects appear to be nearer in accord with that of the original corporation than were those of the appellant, was sustained. *Comm'th v. Pauline Home*, 141 P. S. 537.

21. Where a municipal corporation receives a legacy for a charitable use and the trust is void by reason of a provision for an illegal accumulation, the fund is not impressed in the hands of the corporation with such a trust in favor of the testator's representative, as renders the corporation liable to account to them in the orphans' court. *Franklin's Estate*, 150 P. S. 437; affirming s. c. 9 C. C. 484.

22. A bequest to a missionary bishop in trust for his mission, and should he be deceased then to his successor, makes the bishop trustee for disbursing the bequest, and the fund will be awarded to him as trustee for disbursement in the territory which was included in the orig-

inal diocese; and this, though prior to the testator's death such diocese be divided into several others and the said bishop be placed over one of them or removed to a separate diocese. *Donaldson's Estate*, 11 C. C. 311.

23. A trust to protect citizens of African descent in the enjoyment of their civil rights and to prevent discrimination against them is a valid trust. *Lewis's Estate*, 152 P. S. 477; affirming s. c. 11 C. C. 561.

24. Upon the certainty of beneficiaries as affecting the validity of charitable bequests, see note to *Hazeltine v. Vose*, 14 Atlan. 733.

25. For an interesting and valuable schedule of cases relating to charitable bequests prepared by Hon. F. Carroll Brewster, see note to 9 C. C. 491.

III. Mortmain.

26. The month prescribed by the act of 26 April 1855 (Brightly's Purdon 2104) must be computed exclusive of the days of the execution of the will and death. *Simpson's Estate*, 37 P. L. J. 492.

27. A bequest to build a chapel to be called by the testator's family name is a charity within the act of 26 April 1855 (Brightly's Purdon 2104). *Vanzani's Estate*, 6 C. C. 625.

28. Upon the failure of a charitable bequest in remainder, by reason of death within thirty days, the estate in remainder passes under the intestate laws to the heirs-at-law. *Lynch v. Lynch*, 132 P. S. 422; s. c. 15 W. N. C. 424.

29. If a remainder of a charity lapse under the act of 26 April 1855 (Brightly's Purdon 2104), the legatee of the income for life is not entitled to the corpus; it goes to the next of kin. *Seiber's Appeal*, 9 Atlan. 863.

30. Where the testator bequeathed twenty thousand dollars to a charity, fifty thousand dollars each to five individuals, and the residuary estate to the six legatees *pro rata*, and the charitable bequests were void under the act 26 April

1855 (Brightly's Purdon 2104); it was *held*, that the twenty thousand dollars fell into the residuary estate, of which, as thus increased, five twenty-sevenths went to each of the five individuals and two twenty-sevenths to the next of kin. A legacy which fails either by lapse or because void *ab initio*, goes into the residue, but where some part of the residue itself is not properly given, the lapsed portion goes to the next of kin and not to the other residuary legatees. *Gray's Estate*, 147 P. S. 67; affirming s. c. 38 P. L. J. 464.

31. Where a testator, by a will executed within one calendar month prior to her death, gave her residuary estate to four charitable institutions and revoked all former wills; it was *held*, that this amounted to a revocation of a former will by which she gave her residuary estate to the same charitable institutions. *Teacle's Estate*, 153 P. S. 219.

32. A devise made within thirty days of death will not be deemed a charitable devise merely from the nature of the professional character of the devisee, as a devise "to the pastor of the St. John's Roman Catholic Church of Altoona, Pa." *Hodnett's Estate*, 154 P. S. 485.

33. A gift to a religious use made in a will executed two days before the death of the testator cannot be sustained, although the gift be identical with one made four years before in a codicil to a former will, and the latter will contained no words of revocation. *Hoffner's Estate*, 161 P. S. 331.

34. A gift to a religious use, made in a will executed within thirty days of the death of the testatrix, will be sustained where it appears that the gift was made in pursuance of a promise given by the testatrix to one who bequeathed her whole estate to the testatrix on the express understanding that such a gift should be made; and where such a promise was made in 1883, to be performed after the death of the promisor in 1888, and the adjudication was made in 1893; it was *held*, that the claim was not barred by

the statute of limitations. *Hoffner's Estate*, 161 P. S. 331.

35. Where a mortgage for eleven hundred dollars was assigned in trust to pay from the principal the sum of one thousand dollars with interest thereon to a charity, and the balance to pay over to testator's estate, and such assignment was made within one calendar month of the death of the assignor; it was *held* to be void under the act 26 April 1855 (Brightly's Purdon 2104). *McMichael v. Price*, 12 C. C. 181; s. c. 31 W. N. C. 95.

36. A corporation incorporated for the purpose of uniting its members socially for the improvement of their intellectual and moral condition by the dissemination of scientific truths, and whose lectures and debates are open to the public without charge, is a charity, and a bequest to such a corporation in a will executed less than a calendar month before the death of the testator is void. *Knight's Estate*, 13 C. C. 405.

37. Where a testator was informed that if he died within a month a bequest to charity would be void, and he thereupon bequeathed a certain amount to a brother to be distributed among certain charities named at the time, and the testator also gave legacies to two nieces, and the will further provided that the residuary estate should be divided among the legatees in proportion to sums bequeathed to them; it was *held*, that the gift to the brother was inoperative and fell into the residue, but that the brother was entitled to a share of the residuary estate as a legatee. *Carlile's Estate*, 14 C. C. 362; s. c. 34 W. N. C. 62.

38. Where a codicil was executed within thirty days of the testator's death, and reduced or postponed the time of enjoyment of a charitable bequest given by a will executed long before, the codicil was *held* to be valid; and this, although the codicil purported to annul and revoke the will. *Watts's Estate*, 168 P. S. 422; s. c. 36 W. N. C. 369; affirming s. c. 14 C. C. 625.

39. The capacity of a charitable corporation to take a bequest is not affected by

the act 26 April 1855 (Brightly's Purdon 2104); a charitable bequest to a corporation of this state made by a resident of Delaware within a calendar month before his death, being a valid gift under the laws of Delaware, is not within the operation of that act and is valid. *Hildeburn's Estate*, 16 C. C. 39.

40. An executor is a disinterested witness within the meaning of the act 25 April 1855 (Brightly's Purdon 2104), requiring wills containing bequests to charities to be attested by two disinterested witnesses. *Jordan's Estate*, 161 P. S. 393; affirming s. c. 13 C. C. 506.

41. A charitable bequest will not be sustained where the will is not attested by two disinterested witnesses. *Morris's Estate*, 8 Montg. 153.

42. Where there are no witnesses to a codicil, a bequest contained therein to a charity is void. *Phillips's Estate*, 11 C. C. 500; s. c. 30 W. N. C. 241.

43. Under the act 9 May 1889 (Brightly's Purdon 299), a gift to a charity is not void although it transgresses the rule against perpetuities. A charitable trust taking effect on a remote contingency in derogation of another charity is valid, even though it involves a change of trustee. *Lennig's Estate*, 154 P. S. 209; affirming s. c. 31 W. N. C. 234.

44. Under the first proviso to sec. 9 of the act 18 April 1853 (Brightly's Purdon 1834), a direction in a will that a portion of the income from the residue shall be accumulated to secure payment of a certain sum to a charity is not illegal, although the direction results in the adult children of the testator participating in the income accruing from the accumulation of the residue. *Lennig's Estate*, 154 P. S. 209; affirming s. c. 31 W. N. C. 234.

45. A charity may be created either in perpetuity or for a term of years, it will not be defeated because created in perpetuity. *Franklin's Administratrix v. Philadelphia*, 13 C. C. 241.

46. Under the act 26 May 1891 (Brightly's Purdon 274), a bequest to be used to keep a burial lot in order is a

bequest for a charitable use, and is not subject to the rule against perpetuities. *Tierney's Estate*, 13 C. C. 446.

CHARTER.

See **BOROUGHs: CORPORATION.**

CHARTER-PARTY.

See **SHIPPING, VI.**

CHATTEL MORTGAGE

See **MORTGAGE, VII.**

CHATELS.

See **BAILMENT: CORPORATION, IX. : DERELICT PROPERTY: REPLEVIN: SALE.**

CHECKS.

See **BANKS, VIII.**

CHILDREN.

See **INFANTS.**

CHURCHES.

See **CHARITIES.**

- I. Organization.
- II. Church property.
- III. Officers and trustees.
- IV. Meetings and elections.
- VI. Ecclesiastical tribunals.
- VII. Pastors.
- VIII. Religious worship.

I. Organization.

1. Two congregations which combine for certain purposes but retain a separate existence for all other purposes, cannot be incorporated so that the corporate character attach to the two as combined for the first class of purposes, and to each separately for the second class, and so that each as well as both may act under the same corporate name. *German Lutheran Church*, 9 C. C. 12.

2. A church charter will not be granted without the clause required by the act 25 April 1855, sec. 7 (amended by the act 2 June 1887, Brightly's Purdon 1860), requiring that property shall not be otherwise taken and held or inure than subject to the control and disposition of the lay members of the church. *Trinity Church*, 8 York 191.

3. Where the charter of a church provided that "all conveyances of property to this association shall be deeded in trust, that said property shall be used, kept, and maintained and disposed of for the use and benefit of the Evangelical Association of North America," the court refused an amendment that all conveyances of property to the corporation should be held in trust for the use of the members thereof. *Trinity Church*, 8 York 191.

4. Upon an application to amend a church charter, the presiding elder of a district and the pastor appointed by the lawfully constituted body in the denomination to which the church belonged when the charter was granted, have no legal standing to file exceptions. *Trinity Church*, 8 York 191.

5. Where a church charter was granted in 1871, a petition to amend was refused where there was no proof that the corporation was actually operating and transacting business on 11 May 1874, as required by the validating act of that date (Brightly's Purdon 412). *Trinity Church*, 8 York 191.

II. Church property.

6. The grant of a temporary use of a building adjoining a church to the members of a church guild was *held* to be revocable at the will of the grantor. *Read v. St. Ambrose Church*, 137 P. S. 320; s. c. 27 W. N. C. 203; affirming s. c. 45 L. I. 184; 6 C. C. 76.

7. A bill lies for an injunction against removing a church from one location to another and the destruction of the original house of worship, upon the allega-

tions that subscriptions were made and received for the erection of the building at the original location and for the purpose of building there a memorial to certain persons. *Cushman v. Church of the Good Shepherd*, 162 P. S. 280; reversing s. c. 14 C. C. 26.

8. Where an owner of land executed a deed for a lot of land to himself and others as trustees of a church, to hold the same for the sole use and behoof of the congregation organized for the purpose of building on said lot and worshipping in said building, and subsequently the successors of the trustees other than the original owner, upon the incorporation of the church, executed a deed of the lot to the corporation, and it did not appear that at the date of this deed the original owner was a trustee; it was *held*, that the latter had no standing to object to a sale of the lot by the church. *United Presbyterian Church's Petition*, 166 P. S. 43.

9. Where land is devoted by the owners to a particular purpose (as church property), which use entered into the consideration of the contract of purchase, one of the tenants in common cannot defeat the joint purpose by partition without the consent of the co-tenants; equity has no jurisdiction to decree partition of church property owned in common by two congregations. *Swoyer v. Schaeffer*, 13 C. C. 346.

10. Where a deed of church property from a congregation to a mission society contained the phrase "to be held in trust by them," and the mission society never had any valuable interest in the property or any active duty to perform, the deed was construed to mean, in trust for the congregation, and to convey but a dry trust. *First Baptist Church v. Pennsylvania Baptist State Mission Society*, 15 C. C. 332.

11. Where land is conveyed to a religious society for the purpose of erecting a house of worship, the grantee as between it and the grantor takes an absolute estate including the right of alienation; if

the grantee intends that the property shall revert if applied to other uses, such intention must be clearly expressed in the deed, it cannot be implied. Where, however, the charter of the religious body prohibits alienation except by and with the consent of a certain other body, that assent must be first obtained. *First German M. E. Church's Petition*, 1 Lack. L. N. 89.

12. The title to the church property of a congregation, which is divided, is in that part of the congregation which is in harmony with its own laws, usages and customs as accepted by the body before the division took place, and who adhere to the regular organization; and this, though a majority of the congregation or annual conference was with those who dissent. *Krecker v. Shirey*, 163 P. S. 534; reversing s. c. 4 Northam. 5. See s. c. 3 Northam. 266. See *Young v. Buck*, 8 York 177.

13. Where a congregation is divided and both parties claim the right to occupy the church property, the court will make an order pending proceedings before a master requiring the party in possession to allow the other party to occupy the edifice at stated times for religious worship. *Newhart v. Sampsel*, 13 C. C. 161.

14. Where the pastor of a congregation had been suspended by the church courts and he with others then withdrew from membership and organized into a different ecclesiastical congregation, but continued to hold and use the church property and retained possession of its corporate seal; it was held, that equity had jurisdiction to enjoin such use and to compel the delivery of such corporate seal. *East End Reformed Presbyterian Congregation v. Milligan*, 40 P. L. J. 7.

15. As to the title to church property of a divided congregation, see *United Zions Congregation v. German Evangelical Church*, 5 Kulp 441.

16. Where "The First New Jerusalem Society of the city of Pittsburgh and its vicinity" severed its connection with the general Sweden-Borgian Church of Penn-

sylvania, and a minority of the old society and the trustees then organized another church under the name of "Church of the Advent, Pittsburgh"; it was held, that a bequest to "The New Church of Pittsburgh" should be awarded to the corporation known as "The First New Jerusalem Society of the city of Pittsburgh and its vicinity." *Aitken's Estate*, 158 P. S. 541.

17. A church, with the grounds annexed thereto, is exempt from assessment for the cost of laying a city water pipe. *Philadelphia v. St. James Church*, 134 P. S. 207.

18. Under the act of 1 June 1889, moneys held by the trustees of the General Assembly of the Presbyterian church for the purpose of distributing the income annually among certain classes of beneficiaries, who might appear from year to year to need the same, or for certain general religious uses, were held not to be liable to taxation. *General Assembly v. Gratz*, 139 P. S. 497; s. c. 27 W. N. C. 207.

See TAXES.

III. Officers and trustees.

19. In a suit by a church against its treasurer to recover its funds, books, etc., it is a sufficient affidavit of defence that the name of the corporation plaintiff is being improperly used without authority and by persons who have no right to the money, books, etc., in question. *Third Reformed Church v. Jones*, 132 P. S. 462; s. c. 25 W. N. C. 396.

20. One who accepts an order as treasurer of a church is not individually liable on such acceptance. *Howarth v. McClure*, 149 P. S. 170.

21. If trustees are required to enter security before assuming their duties, others in possession will not be restrained until such bond be entered. *Nolde's Appeal*, 15 Atlan. 777; affirming *Nolde v. Madlem*, 4 Lanc. 347.

IV. Meetings and elections.

22. A resolution of the vestrymen of the church declining to accept a legacy passed at a meeting at which there is not a quorum is void; and this, although a copy of it is afterwards signed by an additional member making up a quorum. *Rittenhouse's Estate*, 140 P. S. 172.

23. Where a new constitution was submitted to the members of the church generally; it was *held*, that a majority of the whole number of persons voting was sufficient to adopt such new constitution; and where certain adherents of the minority took possession of a certain church; it was *held*, that they were an ecclesiastically distinct body and had no title to the property owned by the church prior to their withdrawal from it. *Schlichter v. Keiter*, 156 P. S. 119.

24. Where a church charter contains nothing as to the mode of conducting an election of trustees and there are no by-laws on the subject, the matter will be regulated by former usage and practice. *Seventh Day Baptists*, 4 York 29.

VI. Ecclesiastical tribunals.

25. The general conference of the Evangelical Association of North America, which met at Indianapolis in 1891, was *held* to be the regular and duly constituted general conference of that body, and those who adhered to such general conference and submitted to its authority were held to constitute the Evangelical Association. *Krecker v. Shirey*, 163 P. S. 534; reversing s. c. 4 Northam. 5. See s. c. 3 Northam. 266. See *Young v. Buck*, 8 York 177.

26. The general conference of the Evangelical Association of North America, having delegated to the board of publication the power to appoint the place of meeting of the general conference, such delegation of power is a matter of ecclesiastical regulation and no civil court nor any subordinate body of the church can interfere. *Bliem v. Shultz*, 4 Northam. 157.

27. Where certain matters were placed under the control of a church conference, and the authority of the conference was defied by its members and the power of the association to enforce obedience to its decree was exhausted; it was *held*, that equity would assume jurisdiction and grant relief; and this, though by the discipline of the association such conference was to be the supreme court of law of the church. *Brown v. Painter*, 8 Montg. 130.

28. The decree of a church judicatory is binding only where it is affirmatively shown that it has acted within the scope of its authority; civil tribunals will interfere to ascertain whether the governing body has exceeded its authority. *St. Stephen's Reformed Church v. Imbody*, 10 Montg. 21.

29. Under the constitution of the Reformed Church of the United States, where all the members of a consistory are charged with malfeasance in office, Classis has authority to try them upon an original complaint to it and to depose them from office if found guilty, and an appeal to Synod is not a *supersedeas*. *St. Stephen's Reformed Church v. Imbody*, 10 Montg. 21.

VII. Pastors.

30. Where an Episcopal clergyman, with the consent of the rectors of the three nearest parishes, established a mission church and it was understood that he was to rely on the offerings of the people for his support, and after eleven years' service he claimed to retain fifteen thousand dollars for his salary; it was *held* to be error to subcharge him with all over one thousand dollars a year, on the ground that that salary was ordinarily paid to missionaries by the Episcopal Church. *Nicholson v. Daniel*, 152 P. S. 461.

31. Where a minister was assigned to the pastorate of the Immanuel Church in the city of Reading by a provisional body of adherents, without ecclesiastical

authority, but such assignment was subsequently ratified and adopted by the general conference; it was *held*, that this gave him a title from and after that date which was good under the law of the church, and therefore good under the law of the land. *Krecker v. Shirey*, 163 P. S. 534; reversing s. c. 4 Northam. 5. See s. c. 3 Northam. 266; *Young v. Buck*, 8 York 177.

32. Where the court had granted a preliminary injunction restraining the pastor representing a faction in a church from officiating as pastor, and it subsequently appeared that there was an agreement between the two factions that the pastor representing each faction should officiate on alternate Sundays, the preliminary injunction was amended by the court to conform to such agreement. *Fairville Church v. Brunner*, 10 Lanc. 129.

33. Under the constitution of the Reformed Church of the United States, when a pastor resigns his charge, the vacant pulpit is under the control of the Classis of the district embracing the charge. *St. Stephen's Reformed Church v. Imbody*, 10 Montg. 21.

VIII. Religious worship.

34. It is no offence, under the act 31 March 1860, sec. 31 (Brightly's Purdon 491), to prevent a religious meeting from convening; there can be no conviction under that act unless the worshippers have assembled. *Comm'th v. Underkoffer*, 11 C. C. 589.

35. The singing in a church by a church choir in an orderly manner is not an indictable offence, although such singing was contrary to the orders of the pastor. *Comm'th v. McDole*, 10 Lanc. 119.

CIRCUMSTANTIAL EVIDENCE.

See CRIMINAL LAW, XVII.: EVIDENCE, XXXIV.

CLEARING HOUSES.

See BANKS.

CLERGYMEN.

See CHURCHES.

CLOUD ON TITLE.

See EQUITY, XXI.

CLUBS.

See EXCISE.

COLLATERAL INHERITANCE TAX.

See TAXES, X.

COLLATERAL SECURITIES.

See BAILMENT, III.: DEBTOR AND CREDITOR, VI.

COLLEGES.

1. A charter was granted under the name of "Duquesne College," although such name had previously been conferred upon another institution, but had not been used for years, the institution having been absorbed by another college of a different name. *Duquesne College Charter*, 12 C. C. 491.

2. There is no authority in the act 29 April 1874 authorizing the court incorporating a college to confer upon the officers thereof the authority to confer degrees. *Duquesne College*, 12 C. C. 491.

3. Where a student of Grove City College was suspended by the faculty without a hearing, the court refused to reinstate him by mandamus where the petition did not show that he had applied to the trustees for a hearing or relief, and it appeared that the judicial as well as the legislative powers incident to the management of the college were conferred by the charter on the trustees. *Dunn's Case*, 9 C. C. 417.

COLLUSION.

See EQUITY, XXVI., XXX.

COMMISSION.

See PRACTICE, XI.

COMMON.

See JOINT OWNERS.

COMMON CARRIER.

See CARRIERS.

COMMON LAW.

1. The courts are constantly applying the accepted principles of the common law to new phases and modes of doing business; this is a necessity alike dictated by common sense and the necessities of trade. *Comm'th v. Hess*, 148 P. S. 98.

COMMON SCHOOLS.

- I. School districts.
 - (a) Generally.
 - (b) Division of school districts.
 - (c) Annexation of lands for school purposes.
 - (d) Independent school districts.
 - (e) Suits against school districts.
- II. School directors.
 - (a) Eligibility.
 - (b) Election of school directors.
 - (c) Vacation of office.
 - (d) Dismissal from office.
- III. School contracts.
- IV. School houses and property.
- V. Superintendent of schools.
- VI. Supervising principals.
- VII. Teachers.
- VIII. Teachers' institutes.
- IX. Evening schools.
- X. Scholars.
- XI. Text-books.
- XII. State appropriation.
- XIII. School taxes.

I. School districts.**(a) Generally.**

1. Upon the repeal of the 28th section of the local act of 4 May 1871 by the act of 31 May 1889, the township of Wilkes-Barre became a single school district. *Comm'th v. Kelly*, 5 Kulp 533.

2. Bonds for an increased indebtedness of a school district cannot issue in the absence of a weekly notice of election for thirty days prior thereto, an omission to levy an annual tax to pay the interest, and the failure to file the statement as required by the act of 20 April 1874 (Brightly's Purdon 1396). The basis of values should be the valuation as adjusted by the commissioners for the preceding year. *Witherop v. Titusville School Board*, 7 C. C. 451.

(b) Division of school districts.

3. Requisites of a petition for the division and apportionment of the property and debts of one school district with another, which has been erected out of the former. *Roaring Brook School District*, 1 Lack. Jur. 323.

4. Upon the creation of a new school district, the court, in determining whether an undue proportion of the real estate is in the new district, should be guided by the share of the total value contributed by each; the apportionment should be according to taxable value. Interest on debts and money in hand considered. *Williams Township v. Williamstown*, 9 C. C. 65.

5. Under the act 11 April 1862, sec. 11 (Brightly's Purdon 340), where a new school district is formed, it is a fair rule, in the division of the school property, to take into consideration the taxable property, the number of taxpayers and the number of pupils; but in the apportionment of the debt and of the money arising from the taxes on unseated lands, the taxable valuation affords the proper basis. *Butler Township School District v. Gordon School District*, 10 C. C. 663.

6. By the act of 11 April 1862 (Brightly's Purdon 340) the court can adjust on equitable principles all questions of debt and school property between the various portions of a divided district. *Ridley Township School District v. Ridley Park School District*, 4 Del. 96.

7. Where upon a proceeding to adjust indebtedness between an old district and two new districts divided from it, separate decrees are made against each of the new districts; an appeal by one is no *supersedeas* to an execution against the other. The only defence to such an execution is want of funds, in which case the court will order a special tax. *Ridley Township School District v. Ridley Park School District*, 4 Del. 97.

8. Upon a division of property between two school districts, it is the duty of the auditor to sift the evidence and to decide according to the credibility of the witnesses and their means of knowing the facts; it is a fatal error for the auditor to fix the value by finding the sum of the values testified to and dividing that sum by the number of the witnesses. So, the auditors should not consider the number of pupils in the respective districts. *Darby and Sharon Hill School Districts*, 5 Del. 214.

9. Upon the creation of a new school district it is the duty of the old district to provide for the public wants until the new district is in a condition to supply the place, by the election and organization of a board of directors. *Comm'th v. Casey*, 6 Kulp 45. See *Comm'th v. Casey*, 6 Kulp 161.

10. Where a borough is created out of a part of the territory comprised in another borough, the quarter sessions has jurisdiction under the act 1 June 1887 (Brightly's Purdon 233) to appoint an auditor to report upon the proper adjustment of the property and indebtedness of the school districts in the two boroughs; and the supreme court on appeal is limited to the jurisdiction of the court below and the regularity of its proceed-

ings. *Darby Borough School District's Appeal*, 160 P. S. 79.

(c) **Annexation of lands for school purposes.**

11. Under the act of 17 April 1876 (Brightly's Purdon 340), only those who desire their lands to be annexed to another township, borough or city for school purposes can be included in the decree. *Tredyffrin School Lands*, 7 C. C. 228.

12. The annexation of lands in one township to the school district of another township is only authorized where the land-owner petitions. If the report includes lands not petitioned for, the only remedy is by a new petition. *Easttown School District*, 4 Del. 49.

13. Upon a petition to annex lands in another township for school purposes, a report of viewers that they have viewed the lands in reference to the school facilities, the location of the schoolhouses and the public roads to said schools, and are of the opinion that the lands should be annexed, is sufficient; the report need not show that they inquired into the propriety of granting the prayer of the petition. *Elk Township School District*, 146 P. S. 1.

14. No appeal lies to the supreme court from an order of the quarter sessions under the act 17 April 1876 (Brightly's Purdon 340), annexing lands in one township or borough to another township or borough for school purposes; an appeal under the act 9 May 1889 brings up nothing but the record. *Elk Township School District*, 146 P. S. 1.

(d) **Independent school districts.**

15. Under the acts 8 May 1855 (Brightly's Purdon 341) and 20 May 1857 (Brightly's Purdon 342), an independent school district will not, in the absence of extreme necessity, be erected, where the effect will be to set off the wealthier portion of the township as a separate organization, to the prejudice of the interests of the poorer

portion. *Mount Pleasant Township Independent School District*, 10 C. C. 588. See *South Abington Independent School District*, 11 C. C. 602.

16. It is no ground for the erection of an independent school district that school-children walk along the track of a railroad instead of a public road which is nearly as direct; so, distance alone is not a ground. *Warminster Township Independent School District*, 1 Dist. Rep. 610; s. c. 5 Del. 16.

17. In a proceeding for the erection of an independent school district, the record must set forth the natural or other adequate obstacles which show that the educational welfare of its inhabitants cannot be provided for under the township organization: where the report is defective in that respect, such defect cannot be cured by calling witnesses to prove the existence of the necessary facts. *Warminster Township Independent School District*, 1 Dist. Rep. 610; s. c. 5 Del. 16.

18. Upon a petition for the erection of an independent school district, and a report by the commissioners that they do not deem it practicable, the proceedings fall to the ground. *Huntington School District*, 5 Kulp 473.

19. Upon a petition for the erection of an independent school district, the commissioners should view the premises; no obstacle, but one of a physical character, will authorize its erection; the commissioners may consider remonstrances, but the petitioners are entitled to be heard upon them. *Ibid.*

20. An independent school district will not be created where neither the petition nor the report alleges the existence of any physical object which renders it impossible to provide for the educational interests of the territory under the present organization. *Springgarden Independent School District*, 7 York 181.

(e) Suits against school districts.

21. The act 23 March 1877 (Brightly's Purdon 437), permitting taxpayers to be-

come parties to suits against school districts and other municipalities, applies only to suits pending in the common pleas; it does not apply to suits before magistrates, and an appeal by an individual taxpayer from the judgment of a magistrate against a school district will be stricken off. *Bowman v. Lebanon City School District*, 2 Dist. Rep. 321.

22. An injunction will not be granted against a school board upon a bill by a taxpayer alleging that the board is about to elect, unlawfully, one of its members secretary at a salary; it is only when the board has actually elected such a secretary that the question can be raised either by *quo warranto* against the secretary elect or by an injunction to restrain payment of the salary. *Comm'th v. Guthrie*, 8 Kulp 24.

II. School directors.

(a) Eligibility.

23. The court of common pleas has jurisdiction by *quo warranto* to determine whether the offices of school treasurer and school director are incompatible; in the county of Schuylkill the same person cannot hold both of said offices at the same time. *Comm'th v. Haeseler*, 161 P. S. 92.

(b) Election of school directors.

24. The act of 31 May 1889, providing for the election of a board of school controllers in cities of the third class, is a local law and unconstitutional. *Comm'th v. Reichard*, 137 P. S. 389; 8 C. C. 563; s. c. 5 Kulp 540. The consolidated district is therefore governed by a board of six directors under the act of 8 May 1854. *Comm'th v. Reynolds*, 137 P. S. 389; s. c. 27 W. N. C. 139; affirming s. c. 8 C. C. 568; s. c. 5 Kulp 547.

25. Upon an election for school directors, where six directors were to be chosen, two for three years, two for two years and two for one year, and the

balance of the six persons having a majority of all the votes cast failed to designate the term, but the six persons having a minority of all the votes cast had a majority of all the votes on which the term was designated; it was *held*, that the latter were elected; the act 11 April 1862, sec. 2 (Brightly's Purdon 348), only applies where all the voters neglect to designate on their tickets the term of office for which each person voted for is a candidate. *Chamberlin v. Hartley*, 152 P. S. 544.

26. Where two opposing candidates had an equal number of votes for school director, and at the next regular meeting of the board they appeared, but the respondent refused to participate in the drawing and the relator again appeared at the reorganized board at its next meeting, when the board declared a vacancy in the office and elected the respondent to fill it; it was *held*, that it was the duty of the reorganized board to comply with the relator's request to determine his right to the seat and that the respondent had no title to the office. *Comm'th v. Meanor*, 167 P. S. 292.

27. Upon the division of the 23d ward of the city of Philadelphia by the decree of the 11th November 1890, it became the duty of the citizens of the new 35th ward, under the act of 12 February 1889, to elect, at the election in February 1891, a full board of twelve school directors. The directors of the old ward should fill up their number to twelve, and at the election in February 1891 the citizens should elect four directors to serve for three years from the first Monday of January 1892. *Comm'th v. Connell*, 10 C. C. 93; s. c. 48 L. I. 45.

28. The act 8 May 1854, sec. 6 (Brightly's Purdon 347), providing that if the legality of any election for school directors be contested, the quarter sessions shall examine into the election and either confirm it or set it aside, and if set aside, then shall order a re-election, contemplates a contest on the sole ground of the

illegality of the whole election. It does not apply to proceedings under the act 19 May 1874 (Brightly's Purdon 763) where the only complaint is as to who were duly elected; in such a case the court will decide who was elected and will not order a new election. *Reed v. McArthur*, 15 C. C. 136.

29. Under the act 16 February 1883 (Brightly's Purdon 238), where a borough has been divided into wards, school directors must be elected by the voters of each ward from among the residents of the respective wards; this act is not repealed by the act 13 May 1889 (Brightly's Purdon 237), but the two acts must be read together. *South Chester School Directors*, 5 Del. 412.

(c) Vacation of office.

30. Equity will restrain by injunction a board of school directors from declaring in an illegal manner, the seats of certain members vacant. *Butts v. Howley*, 5 Kulp 338.

31. Where six persons constituting the board of school directors failed to meet and organize on the first Monday in June, but met separately in factions; it was *held*, that their offices thereby became vacant and might be filled by the court under the provisions of the act 8 May 1854, sec. 9 (Brightly's Purdon 347). That act was not repealed by article VII. sec. 4, of the constitution, providing for the removal of officers from office. *Butler Township School District Case*, 158 P. S. 159.

(d) Dismissal from office.

32. That a board of directors disregarded the demand of a committee representing the inhabitants of a village, to provide generally for the children or scholars of said village, does not render them liable to be dismissed from office under the provisions of sec. 9 of the act 8 May 1854 (Brightly's Purdon 347). *Nicklas's Petition*, 146 P. S. 212; reversing s. c. 9 C. C. 425.

33. School directors will not be removed because a schoolhouse is cheap, unsightly, hard to keep in repair and unfit for permanent use; where school directors have exercised their discretion in the location and number of schoolhouses and their character, the court will not interfere in the absence of gross abuse of such discretion. *Ohio Township School Directors*, 9 C. C. 392. See *Price v. Barrett Township School Directors*, 9 C. C. 395.

34. Under the act 8 May 1854, sec. 9 (Brightly's Purdon 347), the court cannot remove school directors on the ground of the illegal election of a school-teacher; school directors can only be removed for non-feasance, and in such case the court cannot remove a part of the board but must remove the whole board. *Union Township School Directors*, 12 C. C. 547.

35. School directors will not be removed because of their exercise of their discretion in closing a schoolhouse where it is shown that two new schoolhouses had been built to supply its place. *Dublin Township School Board*, 14 C. C. 464; s. c. 3 Dist. Rep. 691.

36. Where directors failed to provide and maintain suitable and adequate accommodations for school-children, but filed an answer to a rule upon them averring their willingness to provide proper facilities, the court will temporarily suspend the imposition of the penalty of removal provided by the act 6 June 1893 (Brightly's Purdon 363). *Washington Township School Directors*, 15 C. C. 509.

37. Where the directors and treasurer of a school district are commanded to pay a judgment out of the first unappropriated money of the district, they must use due diligence to get the money and pay the debt; unnecessary delay and obstructive operation would be a contempt of court for which they might be either removed or imprisoned for contempt. *Burgess v. Northmoreland Township School District*, 2 Lack. Jur. 106.

38. The seats of school directors will

not be declared vacant where the neglected duty is one, the performance of which calls for the exercise of deliberation and discretion. *Pfueger v. Lower Saucon*, 1 Northam. 43.

39. The court has no jurisdiction to vacate the seats of school directors unless all the members of the board are guilty of neglect. *Wallen v. Lake*, 2 Northam. 69.

III. School contracts.

40. One who contracts with and renders services for a *de facto* school board, not so *de jure*, cannot recover from the school district. *White v. Archbald School District*, 8 Atlan. 443.

41. The president of a school board acting for the same, or pretending to act for it, in making a contract which the board had no power to make, thereby becomes individually liable thereon. *Forcey v. Caldwell*, 9 Atlan. 466.

42. One who deals with the president of a school board is bound to know that the board of school directors may repudiate any provision of his contract to which it has not given its assent or which has not been ratified by it. *Roland v. Reading School District*, 161 P. S. 102. See *Roland v. Reading School District*, 161 P. S. 106.

43. School directors interested in a piece of property may, at the suit of a taxpayer, be enjoined from voting in favor of its purchase by the district; and this, though the purchase is being made in good faith and at a fair price. *Witmer's Appeal*, 15 Atlan. 428.

44. The 66th section of the act 31 March 1860 (Brightly's Purdon 532), forbidding any member of any corporation to be interested in any contract for the sale or furnishing of supplies or materials, cannot be extended by implication to apply to a purchase by a school board of real estate in which one of the directors is interested as an owner; such a purchase may be ratified by a new and disinterested board. *Trainer v. Wolfe*, 140 P. S. 279.

45. The purchase by a school board, of one of their number, of a lot of ground for school purposes, is not illegal under the 66th section of that act of 31 March 1860 (Brightly's Purdon 532). That act does not apply to contracts for the purchase of real estate. A contract in contravention of the act would be cured by its ratification by a new and disinterested board. *Trainer v. Lower Chichester School Board*, 4 Del. 344.

46. The secretary of a school board has no authority to give notice of the rejection of goods bought on trial, without the previous official action of the board. *Butler v. School District of Leighton*, 149 P. S. 351.

IV. Schoolhouses and property.

47. A court of equity has no jurisdiction to supervise and direct the exercise of the official discretion of a board of school directors in the location of a schoolhouse, where such discretion has been exercised without fraud. *Roth v. Marshall*, 158 P. S. 272.

48. Equity will not interfere by injunction with the selection of a site for a school building; that is wholly within the power and discretion of the controllers or directors. *Witherop v. Titusville School Board*, 7 C. C. 451.

49. The act of 4 April 1889 (Brightly's Purdon 361) does not authorize the use for school purposes of a lot of ground conveyed to the county for the use of its public buildings, an academy, and for the erection of a church or churches. *Tarbell's Appeal*, 129 P. S. 146.

50. When both sexes attend the school, it is the duty of the school directors to erect suitable and convenient water-closets, two in number, separated by a close and substantial fence at least seven feet in height, and to make provision for keeping said water-closets, at all times, in a clean, comfortable and healthful condition. Failure to do so is a good ground

for removal. *Springgarden Independent School District*, 7 York 181.

51. The act 6 June 1893 (Brightly's Purdon 362), authorizing the taking of certain public burying-grounds for school purposes, is unconstitutional as a local act, and passed evidently for the purpose of taking a certain burial-ground in the city of York, and it is also unconstitutional as impairing the obligation of a deed from John Penn to John R. Coates for the burial-ground in question, dedicating it to the purpose of a public burying-ground. *In re Potter's Field*, 8 York 145.

52. Where a borough was authorized by an act of assembly to erect water-works, with power to fix the rates for the use of the water, and some of the water was used in the building of a new school-house in the borough; it was held, that the school district was not liable for water charges for the water so used. *Emaus Borough v. Emaus School District*, 12 C. C. 349.

53. Where a city agreed with the water company not to extend the city pipes to that portion of a city lying south of a river, and the company agreed to make its assessment of all water rents in its territory at rates not higher than those assessed by the city north of the river, and the city agreed to furnish water to her own mains on the south side of the river for the purpose of supplying the fire-plugs and washing the streets, the water company agreeing to supply all fire-plugs not on the line of such city mains; it was held, that under such contract the school districts on the south side were not exempt from liability to the water company for water supplied to the schoolhouses. *St. Clair School District v. Monongahela Water Co.*, 166 P. S. 81.

54. Under the act 16 April 1870, P. L. 1219, requiring the board of controllers of the school district of Allegheny City to deposit all funds in a bank to be selected by them for the highest rate of interest they can obtain on current daily balances, the controllers cannot refuse to deposit in a bank of good standing which offers to

pay interest and give the deposit to a bank which refuses to pay interest, but offers, in consideration of the deposits, to lend the school district a large sum of money without interest if it should need to borrow. *Gilliford v. Allegheny City School District*, 165 P. S. 631.

55. Under the act 13 June 1836, sec. 14, school directors had no power to take possession of real estate held by trustees to the general use of a neighborhood, as a schoolhouse, except by conveyance from such trustees; the possession by school directors of such property with the assent of those interested was held not to be such an adverse possession as would raise a presumption of a grant. *Old Eagle School Property*, 36 W. N. C. 348.

V. Superintendent of schools.

56. A commission cannot be withheld from a duly elected superintendent of schools who holds a professional certificate, because certain branches taught in the schools in his borough are not included in those upon his certificate. *Shenandoah Borough School Superintendent*, 13 C. C. 458.

VI. Supervising principals.

57. The board of public education of Philadelphia may require that an applicant for the position of supervising principal shall have five years of approved experience as a teacher, and that this experience shall be certified to by the superintendent in office at the time the appointment is to be made, and a writ of mandamus will not issue against the board commanding them to certify to the election of a supervising principal who has not had such experience. *Comm'th v. Jenks*, 154 P. S. 368; affirming s. c. 12 C. C. 168.

VII. Teachers.

58. When a teacher of good moral character applies for a school and presents a

certificate of qualification as to scholarship and aptness to teach, that is an end of judicial inquiry into the action of the board in appointing her, as the law makes no further inquisition upon this point. *Hysong v. Gallitzin Borough School District*, 164 P. S. 629.

59. School-teachers will not be enjoined from remaining in possession of their schools where the question as to the time of their employment is disputed and in doubt. *Butler Township School District v. Dougherty*, 13 C. C. 233.

60. Under the act 10 May 1893 (Brightly's Purdon 366), the superintendent of public instruction is not required to grant without examination, permanent certificates, except to graduates of colleges legally empowered to confer degrees; the general incorporation of a literary institution under the act 29 April 1874 (Brightly's Purdon 405) does not legally empower it with that right. *In re College Graduates*, 14 C. C. 108.

61. Under the act 20 May 1857, sec. 10 (Brightly's Purdon 356), the two years' actual teaching which are the condition precedent to a teacher's certificate, must be in Pennsylvania. *In re Teacher's Certificate*, 4 Dist. Rep. 394.

62. The county superintendent of common schools cannot arbitrarily refuse to examine an applicant for examination and certificate to teach, unless such superintendent has absolute knowledge that the applicant is an immoral or intemperate man, unfit to have charge of a school. *Kell v. Rudy*, 15 C. C. 309.

63. School directors may employ as teachers sisters of a religious order of the Roman Catholic church and permit them while teaching to wear the garb of their order, provided no religious sectarian instruction be given or religious sectarian exercises engaged in. *Hysong v. Gallitzin Borough School District*, 164 P. S. 629.

64. The exclusion of a sister of charity from employment as a teacher in the public schools because she is a Roman

Catholic is a violation of the spirit of article I. of the Bill of Rights relating to religious liberty; the fact that such teachers contribute all their earnings beyond their support to the treasury of their order to be used for religious purposes has no bearing on the question of their right to employment as teachers. *Hysong v. Gallitzin Borough School District*, 164 P. S. 629.

65. Denominational religious exercises and instruction in sectarian doctrine have no place in our system of common school education; a teacher will be enjoined from conducting or permitting others to conduct such exercises in the school under his charge. *Stevenson v. Hanyen*, 1 Lack. L. N. 99; s. c. 42 P. L. J. 381.

66. Where the principal of a state normal school was dismissed from office for immoral conduct but without notice or hearing; it was *held*, that such a proceeding was irregular and unjust, but the supreme court sustained an injunction to restrain the discharged principal from assuming to exercise the office, on the ground that greater harm would result to the school and to the public service from disturbing the injunction than from sustaining it, but the injunction was sustained with a saving of all rights of the appellant to proceed at law for the collection of his salary for the remainder of the year, and the costs were put upon the winning party. *Edinboro Normal School v. Cooper*, 150 P. S. 78.

67. In an action by a teacher upon a written contract of employment signed by the president and secretary of the school board, it is necessary for him to show that the contract was executed by the authority of the board of school directors. *Whitehead v. North Huntingdon School District*, 145 P. S. 418.

68. In an action by a teacher upon a written contract of employment, the minutes of the school board are the best evidence of their action in dismissing the plaintiff for incompetency, cruelty, negligence or immorality, and in the absence of corruption, bad faith or a clear

abuse of power they are conclusive; parol testimony is inadmissible to establish the existence of such cause of dismissal.

Whitehead v. North Huntingdon School District, 145 P. S. 418; *McCrea v. Pine Township School District*, 145 P. S. 550.

69. The councils of a city have power to recognize a *bona fide* claim for payment of money, the right to which is in dispute, and to pass an ordinance directing compensation for service rendered by a *de facto* employee of a sectional school board, and to direct payment of the same by means of a warrant drawn by the clerks of councils; and this, although the board of education has refused a confirmation of the claim and the appointment of the claimant has been declared illegal. *Bailey v. Philadelphia*, 167 P. S. 569; s. c. 36 W. N. C. 236; affirming s. c. 3 Dist. Rep. 543.

VIII. Teachers' institutes.

70. At the close of the county Teachers' Institute, upon presentation of the proper certificate, it is the duty of the county treasurer to pay to the county superintendent the expenses incurred in holding the same, provided they do not exceed the sum of two hundred dollars. *Williams v. York County Commissioners*, 1 York 181.

IX. Evening schools.

71. Where the petition for a free evening school was not presented to the directors until December, when it was impossible for them to open a night school for a term of not less than four months without closing the day schools for a nearly equal length of time, and perhaps breaking the contracts with the teachers for the day schools; it was *held*, under the act 22 May 1883 (Brightly's Purdon 360), that an order would not be made on the directors to open the evening school. *Denison School District*, 6 Kulp 457.

X. Scholars.

72. School directors may, in the exercise of a sound discretion, exclude from the public schools, pupils who have not been vaccinated; the courts will not say that such a resolution of exclusion is an abuse of an official discretion. *Duffield v. Williamsport School District*, 162 P. S. 476.

73. The inmates of the Pennsylvania Memorial Home, located in the borough of Brookville, and chartered for the purpose of providing comfortable homes and maintenance for the children of deceased and disabled Union soldiers, are not entitled to admission to the common schools of the borough; the act 18 April 1893 (Brightly's Purdon 368) was only intended to secure common school privileges to the children of soldiers who were obliged to seek employment and homes in families outside of the district of their parents' residence. *Comm'th v. Directors of Brookville*, 164 P. S. 607.

74. The assignment of pupils to schools is in the discretion of the directors; the law does not require that children be admitted to the school buildings most convenient to the residence of their parents. *Comm'th v. School Directors*, 4 Dist. Rep. 314.

75. The common school authorities have no right to make any distinction among the pupils by reason of race or color. *Comm'th v. School Directors*, 4 Dist. Rep. 314.

76. The right of a school-teacher to chastise the pupils is considered in a note to *Sheeham v. Sturges*, 2 Atlan. 843.

XI. Text-books.

77. Notice to teachers on August 29 of a meeting the next evening for the selection of text-books is not sufficient under sec. 25 of the act of 8 May 1854 (Brightly's Purdon 369). *Barber v. Wilhelm*, 7 C. C. 214.

78. In the selection of text-books, the minutes of the board must show an affirmative vote of a majority of the

whole number; such an entry cannot be made at a meeting subsequent to the opening of the schools. *Ibid*.

79. If new text-books be adopted by a void resolution, those formerly used will continue to be used; and this, though some of them were readopted by the void resolution. *Ibid*.

80. Under the act 8 May 1854, sec. 25 (Brightly's Purdon 369), providing for the selection of school-books; it was *held*, that the word "immediately" did not mean instantly, but within a reasonable time; where the teachers were elected on July 25th, the meeting for considering text-books was called on August 1, to be held on August 22, and the schools were to open on August 24; it was *held*, that the meeting was within a reasonable time after the election of teachers and before the opening of the schools. Where three weeks intervened between the call and the meeting and twenty-four out of twenty-seven attended and two sent excuses; it was *held*, that a notice by publication in a newspaper of general circulation, served the purpose for which it was intended. Duties and powers of teachers at such a meeting are purely advisory, and where the directors, after consulting and advising with them and receiving their views in writing, adjourned until a later hour on the same day before taking a final vote; it was *held*, that in the absence of evidence of secrecy or fraud, the irregularity was not fatal. *Maloney v. Rogers*, 6 Kulp 289.

81. Where the plaintiff agreed to furnish text-books of a certain kind at a fixed price per volume and during the year he furnished books of a kind not embraced in the contract; it was *held*, that under the evidence, it was for the jury, whether the plaintiff had undertaken in any manner to furnish the latter books at a particular price. *Roland v. Reading School District*, 161 P. S. 106. See *Roland v. Reading School District*, 161 P. S. 102.

82. Under the act 8 May 1854, sec. 25 (Brightly's Purdon 369), a meeting of the

school board called prior to the election of teachers or without notice to the teachers, to adopt school-books, is illegal and in violation of that act. *Butler v. Shirley Township School District*, 15 C. C. 291.

83. School directors or controllers have no power to adopt more than one series of text-books covering the same studies, but where the schools are graded and the course of studies is divided into steps, they may adopt a series made up of the books of different authors, but such series must be so arranged as to be uniform in the steps in which they are used throughout the district. *Francis v. Allegheny City School District*, 41 P. L. J. 19.

XII. State appropriation.

84. Under the general appropriation act 6 June 1893, sec. 10, P. L. 314, it was held, that the entire proportion of the general appropriation for school purposes should be paid to the city of Philadelphia, and that the specific appropriations to the Teachers' Institute, School of Design and Teachers' Annuity and Aid Association were payable by the city out of the same. *School Appropriations*, 15 C. C. 95.

XIII. School taxes.

85. A school district having levied an annual tax for school purposes, cannot levy another tax for the same purpose during the same year. *Verona Borough School District's Appeal*, 1 Mona. 697.

86. A bill alleging that a board of school directors have conspired to collect a building tax for the purchase of a building in which some of them are interested, sufficiently avers that some of them have an interest in the building and are acting together to sell it to the district. *Witmer's Appeal*, 15 Atlan. 428.

87. Under sec. 33 of the act 8 May 1854 (Brightly's Purdon 337), a special building school tax may be used to lease a building and fit it up for use as a

schoolhouse. *Hackett v. Emporium Borough School District*, 150 P. S. 220.

88. A borough will be restrained by injunction from assessing and collecting a school tax upon the land of one of its citizens situated in an adjoining township, but annexed to land belonging to the same person lying within the borough limits. *Arthur v. Polk Borough School District*, 164 P. S. 410.

89. School taxes are not applicable to the education of the children of another district; the children who are inmates of the Children's Industrial Association of Harrisburg have no right to admission to the common schools in Upper Swatara township where their parents are residents of other school districts. *Comm'th v. Directors of Upper Swatara*, 164 P. S. 603.

90. School taxes are not payable out of the proceeds of the sale of real estate, under the local act of 11 April 1866. *Barclay v. Leas*, 9 C. C. 314.

91. In school districts in cities of the third class which have not accepted the act 23 May 1889, school taxes after the time fixed for their registry are not liens until registered, and are not payable out of a fund produced by a sheriff's sale. *Smith v. Meadowbrook Brewing Co.*, 3 Lack. Jur. 145.

92. Where a board of school directors have failed to make an assessment of school taxes, a sale of land for non-payment of school tax will vest no title in the purchaser. *Irvin v. Gill*, 155 P. S. 8.

93. The court of quarter sessions has no jurisdiction of an appeal from the levying and collection of school taxes. The act of 15 April 1834 (Brightly's Purdon 1983) refers only to road and poor taxes. *Smith v. Middle Smithfield School District*, 7 C. C. 256.

94. A writ of error does not lie on an appeal from a township auditor's report on a school district treasurer's account. *Mohney v. Red Bank School District*, 15 Atlan. 891.

95. The city treasurer of Scranton being *ex officio* school treasurer, is entitled

to such compensation, not exceeding two per cent, as shall be determined by the school controllers. He is not required to submit his accounts to the city controller, and the latter's disallowance of his claim is not conclusive upon him. *Scranton School District v. Simpson*, 133 P. S. 202; s. c. 25 W. N. C. 517; affirming s. c. 1 Lack. Jur. 165.

96. In cities of the third class, under the act of 23 May 1889 (Brightly's Purdon 1565), collectors of school taxes may arrest and commit for non-payment, delinquents who do not possess sufficient goods and chattels. *Fulton v. Jenks*, 9 C. C. 126.

97. A township tax collector is bound to collect the taxes for a school district in the township, and may be compelled to do so by mandamus, if he refuses. *Somerville v. Gallaher*, 13 C. C. 666.

98. The collection of a school building tax will be restrained by injunction until it appears that the levy was authorized and legal. *Gilbert v. Tierney*, 14 C. C. 472.

99. Mandamus lies to compel a tax collector to pay over money collected as school taxes to the treasurer of the school district. *Comm'th v. O'Day*, 6 Kulp 167.

100. Where there were two boards of school directors and each claimed to be the acting legal board, the court refused a mandamus which was applied for by one of the boards to compel the township collector to pay over the school taxes to the treasurer of their board. *Comm'th v. O'Day*, 6 Kulp 177.

101. Where a certificate of the balance due by a collector of school taxes was filed by the board under sec. 13 of the act 11 April 1862 (Brightly's Purdon 338), and judgment entered for the amount against the collector and his sureties; it was *held*, that there was no power given to the court to open the judgment, and that the fact that the collector had not been furnished with a warrant when the duplicate was placed in his hands, gave him no equity to require the

court to open the judgment. *Comm'th v. Titman*, 148 P. S. 168.

102. The sureties on a tax collector's bond are liable for school taxes collected by him, although the school directors did not deliver to the collector their warrant with the tax duplicate of the year, as provided by the act 25 June 1885 (Brightly's Purdon 1993). *Comm'th v. Stambaugh*, 164 P. S. 437.

103. A tax collector who has received a duplicate for school taxes under the act 25 June 1885 (Brightly's Purdon 1993), is liable for the whole amount of the duplicate remaining unpaid and unexonerated after three months from the time the collector receives the corrected duplicate as provided by the act 15 April 1834, sec. 49 (Brightly's Purdon 1992). *Comm'th v. Stamhaugh*, 164 P. S. 437.

104. The sureties of a school tax collector who received a tax duplicate with a classified levy, under the act of 18 March 1875, and whose duplicates were subsequently reformed, on that act being declared unconstitutional, were thereby discharged from liability on their bond. *Scranton School District v. McNamara*, 1 Lack. Jur. 153; s. c. 2 Lack. Jur. 69; 4 Del. 439; 2 Lack. Jur. 58, 68, 185.

105. In an action against the surety of a collector of school taxes, the defendant is entitled to have the moneys received and paid by the officer during the year he was surety, appropriated to his relief; and this, although it may appear that the officer was a defaulter for several preceding years. *Peach Bottom School District v. Swagert*, 2 York 9.

COMPENSATION.

See AGENCY, IX.: ARBITRATION: ATTORNEYS: AUDITORS: CONSTABLES: CONSTITUTIONAL LAW, VIII., X.: EQUITY, XVII.: JUSTICE OF THE PEACE: OFFICE, X.: PROTHONOTARY, III.: TRUSTEES, VII.

COMPETENCY OF WITNESSES.

See EVIDENCE, XXXVII., XLVII.

COMPOSITIONS WITH CREDITORS.

See DEBTOR AND CREDITOR, VII.

COMPOUNDING CRIMES.

See CONTRACT, VIII.

1. An agreement not to arrest and prosecute an embezzler will constitute a defence to a mortgage, but the burden is on the mortgagor, who sets up such a defence, to establish it by competent evidence. *Saalfeld v. Manrow*, 165 P. S. 114; reversing S. C. 13 C. C. 497. As to compromise under act 31 March 1860, sec. 9 (Brightly's Purdon 547), see case in lower court.

COMPROMISE.

See ATTORNEYS: DEBTOR AND CREDITOR, V.

COMPUTATION OF TIME.

See TIME.

CONCLUSIVENESS OF JUDGMENT.

See JUDGMENT, VI.

CONDITION.

See ARBITRATION: BENEFICIAL SOCIETIES: CONTRACT: DEVISE: FORFEITURE: LEGACY: RAILROADS: SALE: VENDOR AND PURCHASER.

1. Where an ordinance provides that it shall not go into effect until accepted by the proper officials, the conditions of the ordinance are conditions precedent, and the ordinance cannot become effective until the conditions are performed in their entirety. No amount of hardship or impossibility or illegality will avoid the bar of a condition precedent unperformed. *Allegheny v. Millville, Etna & Sharpsburg Street Ry. Co.*, 159 P. S. 411.

CONDITIONAL LIMITATIONS.

See DEVISE, VII.

CONFESSIONS.

See EVIDENCE, XXIX.

CONFIDENTIAL RELATION.

See EQUITY, XIV.: FRAUD: ORPHANS' COURT, III.: WILLS, V. (d).

CONFLICT OF LAWS.

See JURISDICTION.

- I. Extra-territorial effect of laws.
- II. Of the *lex loci contractus*.
- III. Of the *lex loci rei sitæ*.
- IV. Of the *lex domicilii*.
- VI. Notes and bills.
- VII. Bankruptcy and insolvency.
- VIII. Marriage and divorce.
- IX. Wills and administrations.

I. Extra-territorial effect of laws.

1. Upon a sale in this state under execution of the assets of a New Jersey corporation, the New Jersey statute giving prior lien to wages will not be enforced. *Baker v. United States Fruit Co.*, 7 C. C. 309.

2. A chattel mortgage which is good in New York will not be enforced against the chattels after they have been removed to this state and purchased by an innocent third party. *Armitage v. Spahn*, 4 Dist. Rep. 270.

II. Of the *lex loci contractus*.

3. In a suit upon a note executed in another state the rate of interest is regulated by the statutes of that state. *Sprouls v. McCloud*, 5 Cent. 453; *Clark v. Searight*, 135 P. S. 173.

4. In an action in this state upon a contract made in New Jersey, if the statute of limitations of New Jersey differ from the Pennsylvania statute, it will be disregarded by the Pennsylvania courts; on the other hand, a statute regulating

procedure will be applied by the Pennsylvania court as a part of the contract of the parties. *Seagrove Building & Loan Ass'n v. Stockton*, 148 P. S. 146; affirming s. c. 9 C. C. 593.

5. A bond given by a married woman, signed in Pennsylvania prior to the act 3 June 1887 and delivered in Delaware accompanying a purchase-money mortgage of real estate situate in Delaware and purchased by the married woman, being valid in that state as a personal obligation, will be enforced against her in Pennsylvania; the contract is governed by the place of delivery. *Baum v. Birchall*, 150 P. S. 164; reversing s. c. 11 C. C. 222.

6. Where a married woman living in Maryland bought certain goods at a sheriff's sale of her husband's property, and gave a note signed by herself, her husband and two sureties, and the note was subsequently paid by the wife and the sureties, and the husband coming to Pennsylvania, the property was again sold as his property and the wife brought an action for damages; it was *held*, that evidence was admissible on behalf of the plaintiff, that under the law of Maryland, a married woman's note, to be binding upon her, must be signed by her husband. *Bollinger v. Gallagher*, 163 P. S. 245. See s. c. 170 P. S. 84.

7. The orphans' court will not order the sale of the separate estate in Pennsylvania of a deceased married woman who died domiciled in Virginia, for the payment of a debt contracted in Virginia by indorsement of her husband's note; and this, though a remedy *in rem* against her estate is given by the Virginia act of 4 April 1877. *Whitehurst's Estate*, 7 C. C. 12.

8. Where the bonds of a corporation, having coupons attached, and the mortgage to secure payment, were made and executed in the state of New Jersey, and related to property entirely within that state; it was *held*, that they were to be interpreted as a New Jersey contract, and this, though the coupons were payable in New York; in an action on such coupons

in our courts, the law of New Jersey requiring first a foreclosure sale of the mortgaged premises will be allowed as a defence. *Newman v. Brigantine Beach R. R. Co.*, 15 C. C. 625.

9. Matters connected with the performance of a contract are governed by the law prevailing at the place of performance; where a contract for the loan of money to a person about to embark in business was made in consideration of a share of the profits, and executed in Pennsylvania, but the business was to be conducted in New York; it was *held*, that the question whether there was a liability as partners as to third persons was to be determined by the law of New York. *Waverly Nat. Bank v. Hall*, 150 P. S. 466.

10. Where no place is designated by the contract, the place of sale is the point at which the goods are set apart and delivered to the purchaser or to a common carrier, who for the purpose of delivery represents him; where a resident of Maryland, being in Pennsylvania, sold goods then in Maryland to a resident of Pennsylvania, and subsequently the terms of sale were modified in letters written from their respective states; it was *held*, that the contract was a Maryland contract and was governed by the laws of that state, that a sale to one who knows himself to be insolvent passes no title. *Perlman v. Sartorius*, 162 P. S. 320.

11. Where the travelling salesman of a Baltimore house offered tobacco for sale by sample to a resident of this state, and the latter offered a lower price, which the agent telegraphed to his principal, who authorized him in answer to close the bargain at the terms offered; it was *held*, that the contract was not a Maryland contract and was not governed by the law of that state, that a sale to one who knows himself to be insolvent passes no title. *Penninghaus v. Jacobs*, 12 Lanc. 203.

III. Of the *lex loci rei sitæ*.

12. A decree of sale under foreclosure proceedings in the state of New York passes no title to property in Pennsylvania. *Pittsburgh & State Line Railroad Co.'s Appeal*, 4 Cent. 107; affirming *Rothschild v. Rochester & Pittsburgh Railroad Co.*, 1 C. C. 620.

13. The statute of New Jersey 23 March 1881, providing that to collect a debt secured by bond and mortgage a creditor must first foreclose the mortgage and sell the mortgaged premises, and then if there be any deficiency, he may sue upon the bond provided his suit be commenced within six months from the sale of the mortgaged premises, and if he recover judgment in such suit for the balance of the debt, the judgment debtor may redeem the property, provided his suit for redemption is brought within six months after the entry of the judgment for the balance of the debt, is a bar to a suit on the bond in this state more than six months from the date of the sale of the mortgaged premises. *Seagrove Building & Loan Ass'n v. Stockton*, 148 P. S. 146; affirming s. c. 9 C. C. 593.

14. A purchase-money mortgage of real estate situate in Delaware is governed by the *lex rei sitæ*. *Baum v. Birchall*, 150 P. S. 164.

15. Where a person is injured in New Jersey and he subsequently dies of his injuries in this state, no action can be brought for his death in this state unless there was a negligent act or omission here which was directly responsible for the injury received in New Jersey. *Derr v. Lehigh Valley R. R. Co.*, 158 P. S. 365.

IV. Of the *lex domicilii*.

16. That the validity of a transfer of personal property is to be determined by the law of the domicile, is subject to the power of the state to provide otherwise as to any property having an actual or legal situs within its borders. *Loftus v. Farmers' & Mechanics' Nat. Bank*, 133 P.

S. 97; s. c. 25 W. N. C. 459; affirming s. c. 46 L. I. 46.

17. Where, under a benefit certificate issued under the laws of Illinois, the benefits were to be paid to the devisees of the member, or if no will, then to his heirs at law, and a member died without children and left a will by which he appointed an executor but made no specific bequest of the benefits; it was held, that the executor was not a devisee within the meaning of the certificate, but that the fund was properly distributable under the intestate laws of the state of Pennsylvania, which was the testator's domicile. *Northwestern Masonic Aid Ass'n v. Jones*, 154 P. S. 99.

18. Upon a *habeas corpus* by a father to secure the custody of a child, where the wife filed an answer averring that the relator was not a fit person to have the custody of the child, and it was not denied that both the parties had previously been domiciled in New Jersey, and that the relator continued to reside there, and that under the laws of that state he was the natural guardian of the child; it was held, that no consideration of comity justified the court in awarding the child to the relator without inquiring as to his fitness to have its custody. *Comm'th v. Sage*, 160 P. S. 399; reversing s. c. 2 Dist. Rep. 553.

VI. Notes and bills.

19. A promissory note, not made payable elsewhere, is payable at the place where it was made, and bears interest according to the law of the latter place. *Clark v. Searight*, 135 P. S. 173; *Sprwells v. McCloud*, 5 Cent. 453.

VII. Bankruptcy and insolvency.

20. An insolvent corporation may prefer a creditor by a confession of judgment, and where no such disability is imposed upon a foreign corporation by its charter, the prohibition of such a preference by a general enactment of the state where the

corporation is chartered can have no extra-territorial effect. *Fairpoint Mfg. Co. v. Philadelphia Optical and Watch Co.*, 161 P. S. 17.

21. A foreign corporation may assign its property in this state for the benefit of creditors, although an act of the state of its incorporation forbids such an assignment in said state. *Active Workers v. Sanders*, 28 W. N. C. 321.

22. The appointment of a receiver in another state will not be recognized in this state, where his claims come in contact with those of citizens of this state or of citizens of other states, having the right to sue in this state. *Clark Co. v. Toby Valley Supply Co.*, 14 C. C. 344.

23. A writ of foreign attachment lies at the suit of a salesman, a resident of this state, against a foreign corporation for a debt due him by the corporation; and this, though the property attached be in the hands of receivers appointed by the court of another state after the creation of the debt. Our courts will not recognize the claims of a foreign receiver where such claims conflict with the rights of citizens of this state. *Lett v. Thurber Whyland Co.*, 15 C. C. 666; s. c. 4 Northam. 335.

24. Where receivers had been appointed in the District of Columbia for an insolvent Virginia corporation; it was *held*, that the courts of this state would not give such effect to the appointment as would enable it to prevail over contemporaneous and subsequent attachment executions by Pennsylvania creditors. *Smith v. Fidelity Building Loan and Investment Ass'n*, 4 Dist. Rep. 317.

VIII. Marriage and divorce.

25. The validity of a marriage is to be determined by the law of the place where such marriage was celebrated. *Moul's Estate*, 1 York 185.

26. The invalidity of the marriage of a minor in Ohio may be shown by its statutes and laws. *Easley v. Comm'th*, 11 Atlan. 221.

27. The marriage of a minor without the consent of his parents or guardian being void in England where it was celebrated (under the act 26 George 2, chap. II.), the husband cannot be prosecuted for adultery in subsequently living with another woman in this state. *Comm'th v. Burton*, Vaux's Dec. 83.

28. Where a husband deserts his wife in this state and goes to another state, the courts of that state have no jurisdiction to grant a divorce on his petition while she is still domiciled here. *Fyock's Estate*, 135 P. S. 522.

29. If it be shown that the respondent never resided in this state, the proceedings will be dismissed. *Bennett v. Bennett*, 1 Lack. Jur. 453.

30. For an offence committed in another state our courts have no jurisdiction, unless the parties were once domiciled here, and the domicile of the injured party continues here still or has been regained; and this, though service be made on respondent while temporarily in the county. This rule does not apply, however, where the divorce is sought on the ground that the alleged marriage was procured by fraud in another state and has not since been confirmed; in such cases the *lex fori*, rather than the *lex loci*, will govern. *Hines v. Hines*, 10 C. C. 74; s. c. 48 L. L. 34. See an interesting comment on, and approval of, this case by Arnold, J., in the Philadelphia Times of 20 January 1891.

31. Where a divorce is granted in a state where one of the parties is domiciled, and of which the other party has always been a non-resident and has made no defence, the decree will be *held* to be valid only in the state in which it is granted. *Comm'th v. Steiger*, 12 C. C. 334.

32. A decree of divorce in a foreign jurisdiction against a respondent who resided in this state, and upon whom no personal service was had, and to whom no notice was given other than by publication, has no effect in this state, and will not bar an order on the libellant for the support of the respondent here. *Comm'th v. Shuler*, 2 Dist. Rep. 552.

33. As to the validity of a foreign divorce, see note to *Gregory v. Gregory*, 3 Atlan. 282.

IX. Wills and administrations.

34. An original foreign will is entitled to probate here, where the testator's lands lie here, and the personalty has been administered at the domicil. *Butler's Estate*, 37 P. L. J. 122.

35. If a will has been probated and deposited in a foreign court, a copy may be admitted to probate here on due proof of the execution of the original. *McDonald's Estate*, 130 P. S. 480; affirming s. c. 36 P. L. J. 324.

36. If the will of a married woman be executed in conformity to the laws of this state, it will pass title to realty situated in this state; and this, though such will be void by the law of her domicil. *Martin's Estate*, 11 C. C. 245; s. c. 30 W. N. C. 461.

37. Where a will was duly executed by a resident of New York and according to the laws of both New York and this state; it was held, that it could be admitted to probate first in this state, where the principal part of the estate was in this state at the time of the death of the decedent. *Brown's Estate*, 13 C. C. 289.

38. The law of the domicil governs the distribution of personalty. *Wisler's Estate*, 6 Montg. 159.

39. Upon the distribution of a fund raised here under ancillary letters, the orphans' court will not pass upon a question as to what is the law of the domicil, but will direct the fund to be paid to the administrator *cum testamento annexo* at the domicil. *Ruebsam's Estate*, 26 W. N. C. 311.

40. The court of ancillary jurisdiction will not remit the surplusage of personal estate to the domiciliary jurisdiction for distribution where there are parties entitled to share in such property claiming distribution in the ancillary jurisdiction

and there are no domiciliary creditors. *Welles's Estate*, 161 P. S. 218.

41. Where a decedent was a native of Germany, but lived in England for fourteen years and there abandoned his wife and left England for this country; it was held, upon a distribution of his estate, that his domicil of choice having been abandoned, his domicil of origin was resumed by operation of law, and as his relatives in Germany had asked for the distribution of his estate in this jurisdiction, the estate would be distributed in accordance with the laws of this state. *Bremme's Estate*, 13 C. C. 177; s. c. 32 W. N. C. 135.

42. A court of ancillary jurisdiction may, in its discretion, award the payment to a resident legatee before ordering the remission of the balance to the jurisdiction of the testator's domicil, but it will not do so where questions exist which can only properly be determined under the law of the latter jurisdiction. *Harlan's Estate*, 16 C. C. 51.

43. Where an executor took out ancillary letters here, where he sold real and personal property for which he accounted in the court of the domicil, and a legatee who had demanded his legacy from the executor of the domicil and had brought suit for it filed a petition here after the lapse of ten years to compel the filing of an ancillary account; it was held, that the executor was warranted in presuming that the legatee had, by acquiescence, dispensed with the filing of an ancillary account, and that it therefore would be inequitable to order the filing of such an account. *Harlan's Estate*, 16 C. C. 51.

44. Where money is received for damages to land or from the sale of land in New Jersey by the guardian of a minor since deceased, it will be remitted to the guardian of the intestate minor in New Jersey to be distributed according to the law of that state. *Hough's Estate*, 3 Dist. Rep. 187.

45. Where there are domestic creditors, the executors of a mortgagee who was

domiciled in another state at the time of his death may be required to account in this state for the proceeds of a mortgage foreclosed by process in this state; such a foreign executor cannot escape liability to so account by proceeding in the name of a merely nominal assignee. *Myrick v. Hutchinson*, 6 Kulp 293.

46. A "lease and demise" of all the anthracite coal in and upon and under certain land which the party of the second part can take from the same within and during the term of twenty-five years with the usual clauses as to minimum, etc., amounts to a sale of the coal in place and not to a mere license to take the coal, and after the death of the grantor the royalties accruing are distributable as personalty, the share of a daughter who died after her father being distributable to her husband and children according to the law of the state in which she was domiciled. *Hancock's Estate*, 7 Kulp 36.

47. Where letters of administration were taken out in this state in the forum where the assets were found, but the domicil was in another state, and the next of kin and sole heir resided in the said forum, and the only known creditor presented his claim there, although he resided at the decedent's domicil; it was held, that it was not necessary for the administrator to remit the balance in his hands to an administrator to be appointed at the decedent's domicil, for distribution. *Weaver's Estate*, 12 Lanc. 57.

48. A Pennsylvania debtor may make payment to a foreign administrator so long as there are no Pennsylvania creditors; and this, though the debt be secured by mortgage on lands in this state. *Colburn v. Wells*, 1 Lack. Jur. 106.

49. Where the proceeds of land in New Jersey are awarded for distribution to a guardian in New Jersey, the latter will not be required by the orphans' court in this state to enter security for the faithful performance of his duty. *Hough's Estate*, 3 Dist. Rep. 187.

50. Where real estate has been sold by

executors in another state and administration raised there, the decree of the foreign court as to compensation due the executors in connection with the sale is conclusive here. *Stockham's Estate*, 7 C. C. 321; s. c. 46 L. I. 281.

51. An assignment by a New York executrix of a claim of her testator against a party domiciled in New York will be recognized in this state to enable the assignee to maintain a suit here. *Elmer v. Hall*, 148 P. S. 345.

CONSIDERATION.

See CONTRACT: PROMISSORY NOTES, II.

CONSOLIDATION OF ACTIONS.

See PRACTICE, VI.

CONSPIRACY.

See CRIMINAL LAW, LI.; TRADES-UNIONS.

1. If a sale be made on execution under an agreement that the plaintiff should bid in the property at any price and satisfy the judgment, such an agreement is binding, and a subsequent revival of the judgment by the plaintiff and defendant with intent to defraud other creditors, is a conspiracy for which the latter may recover. *Morley v. Elsbree*, 17 Atlan. 212; s. c. 2 Mona. 281.

2. In a suit by one judgment creditor against another, alleging a conspiracy with the common defendant to cheat and defraud the plaintiff, by procuring the revival of the defendant's judgment, the plaintiff may show that the latter had been paid previous to its revival. *Ibid.*

3. In case for conspiracy against three defendants, if it be shown that one, as plaintiff's agent to buy hay for him, turned it over to his co-defendants, though bought with plaintiff's money, recovery may be had against him alone. *Rundell v. Kalbfus*, 125 P. S. 123; *Collins v. Cronin*, 117 *Ibid.* 35.

4. In an action for a conspiracy to defraud, it is error for the court to call the attention of the jury to the fact that if judgment be given for the plaintiff, the defendants will not be entitled to the exemption, and will be liable to arrest. So, it is error to charge that before finding against the defendants, the jury ought to be satisfied of their guilt by "clear and full evidence," and that the circumstances ought to be such as are inconsistent with the theory of innocence; and this, though the court add that the jury need not be satisfied beyond a reasonable doubt. *Catasauqua Mfg. Co. v. Hopkins*, 141 P. S. 30.

5. In an action for conspiracy to defraud, where the testimony indicated fraud by one of the defendants and conduct on the part of the others that tended to aid in its accomplishment; it was held, that the question of intent was for the jury, and it was error to direct a verdict for the defendants. *Percival v. Harres*, 142 P. S. 369.

6. In an action by a creditor against his debtor and another person to whom the debtor has confessed judgment, to recover damages for the loss of the debt caused by an alleged conspiracy between the defendants, the case will be withdrawn from the jury unless the evidence of collusion does more than merely raise a suspicion. *Merchants' & Manufacturers' Nat. Bank of Pittsburgh v. Tinker*, 158 P. S. 17.

7. Where it appeared that workmen engaged in the building trade had entered into a lawful combination to advance wages by reducing the hours of labor, and the defendants were members of an association of employers who agreed among themselves that they would not sell material to contractors who conceded the advance, and who induced other dealers not to furnish such material; it was held, that the defendants were not liable in damages to a person in the same business who aided the strike by selling materials to the strikers and contractors, and who, by reason of the combination,

was not able to procure all of the material which he desired. It was not decided whether the acts 8 May 1869, 14 June 1872, 20 April 1876 and 16 June 1891 (Brightly's Purdon 2017, 2019) are void because they embrace only a particular class of citizens. *Cote v. Murphy*, 159 P. S. 420; *Buchanan v. Kerr*, 159 P. S. 433.

CONSTABLES.

- I. Election of constables.
- II. Deputy constables.
- III. Constables' bonds.
- IV. Duties of constables.
- V. Powers.
- VI. Responsibilities.
- VII. Actions against constables.
- VIII. Compensation.

I. Election of constables.

1. The act of 4 May 1889 (Brightly's Purdon 373), providing for the election of constables in wards of cities of the second and third classes, is not in conflict with article III., sec. 7, of the constitution. A constable is not strictly a township or ward officer within the meaning of that section, and his election is capable of classification. *Reading's Constables*, 8 C. C. 101.

2. The terms of constables in Philadelphia remain at five years, notwithstanding the act 14 February 1889 (Brightly's Purdon 373). *Barr's Petition*, 8 C. C. 64.

3. A borough may elect both a constable and a high constable. The latter is not bound to execute a warrant issued by a justice, but he is the executive officer of the burgess and town council to serve their notices and execute legal mandates. *Comm'th v. Schaffer*, 7 C. C. 24.

4. Since the passage of the act 14 February 1889 (Brightly's Purdon 373) the term of a borough constable is for three years; under that act the voters of each ward in a borough should elect their own constable. *Womer's Bond*, 2 Dist. Rep. 670.

5. The high constable provided by the act 10 May 1878 (Brightly's Purdon 238) for boroughs divided into wards is a constable within the meaning of the act 14 February 1889 (Brightly's Purdon 373), and must be elected for three years. *Comm'th v. Atticks*, 16 C. C. 147.

6. The act of 14 February 1889 (Brightly's Purdon 373), providing for the election of constables for three years, applied to the election on the 3d February of the current month; and this, though ten days' notice could not be given of the election. *Constable's Case*, 7 C. C. 550; s. c. 25 W. N. C. 555; *Weikel's Bond*, 8 C. C. 121; contra, *Tallon's Bond*, 7 C. C. 636; *Hunsinger's Case*, 8 Ibid. 173; *Constables' Bonds*, Ibid. 282.

7. Where, under the act 14 February 1889 (Brightly's Purdon 373), a person was elected to the office of constable on February 17, 1889; it was held, that he held his office for three years. *Burrell Township Constable*, 11 C. C. 436.

8. The act 14 February 1889 (Brightly's Purdon 373), authorizing the election of constables for three years, was held to apply for the first time to constables elected in 1890. *Comm'th v. Erdman*, 11 C. C. 285. See *Green Township Constables*, 11 C. C. 287.

9. Under the act 14 February 1889 (Brightly's Purdon 373), providing for the triennial election of constables, such triennial election began with the February election of 1890; an election at a different year and triennially thereafter is void. *English's Case*, 16 C. C. 129.

10. A person appointed under the act 15 April 1834 (Brightly's Purdon 373) to fill a vacancy in the office of constable, will hold the office only until the qualified voters at the next annual election shall elect a constable; and this, though it may be less than three years after the first incumbent's election under the act 14 February 1889 (Brightly's Purdon 373). *Rudy's Case*, 9 C. C. 467.

11. Under the act 14 February 1889 (Brightly's Purdon 373), constables are to be elected for a term of three years at

the next annual election after the happening of a vacancy. *Green Township Constables*, 11 C. C. 287; *In re Davis*, 7 Kulp 355; *Dauphin Borough Constable*, 4 Dist. Rep. 35; contra, *Tyson's Case*, 13 C. C. 212; *Sadsbury's Constable*, 3 Dist. Rep. 589.

12. Under the acts 15 April 1834, sec. 109, and 14 February 1889 (Brightly's Purdon 373), where a vacancy occurs in the office of constable, an appointment to fill the vacancy should be for the balance of the year, and at the next annual election a constable should be elected for three years. *Carr's Case*, 1 Dist. Rep. 262.

13. Under the act 14 February 1889 (Brightly's Purdon 373), elections for constables are to be held but once in three years, and where a vacancy occurs, an appointment must be made by the court for the unexpired term. *Tyson's Case*, 13 C. C. 212; *Sadsbury's Constable*, 3 Dist. Rep. 589; contra, *Green Township Constables*, 11 C. C. 287; *In re Davis*, 7 Kulp 355; *Dauphin Borough Constable*, 4 Dist. Rep. 35.

14. The act 14 February 1889 (Brightly's Purdon 373) discloses a clear intent that constables shall be elected every three years and not oftener; it repeals so much of the act of 15 April 1834, sec. 100 (P. L. 556), as provides that the appointee to fill a vacancy in the office of constable shall hold only until the next annual election. *Beaver Falls Election*, 14 C. C. 289.

15. Under the act 14 February 1889 (Brightly's Purdon 373), where a constable is appointed to fill a vacancy, he holds until the next triennial election, and until the person then elected shall qualify. *English's Case*, 16 C. C. 129.

II. Deputy constables.

16. The appointment of a deputy constable will not be approved by the court unless the constable, because of personal disability, or of the volume of his business, is unable to perform the duties of his office. *Smith's Petition*, 4 Dist. Rep. 217.

17. In Philadelphia, constables connected with magistrates' offices are selected by the magistrates; such constables can in no event apply to the court for the appointment of deputies to act for them before the magistrates. *Smith's Petition*, 4 Dist. Rep. 217.

18. A deputy constable appointed as a township policeman, under the act 9 May 1889 (Brightly's Purdon 374), is not an officer of the commonwealth within the provisions of the act 31 March 1860, sec. 12 (Brightly's Purdon 503), providing a penalty for the crime of extortion, but such an officer may be convicted of extortion at common law if the evidence justifies it. *Comm'th v. Saulsbury*, 152 P. S. 554.

19. Deputy constables appointed under the act of 9 May 1889 (Brightly's Purdon 374), upon petition of citizens, have no claim upon the county for compensation. *Cawley's Case*, 5 Kulp 455.

III. Constables' bonds.

20. In an action on a constable's bond for his neglect to appraise or sell goods upon which he had levied; it was held, that parol evidence was admissible to explain the return of the constable which was unintelligible without such proof. *Comm'th v. Rooney*, 167 P. S. 244.

21. The sureties of a constable are liable for his default as collector of taxes where he accepts the duplicate under the act of 8 May 1854 (Brightly's Purdon 337). *Comm'th v. Compton*, 7 C. C. 262; *Marion School District v. Donahue*, Ibid. 264.

22. A high constable of a borough is not a court or county officer, and the quarter sessions has no jurisdiction to approve his bond unless the charter of the borough so provides. *Doylestown's High Constable*, 16 C. C. 90.

23. Under the fee bill 2 April 1868 (Brightly's Purdon 884) the clerk of quarter sessions is entitled to a fee of twenty-five cents for all services connected with a constable's bond; he is not

entitled to any additional fee for filing the bond or the oath of office. *Constables' Bonds*, 16 C. C. 93.

24. The jurisdiction of a justice to proceed by *scire facias* against the bail of a delinquent constable under the act 20 March 1810, sec. 19 (Brightly's Purdon 377), was not taken away by the act 29 March 1824, sec. 3, 8 Sm. 302, since supplied by the act 15 April 1834, sec. 112 (Brightly's Purdon 374). *Ream v. Warfel*, 10 Lanc. 17; s. c. 5 Del. 186.

IV. Duties of constables.

25. It is the duty of constables to investigate into the existence of public evils, and to make return thereof to court. *In re Grand Jury*, 4 Northam. 374.

V. Powers.

26. A constable's levy remains a lien for twenty days after the date of the levy, and during said twenty days the constable may sell without an alias writ; and this, though the return-day of the writ have passed. *Page v. Gardner*, 11 C. C. 577.

VI. Responsibilities.

27. A married woman may, in good faith, lend money to her husband for the purchase of a horse to be used in her business; a seizure of the horse for the husband's debts will support an action for trespass against the constable. *Tibbins v. Jones*, 3 Cent. 542.

28. In an action by a married woman against a constable for levying on her separate estate for a debt of her husband's, her petition under the act of 3 April 1872 (Brightly's Purdon 1301) is evidence in her behalf. *Bennethum v. Long*, 13 Atlan. 776.

29. In trespass by a wife against a constable and attaching creditor who have sold the property under an execution, which the wife claims to be hers, she is required to establish that she paid for the property out of her separate

estate. *Bollinger v. Gallagher*, 144 P. S. 205.

30. In an action against a constable for levying on and selling plaintiff's property under a judgment against his father, evidence of fraudulent transfers between the plaintiff's father and mother is inadmissible, unless there be an offer to show that the plaintiff's title had been obtained by such a transfer. *Bennethum v. Long*, 13 Atlan. 778.

31. In a suit against a constable for wrongful levy on plaintiff's property evidence is not admissible for the defendant, that a year after the levy the defendant in the execution (the plaintiff's father) claimed compensation as owner upon a fire policy. *Ibid*.

32. It is the duty of a constable to execute a writ of *feri facias* without inquiring whether the justice had jurisdiction or as to the status of the proceedings; the only notice a constable is bound to regard is one proceeding from the authority issuing the writ. Where a constable sold the plaintiff's goods under a judgment and execution, after a *certiorari* had been issued on which the judgment and execution were afterwards set aside, and it appeared that the plaintiff had notified the constable, but had not demanded from him a perusal or copy of the execution, and the alderman had told the constable of the *certiorari* but had not told him not to sell nor to recall the execution, nor issued a *supersedeas*; it was *held*, in a suit against the surety on the constable's official bond, that a judgment of non-suit was properly entered. *Ream v. Warfel*, 10 Lanc. 17; s. c. 5 Del. 186.

33. Where, at the time of a levy, notice is given to the constable that the title to the chattel levied on is not in the defendant, but in the claimant, and such notice is again given at the sale, but the constable upon receiving an indemnifying bond proceeds to sell, both he and the plaintiff are liable in an action of trespass by the owner of the property. *Davis v. Turner*, 7 Kulp 85.

34. In an action against a constable to recover damages for attaching goods of the plaintiff under an attachment against her son-in-law; it was *held*, that the constable was bound to obey the exigency of his writ, and that he was not bound to inquire into the regularity of the proceedings on which it was based; and it was further *held*, that the fact that the goods were household goods and had just been removed from the son-in-law's house was *prima facie* evidence that they were his property, and warranted the constable in attaching them as such. *Malone v. Stewart*, 5 Del. 14.

35. In an action against a constable for levying on personal property which the plaintiff claims to have purchased at a previous sheriff's sale, neither the plaintiff nor the sheriff are competent witnesses to show by parol that the property was sold at the sheriff's sale, where neither the levy nor the return of sale included the property in question. *Heinbaugh v. Powell*, 13 C. C. 360.

36. An action does not lie against a constable for altering the return-day in a summons before serving it upon the defendant. *Comm'th v. Warfel*, 157 P. S. 444.

37. Where an assignee of a term of years holding over has been dispossessed by proceedings by the landlord against the original lessee, he cannot maintain an action for a false return against the constable who returned the summons in the proceedings to recover possession. *Butler v. Bennett*, 11 C. C. 88.

VII. Actions against constables.

38. Bail is demandable in an action of trespass *de bonis asportatis*, but in such an action against a constable for an act done by him in the line of his office, where his official bond is sufficient in amount to cover the probable damages, he will not be required to furnish additional bail to the action. *Mellick v. Osterstock*, 3 Northam. 83.

39. Where a constable in good faith

attached goods of a stranger believing them to be the goods of the defendant; it was *held*, that an action of trespass against him by the real owner must be brought within six months under the act 21 March 1772, sec. 7 (Brightly's Purdon 380); the phrase "acting as aforesaid" in that section means acting by his order and in his aid. It seems, however, that the limitation does not commence to run until the real owner has knowledge of the sale. *Mellick v. Osterstock*, 11 C. C. 82.

40. The limitation of six months within which actions must be brought against constables, as prescribed by the act 21 March 1772, sec. 7 (Brightly's Purdon 380), does not apply to an action for an act done or committed by the constable in open contempt of his warrant. *Hill v. Rice*, 7 Kulp 311.

41. No action lies against a constable for anything done in obedience to a warrant until a demand and a refusal for the space of six days as required by the act 21 March 1772 (Brightly's Purdon 380). *Comm'th v. Warfel*, 157 P. S. 444.

VIII. Compensation.

42. The county is liable for constable's fees for serving notices of election on school directors, judges, and inspectors of election and assessors. The act of 13 June 1840 (Brightly's Purdon 378) is not repealed by the election act of 30 January 1874. *Lehigh County v. Yingling*, 6 C. C. 594.

43. The county is liable to a constable for services rendered in serving notice of objections to certificates of nomination and of the hearing. *Early v. Luzerne County*, 7 Kulp 512.

44. Where a borough employs a constable to light lamps and patrol the streets at a fixed daily compensation, his wages are not an official salary which cannot be reduced without violating article III., sec. 13, of the constitution, which forbids the decrease of an officer's salary during his term of office. *Bigley v. Bellevue Borough*, 158 P. S. 495.

45. A constable is entitled to one fee for executing a criminal warrant and one fee for a commitment; and this, whether there be one or many defendants included in the warrant or commitment. *Keller v. Clinton County*, 4 Dist. Rep. 216; s. c. 1 Mag. & Con. 43.

46. Constables are entitled to a fee of fifty cents for every witness upon whom a subpoena is served; and this, whether the names are upon separate subpoenas or on one. *Comm'th v. Moore*, 4 Del. 617.

47. A constable who serves subpoenas for the commonwealth in a criminal case is entitled to compensation as provided by the sheriff's fee bill 2 April 1868 (Brightly's Purdon 899), to wit, fifteen cents for each service and six cents for each mile circular, and not at the rate of fifty cents for each service, and ten cents per mile circular as fixed by the constable's fee bill, 23 May 1893 (Brightly's Purdon 886). *Meagher v. Clearfield County*, 15 C. C. 420. *Hannum v. Becker*, 4 Dist. Rep. 444.

48. A railroad policeman appointed under the act of 27 February 1865, or a county detective, is not entitled to constable's costs in a criminal prosecution. He may receive, however, compensation from the county for the service of subpoenas. *Hamlin v. County*, 8 C. C. 462. *Wunch v. County*, Ibid. 465.

49. A constable will not be allowed travelling expenses in an unsuccessful attempt to execute a warrant. *Comm'th v. Leshner*, 13 C. C. 462.

50. Where a constable charges for mileage not actually travelled, he makes himself amenable to law; a charge for mileage where the mail is used is illegal. *Comm'th v. Rice*, 3 Dist. Rep. 259.

51. Where a subpoena is placed in the hands of a constable at his residence, his charge for mileage begins from his residence and ends with the point where the subpoena is returned. *Elliott v. Mutual Fire Ins. Co.*, 9 Lanc. 294.

52. Constables cannot charge for mileage not actually travelled, in serving warrants and subpoenas sent to them or returned by mail; if they do so, they

make themselves liable to a prosecution for extortion. *In re Office Costs*, 11 Lanc. 28. See s. c. 11 Lanc. 121; *Comm'th v. Frescoln*, 11 Lanc. 161; *Comm'th v. Sollenberger*, 11 Lanc. 235.

53. The act 23 May 1893 (Brightly's Purdon 886, 890), establishing fees for constables and justices, does not apply to constables and justices who were in office at the time of its passage and approval. *Rupert v. Chester County*, 13 C. C. 342.

54. The act 23 May 1893 (Brightly's Purdon 886, 890), fixing uniform fees for justices and constables, is applicable to all constables elected after its passage; so far as it relates to officers elected before its passage, it is unconstitutional. *Cornell v. Beaver County*, 42 P. L. J. 262.

55. The act 2 April 1868 (P. L. 3) fixing the fees of constables in Lancaster county, is repealed by the general act 23 May 1893 (Brightly's Purdon 886). *Fraim v. Lancaster County*, 12 Lanc. 380; reversing s. c. 11 Lanc. 157.

56. The act 2 April 1868 (P. L. 3), so far as it relates to the fees of aldermen, justices and constables elected or appointed in Luzerne county, subsequent to the passage of the act 23 May 1893 (Brightly's Purdon 886, 890), is repealed by the latter act. *Fenner v. Luzerne County*, 167 P. S. 632.

CONSTITUTIONAL LAW.

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I. General principles.

1. A part of an act may be declared unconstitutional and the other parts permitted to stand when the latter do not depend upon the part which is declared void. *Lehigh Valley Coal Co. v. United States Pipe-Line Co.*, 7 Kulp 77.

2. Where a city laid out a street and gave a peremptory notice to the owner of a building which encroached upon the street, that he must remove it, or the city would do so at his expense; it was *held*, that the owner, by cutting away from the building in obedience to such order, did not thereby render himself liable in damages to the tenant for interference with the latter's possession of the premises; and this, although the statute under which the city acted was afterwards adjudged unconstitutional. Neither a city officer nor a citizen who acts as his representative will incur personal responsibility by acting under an uncon-

stitutional statute. *Dunn v. Mellon*, 147 P. S. 11.

3. An act performed by municipal officers under the authority of an act of the legislature, is not rendered invalid upon such act being subsequently declared unconstitutional. *King v. Philadelphia Company*, 154 P. S. 160.

4. Where an act has been certified by both houses and approved by the governor, the supreme court cannot declare it void because it had not been advertised in the locality affected in compliance with article III., sec. 8, of the constitution. The court is bound to presume that all precedent formalities have been complied with. *Perkins v. Philadelphia*, 156 P. S. 554. See s. c. 156 P. S. 539.

II. Legislative power.

5. When a public highway has once been located, laid out and used by the public, its location cannot be changed except by proceedings under the road laws. The act 14 April 1851, P. L. 583, appointing commissioners to resurvey Wyoming avenue in the borough of Wyoming, Luzerne county, and fix the original lines of the same, was held to be unconstitutional as not providing due process of law, it appearing that said avenue had been opened of its full width and used as a public highway for very many years prior to the passage of that act. *Hancock v. Wyoming*, 148 P. S. 635.

6. The act of 5 April 1870, ratifying the title of the borough of Wilkes-Barre to certain lots, and directing that, before any sale, a certain lot should be conveyed to the historical society, is not unconstitutional as being legislative compulsion to convey. *Wilkes-Barre v. Wyoming Historical Society*, 134 P. S. 616; s. c. 26 W. N. C. 297.

7. The act of 13 May 1871, authorizing viewers in the city of Pittsburgh to impose a cost of repaving a street upon such portion of the city as may be locally benefited, is a gross perversion of constitutional rights. *Tenth Street*, 4 East. 341.

8. The 10th section of the act of 30 January 1874 (Brightly's Purdon 735), prescribing the manner in which non-registered voters must prove their qualifications, is constitutional. Its provisions are mandatory and must be complied with. *Cusick's Election*, 136 P. S. 459; s. c. 26 W. N. C. 425; affirming s. c. 1 Lack. Jur. 265.

9. The act of 19 May 1874 (Brightly's Purdon 1625), establishing separate orphans' courts for certain counties, is not repealed, so far as it relates to Luzerne county, by the act of 13 April 1887. The legislature having put into actual operation the mandate of the constitution as to the establishment of separate orphans' courts, has not the power wholly to undo it. *Reid v. Smoulter*, 128 P. S. 324; reversing *Comm'th v. Smoulter*, 5 Kulp 145.

10. The act 16 May 1891 (Brightly's Purdon 1534), providing for municipal assessments for street improvements made under the void acts of 14 June 1887 and 16 May 1889, is constitutional; the legislature had a clear right to provide for the assessments and legalize what it might previously have ordered; so, the act does not violate article III., sec. 3, of the constitution. *Donley v. Pittsburgh*, 147 P. S. 348; *Whitney v. Pittsburgh*, 147 P. S. 351; *Bingaman v. Pittsburgh*, 147 P. S. 353; *Gray v. Pittsburgh*, 147 P. S. 354; *Rubright v. Pittsburgh*, 147 P. S. 355. See *Twenty-Eighth Street*, 158 P. S. 464; *Boggs Avenue*, 39 P. L. J. 308; *Allen Avenue*, 39 P. L. J. 309.

11. The legislature has the power to abolish or change offices which are legislative only and not constitutional; it may enact a law the effect of which will be to deprive the chief burgess of a borough of a portion of his term of office. *Comm'th v. Weir*, 165 P. S. 284; *Comm'th v. Schneipp*, 166 P. S. 401.

12. The act 16 April 1891 (Brightly's Purdon 1047), providing that the insurance commissioner shall prepare a uniform blank of fire insurance policies and forbidding the use of any other, is unconstitutional as an unauthorized delegation

of legislative power. *O'Neill v. American Fire Ins. Co.*, 166 P. S. 72; reversing s. c. 3 Dist. Rep. 778; 4 Northam. 318.

13. The act 11 May 1893 (Brightly's Purdon 256), to enable boroughs to establish boards of health, is constitutional; the title is sufficient, and the act does not offend against article III., sec. 20, of the constitution, prohibiting the legislature from delegating to any commission power to interfere with any municipal function. *Smith v. Baker*, 14 C. C. 65.

14. The act 24 May 1893, abolishing the public building commission in Philadelphia and placing the buildings under the control of the department of public works, is in violation of article III., sec. 20, of the constitution, which provides that the general assembly shall not delegate to any special commission any power to make, supervise or interfere with any municipal improvement, money, property, or effects, or perform any municipal function whatever. *Perkins v. Philadelphia*, 156 P. S. 554. See s. c. 156 P. S. 539.

15. As to the delegation of legislative power, see note to *New Jersey v. Circuit Court*, 15 Atlan. 298.

III. Validity of statutes.

(a) Popular vote.

16. The act of 12 June 1878 for the taxation of dogs was rendered unconstitutional by the proviso that it should only take effect where the majority vote for it. *Bowen v. Tioga County*, 6 C. C. 613.

17. Upon the constitutionality of the act of 4 June 1879 (Brightly's Purdon 1700), transferring the care of the poor to county commissioners, the same to go into effect upon a vote of the people of the county, see *Overseers of Jenks v. Overseers of Sheffield*, 135 P. S. 400; s. c. 26 W. N. C. 275.

(b) Local and special acts.

18. The provisions of article III., sec. 7, of the constitution, prohibiting the passage of local or special laws in cer-

tain cases, apply to borough ordinances as well as to acts of assembly. *Norristown v. Norristown Pass. Ry. Co.*, 148 P. S. 87.

19. The local act of 5 April 1867, authorizing the borough of Wilkes-Barre to assess for paving according to the frontage rule, is not in conflict with article IX., sec. 1, of the constitution. The liability for the assessment attaches on the completion of the work, and the assessment may be made payable in instalments. *Beaumont v. Wilkes-Barre*, 142 P. S. 198; affirming s. c. 6 Kulp 163.

20. The act of 18 March 1875 (Brightly's Purdon 1301), providing that a married woman may transfer loans of the city of Philadelphia as a *feme sole*, is constitutional. *Loftus v. Farmers' & Mechanics' Nat. Bank*, 133 P. S. 97; s. c. 25 W. N. C. 459; affirming s. c. 46 L. I. 46.

21. The act 8 May 1876 (Brightly's Purdon 1829), repealing the limitations contained in the charters of passenger railway companies in cities of the first class, restricting them to the use of horse power, does not transgress the prohibition of article III., sec. 7, of the constitution as a local or special law amending or extending the charters of a corporation. *Reeves v. Philadelphia Traction Co.*, 152 P. S. 153.

22. The act 8 May 1876 (Brightly's Purdon 1829), authorizing the use of other than animal power on street railways, in so far as it attempts to repeal limitations in special charters of street railway companies, violates article III., sec. 7, of the constitution. *Watkin v. West Philadelphia Pass. Ry. Co.*, 11 C. C. 648.

23. The act 22 March 1877, sec. 12, P. L. 16, providing that claims for overdue taxes and water rents in second class cities shall be liens whether the owner be named or not, and that a judicial sale shall vest a good title, is unconstitutional and void as violating article III., sec. 7, of the constitution that no local law shall authorize the creation, extension or im-

pairing of liens or prescribe the effect of judicial sales of real estate. *Safe Deposit & Trust Co. v. Fricke*, 152 P. S. 231; *McKay v. Trainor*, 152 P. S. 242. See *Comm'th v. Macferron*, 152 P. S. 244.

24. The act of 3 May 1878, P. L. 43, authorizing the reindexing of records in the county offices, having a proviso that it shall not apply to counties having a population of over 400,000, was held to be unconstitutional. It is also in conflict with article V., sec. 26, providing that the jurisdiction and power of all courts of the same class or grade shall be uniform. *Beaver County Indexes*, 6 C. C. 525. See *Lanius's Petition*, 1 York 221.

25. Under the act 25 May 1878 (Brightly's Purdon 1332), adulterated milk means milk diluted with water or skimmed milk, or milk that contains less than twelve and one-half per cent of milk solids. That act is not unconstitutional in that it provides for a fine and also for imprisonment until the fine be paid. Query whether the act 7 July 1885 is constitutional in that it does not apply to cities of the first class or to boroughs or townships. *Comm'th v. Hough*, 1 Dist. Rep. 51.

26. The acts of 11 June 1879 (Brightly's Purdon 233) and 17 May 1883 (Brightly's Purdon 232), providing for the annexation of adjacent territory to boroughs, are not unconstitutional. *Pottstown Borough Extension*, 4 Montg. 29; affirming s. c. 1 Ibid. 189.

27. The act of 2 June 1881 (Brightly's Purdon 1988), making taxes assessed a lien, except in cities of the first, second and fourth classes, is in conflict with article III., sec. 7, and article IX., sec. 1, of the constitution. *Townsend v. Wilson*, 7 C. C. 101; *Miller v. Cunningham*, 7 Ibid. 500; *Bryn Mawr College v. Anderson*, 10 C. C. 442.

28. The act of 1 June 1883 (Brightly's Purdon 438), for the purchase by county commissioners or the condemnation of lands for county buildings, violates article III., sec. 7, of the constitution in excepting counties containing cities coextensive

with the county. *Chester County Court House*, 7 C. C. 212.

29. The act 4 June 1883 (Brightly's Purdon 1815) is not in conflict with article III., sec. 7, of the constitution, forbidding any special law regulating labor, trade, mining or manufacturing. *Hoover v. Pennsylvania R. R. Co.*, 156 P. S. 220.

30. The act 25 June 1885 (Brightly's Purdon 1992), regulating the collection of state, county, and other taxes in boroughs, not cities, is, as to state and county taxes, in violation of article III., sec. 1, of the constitution. It is valid, however, so far as it relates to local taxes. *Comm'th v. Swab*, 8 C. C. 111.

31. The act of 13 April 1887 (Brightly's Purdon 1627), amendatory of the statute of 19 May 1874, establishing separate orphans' courts, is not in conflict with the constitution as special or local in its operation, nor is its title defective. *Reid v. Smoulter*, 128 P. S. 324; reversing *Comm'th v. Smoulter*, 5 Kulp 145.

32. The act 28 April 1887 (Brightly's Purdon 1702), relating to the acquisition, etc., of real estate by the poor guardians in cities of the second class, is not special legislation and is constitutional. *Straub v. Pittsburgh*, 38 P. L. J. 89; affirmed in 138 P. S. 356.

33. Sections 1 and 2 of the act 6 May 1887 (Brightly's Purdon 1497), that in opening and widening plotted streets in Philadelphia, viewers shall also assess damages and benefits, are constitutional; secs. 3 to 17 are unconstitutional. *Ruan Street*, 132 P. S. 257; s. c. 25 W. N. C. 349. See s. c. 24 Ibid. 460.

34. The act 6 May 1887 (Brightly's Purdon 263), providing for increased tolls on a certain class of bridges, is not unconstitutional as a local or a special act. *Boston Bridge Company's Case*, 13 C. C. 190.

35. The act 14 June 1887, providing a peculiar method of procedure in road cases in the city of Pittsburgh, is in violation of article III., sec. 7, of the constitution, prohibiting local legislation. *Wyoming Street*, 137 P. S. 494; s. c. 27 W.

N. C. 136; *Pittsburgh's Petition*, 138 P. S. 401.

36. The act 14 June 1887 (Brightly's Purdon 861), providing for exhibition companies, is not unconstitutional, it simply enlarges the right of the city of Pittsburgh to consent to the use of its wharves for purposes not before allowed by the act 31 March 1836. *Rees' Appeal*, 12 Atlan. 427.

37. A township assessor appointed to fill a vacancy holds his office for the unexpired portion of the three-year term under the 4th section of the act of 14 February 1889 (Brightly's Purdon 2011). That act, so far as it relates to townships and boroughs, not divided into wards, is constitutional. *Comm'th v. Coleman*, 9 C. C. 90.

38. The act of 25 April 1889 (Brightly's Purdon 452), authorizing county commissioners to furnish fuel, etc., to county officers, is not special legislation within article III., sec. 7, of the constitution. *Young v. Bradford County*, 7 C. C. 428. See *Wren v. Luzerne County*, 6 Kulp 37.

39. The act of 4 May 1889 (Brightly's Purdon 373), providing for the election of constables in wards of the cities of the second and third classes, is not in conflict with article III., sec. 7, of the constitution. A constable is not strictly a township or ward officer within the meaning of that section, and his election is capable of classification. *Reading's Constables*, 8 C. C. 101.

40. The act of 8 May 1889 (Brightly's Purdon 1875), fixing the number of road and bridge viewers, is not unconstitutional by reason of the proviso that it shall not apply to counties having local acts inconsistent therewith. *Road in Cheltenham*, 140 P. S. 136; s. c. 7 Montg. 42; *East Avenue*, 7 Lanc. 164.

41. The act of 8 May 1889, authorizing soldiers or sailors of the late war to bring suit against any county, borough or township to recover the money they may be entitled to, by reason of being accredited, was held to be unconstitutional as a local act, not applying to cities. *Bearce v.*

Fairview Township, 9 C. C. 342; s. c. 27 W. N. C. 211.

42. The act 8 May 1889 (Brightly's Purdon 2011), providing that when any borough shall be divided into wards there should be elected an assessor for each of said wards, who shall perform all the duties relating to elections as well as to the valuation of property, is not unconstitutional as local or special legislation. *Comm'th v. Green*, 7 Kulp 151; s. c. 5 Del. 342.

43. The second section of the act of 23 May 1889, providing for the election of a board of school controllers in cities of the third class, is a local law and unconstitutional. *Comm'th v. Reichard*, 8 C. C. 563; s. c. 5 Kulp 540. That act is wholly unconstitutional, and the consolidated district is therefore governed by a board of six directors under the act of 8 May 1854. *Commonwealth v. Reynolds*, 137 P. S. 390; s. c. 27 W. N. C. 139; affirming s. c. 8 C. C. 568; s. c. 5 Kulp 547. See act 16 June 1891 (Brightly's Purdon 1559).

44. Under the act 23 May 1889 (Brightly's Purdon 1543) there is no authority for the annexation to a city of the third class of a part of a borough adjacent to the city; it was not decided whether the provisions of this act relative to the annexation of territory is local legislation or whether the subject is clearly expressed in the title. *McAskie's Appeal*, 154 P. S. 24.

45. The act of 29 May 1889 (Brightly's Purdon 235), providing for the incorporation of a new borough out of a seceding part of an existing borough, is constitutional. *Sharon Hill Borough*, 140 P. S. 250; affirming s. c. 4 Del. 252.

46. The act 8 June 1891 (Brightly's Purdon 274), prohibiting the establishment of certain cemeteries within one mile from any city of the first class, is a local law in violation of article III., sec. 7, of the constitution. *Philadelphia v. Westminster Cemetery Co.*, 162 P. S. 105; affirming s. c. 34 W. N. C. 17.

47. The act 6 June 1893 (Brightly's

Purdon 362), authorizing the taking of certain public burying-ground for school purposes, is unconstitutional as a local act and passed evidently for the purpose of taking a certain burial-ground in the city of York, and it is also unconstitutional as impairing the obligation of a deed from John Penn to John R. Coates for the burial-ground in question, dedicating it to the purpose of a public burying-ground. *York School District's Appeal*, 169 P. S. 70; affirming *In re Potter's Field*, 8 York 145.

48. Under the act 20 June 1883, amending the act 4 April 1873 (Brightly's Purdon 1060), an attachment execution may be served on the state agent of a foreign insurance company as garnishee, whether the agent has his office in the county in which the writ issues or not. The act of 1883 is not unconstitutional as special legislation. *Kennedy v. Agricultural Ins. Co.*, 165 P. S. 179.

49. The act 24 May 1893, abolishing the Public Buildings Commission of Philadelphia, was held to be in violation of article III., sec. 7, of the constitution, which forbids the General Assembly to pass any local law regulating affairs of cities. *Perkins v. Philadelphia*, 156 P. S. 554. See s. c. 156 P. S. 539.

50. As to what constitutes a special or local act, see notes to *New Jersey v. Township Committee of Northampton*, 14 Atlan. 588, and *New Jersey v. Circuit Court*, 15 Ibid. 297.

(c) Sufficiency of title.

51. Misplaced quotation marks in the title of an act will not vitiate the title when the sense is clear. The court will make the proper change. See the act 16 February 1883, P. L. 5. *Comm'th v. Taylor*, 159 P. S. 451.

52. Where the title of a local act (3 March 1868, P. L. 263) designated it as "an act relative to the borough of Oxford, to enable the borough authorities to widen Third street and relative to the opening, widening, straightening and arranging the line of new buildings on the same in said borough," it was

held, that there was nothing in the title to indicate a change as to the manner of opening streets in said borough, and that sec. 2 of the act which provided for a change in the selection of the jury and in the assessment and payment of damages for the opening of streets in the borough, was therefore unconstitutional. *Oxford Borough Street*, 2 Dist. Rep. 327.

53. The second section of the act of 9 April 1869, providing a punishment for the sale of liquor without a license in certain boroughs, is unconstitutional, the title of the act being "An act to prohibit the issuing of licenses to sell." The sale of liquor without a license in said borough is punishable under the act of 13 May 1887 (Brightly's Purdon 1229). *Comm'th v. Frantz*, 135 P. S. 389.

54. A title to the act of 13 May 1871 in the words, "An act to incorporate the Lawrenceville and Evergreen Passenger Railway Company," is sufficient prior to the constitution of 1874 to authorize the passage thereunder of an act granting a special charter for a steam railroad. *Millvale Borough v. Evergreen Railway Co.*, 131 P. S. 1.

55. The exclusive privileges given to water companies by the act 29 April 1874, sec. 34, clause 3 (Brightly's Purdon 955), is repealed by implication by sec. 3 of the act 3 June 1887 (Brightly's Purdon 957). Such implied repeal is clearly expressed in the title of the act of 1887. *Luzerne Water Co. v. Toby Creek Water Co.*, 148 P. S. 568; affirming s. c. 6 Kulp 237.

56. The act 11 June 1879 (Brightly's Purdon 1302), providing that where a husband disclaims his right to damages, the wife may recover such damages as he might be entitled to, does not violate article III., sec. 3, of the constitution, relating to titles of acts. *Kelley v. Mayberry Township*, 154 P. S. 440.

57. The act of 10 June 1881 (Brightly's Purdon 945), supplementary to the acts relating to game and fish, is in violation of article III., sec. 3, of the constitution in regard to fish, they not being

enumerated in the title. *Comm'th v. Bender*, 7 C. C. 620.

58. The act 1 June 1883 (Brightly's Purdon 1982), requiring the assessors of seated lands to make the assessment in the county in which the mansion house is situate when county lines divide a tract of land, and that when lines which separate a borough from a township or one borough from another passed through the lands of any person, such lands shall be assessed where the mansion is situated, is unconstitutional so far as concerns township and borough lines, where they are not also the lines of a county; there is nothing in the title of the act to give notice that lands divided by township and borough lines are to be affected by it. *La Plume Borough v. Gardner*, 148 P. S. 192; affirming s. c. 2 Lack. Jur. 28. See *Cassel's Appeal*, 8 Lanc. 260; *Rich's Appeal*, 8 Lanc. 264.

59. The act 25 June 1885 (Brightly's Purdon 1992), providing for the election of borough and township tax collectors, is constitutional; its title gives sufficient notice of its contents, it is not a local or special enactment, and does not violate the constitutional requirements of uniformity in the levy and collection of taxes. *Comm'th v. Lyter*, 34 W. N. C. 393; *Bennett v. Hunt*, 148 P. S. 257; overruling *Comm'th v. Commissioners of Lackawanna*, 7 C. C. 173; *Evans v. Witmer*, 2 C. C. 612, and *Hannick's Bond*, 4 C. P. 38. See *Comm'th v. Lyter*, 162 P. S. 50.

60. It was not decided whether a city passenger railway company, without power under its charter to lease its lines, has power, by implication, to lease its road to a motor power company under subdivision 8 of sec. 1 of the act 22 March 1887 (Brightly's Purdon 1388), which gives motor power companies the power to lease the property and franchises of passenger railway companies and operate them, but does not state in the title of the act, a purpose to enlarge the powers of city passenger railways. *Smith v. Reading City Pass. Ry. Co.*, 156 P. S. 5; affirming s. c. 13 C. C. 49.

61. The act of 6 May 1887 (Brightly's Purdon 525), against the making and dissemination of obscene literature, is not unconstitutional by reason of its title. *Comm'th v. Havens*, 6 C. C. 545.

62. The high license act of 13 May 1887 (Brightly's Purdon 1225) is not violative either of sec. 3 or sec. 7 of article III. of the constitution. *Comm'th v. Sellers*, 130 P. S. 32.

63. The title of the act of 13 May 1887 (Brightly's Purdon 1230) is sufficient under article III., sec. 3, of the constitution, to sustain sec. 17 of that act prohibiting the furnishing of liquors to minors or intemperate persons by sale, gift or otherwise. *Comm'th v. Silverman*, 138 P. S. 642.

64. *Quere.* Whether the act of 18 May 1887 (Brightly's Purdon 1310), enlarging and extending the act of 1 May 1861 (Brightly's Purdon 1310) in reference to liens for repairs, is in conflict with article III., secs. 3 and 6, of the constitution. *Swaney v. Washington Oil Co.*, 7 C. C. 351. See *Purvis v. Ross*, 158 P. S. 20; *Smyers v. Beam*, 158 P. S. 57.

65. The act of 3 June 1887, for the suppression of lottery gifts by storekeepers, was held to be in conflict with article III., sec. 3, of the constitution; the title is misleading. *Comm'th v. Moorhead*, 7 C. C. 513.

66. The act 17 June 1887 (Brightly's Purdon 1315), allowing a lien upon personal property and leasehold estates, is obnoxious to article III., sec. 3, of the constitution, its subject not being clearly expressed in its title. *Titus v. Elyria Oil Co.*, 1 Dist. Rep. 204.

67. The act 22 April 1889 (Brightly's Purdon 242), authorizing boroughs to collect a license tax on hacks, is not unconstitutional or violative of article III., sec. 3, of the constitution. *Washington v. McGeorge*, 146 P. S. 248.

68. The provision of the sixth section of the act 15 May 1889, entitled "an act for the taxation of dogs and the protection of sheep," that all dogs shall hereafter be personal property and subject of larceny,

was held not to be unconstitutional; the provision was germane to the object of the act. *Comm'th v. Depuy*, 148 P. S. 201. See act 25 May 1893, sec. 7 (Brightly's Purdon 692).

69. The act 23 May 1889 (Brightly's Purdon 1541), entitled "an act providing for the incorporation and government of cities of third class," and providing a method for changing and enlarging the limits of a city, does not violate the provision of article III., sec. 3, of the constitution that the subject of a bill shall be clearly expressed in its title. *Lackawanna Township*, 160 P. S. 494.

70. The title of an act declaring it to be a supplement to a former act is a sufficient statement of the subject-matter, where the subject of the supplementary act is germane to the subject of the original act; the act 8 June 1891, providing for the collection of state taxes, is not in conflict with article III., sec. 3, of the constitution. *Comm'th v. Edgerton Coal Co.*, 164 P. S. 284; affirming s. c. 14 C. C. 449. See *Comm'th v. Pittsburgh & Western Ry. Co.*, 166 P. S. 453.

71. The act 8 June 1893 (Brightly's Purdon 452), entitled "an act creating the office of county controller in counties of this commonwealth containing one hundred and fifty thousand inhabitants and over, prescribing his duties," is in conflict with article III., sec. 3, of the constitution, as there is no indication in the title of the purpose and effect of the act to abolish the office of county auditor. *Comm'th v. Samuels*, 163 P. S. 283; reversing s. c. 14 C. C. 423; *Comm'th v. Secern*, 164 P. S. 462; affirming s. c. 15 C. C. 249.

72. The act 6 June 1893 (Brightly's Purdon 1704), providing that overseers shall provide support and burial for persons whose place of settlement is unknown, is in violation of article III., sec. 3, of the constitution, that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, and it is also in violation of article III., sec. 7, prohibiting special legislation. *Conyng-*

ham Township Poor District v. Luzerne County, 8 Kulp 9.

73. As to the sufficiency of the title of acts regulating the liquor traffic, see note to *New Jersey v. Circuit Court*, 15 Atlan. 297.

(d) Number of subjects.

74. The act 16 March 1865, P. L. 394, entitled "a supplement to an act entitled 'an act to incorporate the Union Passenger Railway Company,' approved April 8 1864, authorizing said company to extend their track," and providing also that the company should not be chargeable with paying the cost of paving any street which had never been previously paved, was held to violate the constitutional requirements that each act shall contain but one subject, which shall be clearly expressed in the title. *Philadelphia v. Spring Garden Farmers' Market Co.*, 161 P. S. 522.

75. The act 27 March 1873, "to organize the state hospital for the insane at Danville and provide for the government and management of the same," does not contain more than one subject within the prohibition of article XI., sec. 8, of the constitution. Section 4 is not violative of article III., sec. 6, of the constitution. *Clearfield County v. Overseers of Cameron*, 135 P. S. 86.

76. The act 28 January 1873, P. L. 100, entitled "an act authorizing the town council of the borough of Carlisle to establish a board of health," violates the provision of the constitution of 1838 which declared that "no bill should be passed containing more than one subject, which should be clearly expressed in the title." That act is unconstitutional so far as it imposed the duty of paying the expense incurred by the board of health of the borough of Carlisle upon the taxpayers of the county, and it was repealed by the general act 11 May 1893 (Brightly's Purdon 256). *Quinn v. Cumberland County*, 162 P. S. 55; reversing s. c. 13 C. C. 602.

77. The act 12 April 1875, P. L. 40, entitled "an act to repeal an act to permit the voters of this commonwealth to

vote every three years on the question of granting licenses to sell intoxicating liquors and to sell and regulate the sale of the same," and which provided further for the filing of bonds by bottlers, was *held* not to violate article III., sec. 3, of the constitution as containing more than one subject or being misleading in its title. *Comm'th v. Deibert*, 12 C. C. 504. See s. c. 2 Dist. Rep. 53.

78. The act 24 June 1885, sec. 5, P. L. 160, giving the recorder of deeds certain fees for adding certificates to old records, is in violation of article XIV., sec. 5, of the constitution. *Pierie v. Philadelphia*, 139 P. S. 573; s. c. 27 W. N. C. 285; affirming s. c. 47 L. I. 154. It also offends article III., sec. 3, of the constitution, there being nothing in the title of the act to give notice or warning to the taxpayers of the different counties that the recorder's fees given in the act were imposed upon them. *Gackenbach v. Lehigh County*, 166 P. S. 448.

79. The act 24 May 1893, abolishing the Public Buildings Commission of Philadelphia, was *held* to be in violation of article III., sec. 3, of the constitution, which provides that no bill shall be passed containing more than one subject, which shall be clearly expressed in the title. *Perkins v. Philadelphia*, 156 P. S. 554. See s. c. 156 P. S. 539.

(e) **Supplements and amendments.**

80. Article III., sec. 6, of the constitution, relating to amendments, applies only to express amendments. *Searight's Estate*, 163 P. S. 210.

81. A statute which amends another by implication is not within the rule of the constitution which forbids an amendment except by re-enactment and publication at length of so much as is amended. *Comm'th v. Morrow*, 40 P. L. J. 327.

82. If an act be entitled generally as a supplement to another act, it is valid in all its sections germane to the original act; but if the title also specifies the nature of the changes made, its provisions

are limited to the subjects named in its title. *Comm'th v. Bender*, 7 C. C. 620.

83. An amendatory statute declaring that a prior statute shall be read in a particular way, will not repeal the provisions of the prior statute, if such repeal would produce a result transcending constitutional authority. *Reid v. Smoulter*, 128 P. S. 324; reversing *Comm'th v. Smoulter*, 5 Kulp 145.

84. A title (to the act of 9 March 1872, P. L. 290) declaring an act to be a supplement to a former one, is constitutional, if the subject therein is germane to the subject of the original act. *Millvale v. Evergreen Railway Co.*, 131 P. S. 1.

85. Where an act is declared to be a supplement to a former act, if the subject of the original act is sufficiently expressed in its own title and the provisions of the supplement are germane to that subject, the subject of the supplement is sufficiently covered by a title containing a specific reference to the original act by its title with the date of its approval. The act of 8 March 1872, however, entitled "an act relating to the Ridge Avenue Passenger Railway Co.," which inferentially repeals the company's liability to the city of Philadelphia to keep the streets traversed by it in repair, is unconstitutional, as it affects the rights of the city of Philadelphia and reduces the rate of taxation of dividends of said company for city purposes, and its title discloses no intent to alter the city's rights. *Philadelphia v. Ridge Avenue Ry. Co.*, 142 P. S. 484; *Ridge Avenue Railway Co. v. Philadelphia*, 124 P. S. 219.

86. The act of 17 June 1887 (Brightly's Purdon 1315), relating to liens upon leaseholds and providing that "proceedings shall be as is now provided by law in cases of mechanics' liens," is in violation of article III., sec. 6, of the constitution, prescribing the method of amending or extending existing laws. *McKeever v. Victor Oil Co.*, 9 C. C. 284.

87. The act 17 June 1887, sec. 4 (Brightly's Purdon 1316), providing that all proceedings for the collection of

claims against personal property and leaseholds shall be as is now provided by law in case of mechanics' lien, excepting that where no person can be found upon whom service can be made, that service can be made by publication, is in violation of article III., sec. 6, of the constitution, and with that section stricken out the act confers no rights or privileges which can be enforced. *Titus v. Elyria Oil Co.*, 1 Dist. Rep. 204.

88. The act 18 May 1887 (Brightly's Purdon 1310), extending the act 1 May 1861 (Brightly's Purdon 1310), giving a lien for alterations to all the counties of the commonwealth, is not in conflict with article III., sec. 6, of the constitution, which provides that no law shall be revived, amended or the provision thereof extended or conferred by reference to its title only. *Purvis v. Ross*, 158 P. S. 20; affirming s. c. 12 C. C. 193; *Smyers v. Beam*, 158 P. S. 57. See *Swaney v. Washington Oil Co.*, 7 C. C. 351.

89. The act 22 April 1889 (Brightly's Purdon 242), authorizing boroughs to collect a license tax on hacks, is not unconstitutional or violative of article III., sec. 6, of the constitution. *Washington v. McGeorge*, 146 P. S. 248.

90. An amending act cannot stand where its title contains no specific reference to the original; the act 25 April 1889 (Brightly's Purdon 2100), amending the first section of the act 15 May 1887, P. L. 118, providing for the destruction of wild animals, is unconstitutional for that reason. *Sanders v. Cambria County*, 16 C. C. 94; s. c. 4 Dist. Rep. 241; 1 Mag. & Con. 65.

91. The act 8 June 1891 (since repealed by the act 20 June 1893, Brightly's Purdon 685), extending the causes of divorce, was held to offend article III., sec. 6, of the constitution. *Oakley v. Oakley*, 11 C. C. 572.

(h) Repealing acts.

92. Under article III., sec. 6, of the constitution, the legislature may repeal a

statute by reference to its title. *Comm'th v. Evans*, 6 Kulp 145.

(i) Appropriation bills.

93. The general appropriation in 1893 appropriating a sum for the payment of the salary of a clerk in the offices of the prothonotaries of the supreme court, is not in violation of article III., sec. 15, of the constitution, that such bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the commonwealth. *Comm'th v. Gregg*, 161 P. S. 582.

IV. Regulation of salaries.

94. The salary of a constitutional officer being once fixed by act of assembly, the legislature is incompetent to repeal it, without substituting another provision in its stead. *Reid v. Smoulter*, 128 P. S. 324; reversing *Comm'th v. Smoulter*, 5 Kulp 145.

95. The act of 25 April 1889 (Brightly's Purdon 452), authorizing county commissioners to furnish furniture, books, stationery, light and fuel to county officers, does not increase the emoluments of office within article III., sec. 13, of the constitution. *Young v. Bradford County*, 7 C. C. 428.

96. The act of 25 April 1889 (Brightly's Purdon 452), so far as it requires the county to heat and light the county offices, is constitutional and applies to officers elected before its passage, but the provision that the county shall furnish the office furniture, books and stationery is as to officers elected before its passage an increase of the officers' emoluments and in violation of article III., sec. 13, of the constitution. *Wren v. Luzerne County*, 6 Kulp 37.

97. Where an officer is elected when a county contains less than one hundred and fifty thousand inhabitants, but the census is increased to that number during his term, the act 31 March 1876

(Brightly's Purdon 455), that officers of counties containing over one hundred and fifty thousand inhabitants shall be paid by salary, is not made, therefore, to apply to such officer. *Guldin v. Schuylkill County*, 149 P. S. 210; reversing s. c. 10 C. C. 601; *Comm'th v. Comrey*, 149 P. S. 216. See *Darte v. Luzerne County*, 10 C. C. 604.

98. The act 21 May 1879, purporting in its title to repeal the act 31 March 1876, sec. 7 (Brightly's Purdon 457), providing for a salary board to fix the salaries of employees in counties containing over one hundred and fifty thousand inhabitants, is unconstitutional under article III., sec. 3, of the constitution, prohibiting the passage of any act containing more than one subject, which shall be clearly expressed in its title, and under article III., sec. 6, prohibiting the amendment to an act by reference to its title only, and under article III., sec. 7, prohibiting local legislation. The act 5 July 1883, P. L. 182, is also unconstitutional for the same reasons. The act 31 March 1876 is still in force and provides the method for the organization of a salary board to fix the salaries of employees. *Comm'th v. Mercer*, 9 C. C. 461.

99. Article III., sec. 13, of the constitution prohibiting any law from increasing or diminishing the salary or emoluments of any public officer after his election or appointment, does not take away the power of the court in Northampton, Fayette and Carbon counties under the act 14 February 1867 (Brightly's Purdon 1027, note z) to change the emoluments of the sheriff for boarding prisoners. That section of the constitution is a limitation upon the power of the legislature alone. The act 11 April 1856 (Brightly's Purdon 1915) and the act 14 February 1867 must be construed together. *McCormick v. Fayette County*, 150 P. S. 190.

100. Where the plaintiff was elected city assessor after the passage of the act of 23 May 1889, providing for the government of cities of the third class, and the salary of said office had previously been

fixed by ordinance; it was *held*, that his compensation having been thus fixed could not be changed during his term of office under article V., sec. 3, clause 13 of that act (since amended by the act 9 June 1891, Brightly's Purdon 1546). *Devers v. York*, 150 P. S. 208; s. c. 156 P. S. 359.

101. The act 9 May 1889 (Brightly's Purdon 399), providing that deputy coroners shall be paid by fees, is unconstitutional as to counties containing over one hundred and fifty thousand inhabitants, its title being "an act to provide for the appointment of deputy coroners in the several counties of the commonwealth," but giving no notice as to how they were to be appointed or paid. *Comm'th v. Grier*, 9 C. C. 444. *Fogarty v. Schuylkill County*, 13 C. C. 454.

102. A general affirmative statute will not repeal a previous particular statute on the same subject though their provisions be different; the local acts 1 May 1861 and 11 March 1870, fixing the salary of the treasurer of Allegheny county, are not repealed by the act 31 March 1876 (Brightly's Purdon 455). *Bell v. Allegheny County*, 149 P. S. 381; reversing s. c. 10 C. C. 597. See *McCleary v. Allegheny County*, 163 P. S. 578.

103. The act 24 June 1885, sec. 5, P. L. 160, giving the recorder of deeds certain fees for adding certificates to old records, is in violation of article XIV., sec. 5, of the constitution. *Pierie v. Philadelphia*, 139 P. S. 573; s. c. 27 W. N. C. 285; affirming s. c. 47 L. I. 154. It also offends article III., sec. 3, of the constitution, there being nothing in the title of the act to give notice or warning to the taxpayers of the different counties that the recorder's fees given in the act were imposed upon them. *Gackenbach v. Lehigh County*, 166 P. S. 448.

104. The salary of a municipal officer may be increased during his term of office. He is not within the prohibition of article III., sec. 13, of the constitution. *Carpenter v. Lancaster*, 4 Del. 63; s. c. 6 Lanc. 273.

105. Article III., sec. 13, of the constitution does not apply to a municipal officer whose salary is fixed by ordinance. There is nothing in the act 23 May 1889 which prohibits the changing of the salary of the mayor of a city of the third class after his election, or which compels the councils to do more than provide by ordinance a fixed annual salary for him; the restriction contained in art. V., sec. 3, clause 13, of that act (since amended by the act 9 June 1891, *Brightly's Purdon* 1546) applies only to the offices which the councils are empowered to create; it does not apply to the principal municipal offices such as mayor, treasurer or controller. *Fellows v. Scranton*, 2 Lack. Jur. 211.

106. Where a borough employs a constable to light lamps and patrol the streets at a fixed daily compensation, his wages are not an official salary which cannot be reduced without violating article III., sec. 13, of the constitution, which forbids the decrease of an officer's salary during his term of office. *Bigley v. Bellevue Borough*, 158 P. S. 495.

107. Policemen in cities of the third class are officers and not employees, they have no fixed term, and are entitled to an increase of salary made while in office. *Russell v. Williamsport*, 9 C. C. 129.

108. The act 23 May 1893 (*Brightly's Purdon* 886, 890), establishing fees for constables and justices, does not apply to constables and justices who were in office at the time of its passage and approval. *Rupert v. Chester County*, 13 C. C. 342.

109. The act 23 May 1893 (*Brightly's Purdon* 886, 890), fixing uniform fees for justices and constables, is applicable to all constables elected after its passage; so far as it relates to officers elected before its passage, it is unconstitutional. *Cornell v. Beaver County*, 42 P. L. J. 262.

VI. Judicial department.

110. Where the legal title to real estate, and the right of possession thereunder, is involved, the defendant is

entitled to a trial by jury, and a court of equity has no jurisdiction by injunction to try the question according to the course of procedure in chancery. *Pennsylvania Canal Co. v. Middletown & Harrisburg Turnpike Co.*, 11 C. C. 582.

111. The act 22 April 1874 (*Brightly's Purdon* 2023), authorizing parties to submit to a trial by the court without a jury, so far as it excepts parties acting in a fiduciary capacity, is unconstitutional. County commissioners and all other public officers having charge of the public moneys are persons acting in such fiduciary capacity. *Campbell v. Fayette County*, 127 P. S. 86. See *Barber Asphalt Co. v. Scranton*, 2 Lack. Jur. 301.

112. As to the right of trial by jury, see note to *Rhode Island v. Fitzpatrick*, 11 Atlan. 775.

113. The act of 26 April 1855 (*Brightly's Purdon* 1604), limiting actions for injuries causing death to one year, is constitutional; it applies to all injuries, whether committed by corporations or individuals. *Kashner v. Lehigh Valley Railroad Co.*, 1 Northam. 332.

114. The act of 11 April 1866, providing that all fines imposed by the quarter sessions of Luzerne county shall be paid to the library association for the purchase and maintenance of a law library for the use of the courts, is constitutional. It is not repealed by the act of 12 April 1875. *Comm'th v. Ehret*, 1 Northam. 168.

115. The local act 6 April 1870, P. L. 948, providing for the voluntary choice of a legal arbitrator without the right of appeal, is constitutional; but the supplement of 25 March 1873, P. L. 396, substituting a compulsory mode of procedure, is unconstitutional. The act of 1870 cannot be read into the compulsory arbitration act of 16 June 1836 (*Brightly's Purdon* 125) so as to give a right of appeal. *Cutler v. Hinds*, 151 P. S. 195; *Spratt v. Raymond*, 149 P. S. 258.

116. The act of 11 April 1876 (amending the act of 23 May 1874) being unconstitutional, a municipal lien for construct-

ing a sewer, filed by the city of Meadville, was held invalid and void and was stricken off. *Meadville v. Dickson*, 129 P. S. 1.

117. The acts 24 March 1877, 1 May 1879 and 14 February 1881, establishing recorders' courts in certain cities which accept their provisions, are in violation of article III., sec. 7, of the constitution, because whether they shall apply to a city of the class described is dependent on the contingency of the action of its municipal officers. *Comm'th v. Denworth*, 145 P. S. 172.

118. The act 18 May 1887 (Brightly's Purdon 1310), extending the act 1 May 1861 (Brightly's Purdon 1310), giving a lien for alterations to all the counties in the commonwealth, is not a judicial order or decree directed to the courts in violation of article V., sec. 1, of the constitution. *Purvis v. Ross*, 158 P. S. 20; affirming s. c. 12 C. C. 193; *Smyers v. Beam*, 158 P. S. 57.

119. The act 23 May 1887 (Brightly's Purdon 834), prohibiting a citizen of this state from assigning a claim against a resident for the purpose of having the same collected by attachment in the courts of another state with the intent to deprive the debtor of his right of exemption, and imposing a penalty therefor, is not unconstitutional. *Sweeny v. Hunter*, 145 P. S. 363.

120. The third section of the act 23 May 1887 (Brightly's Purdon 816), making it competent upon a second criminal trial to read the notes of examination of a witness at a former trial, where it appears that the defendant was present at the former trial, and the witness is either dead or out of the jurisdiction, is not unconstitutional. *Comm'th v. Cleary*, 148 P. S. 26. See *Comm'th v. Keck*, 148 P. S. 639.

121. The procedure act of 25 May 1887 (Brightly's Purdon 1728) is constitutional. *Honeywell v. Tonery*, 5 Kulp 360.

122. The act 8 June 1891 (Brightly's Purdon 260), providing that soldiers and sailors who re-enlisted to fill quota may sue for bounty, was held to be unconstitu-

tional as violating article III., sec. 21, of the constitution, that no act shall prescribe any limitation of time within which suits may be brought against corporations different from a limitation fixed in actions against natural persons; that section is broad enough to include not only corporations, but also municipal and quasi-municipal corporations. *Cole v. Economy Township*, 13 C. C. 549.

123. The act 12 June 1893 (Brightly's Purdon 1019), providing for the separate confinement and trial of infants under sixteen, violates the provisions of the constitution that all courts shall be open and that all laws relating to the courts shall be general and uniform. *Courts for Trial of Infants*, 14 C. C. 254.

VII. Personal rights.

124. The act 28 October 1851, sec. 7 (Brightly's Purdon 1280), providing for proceedings to declare a wife a lunatic without notice, is unconstitutional under the declarations of rights as to personal liberty and private property in article I., sec. 1, of the constitution. *May's Case*, 10 C. C. 283.

125. The act of 22 April 1887 (Brightly's Purdon 1058), prohibiting, under a penalty, the placing of insurance with a foreign insurance corporation not authorized to do business in this state, does not apply to a citizen who contracts for the insurance of his own private property. *Comm'th v. Biddle*, 27 W. N. C. 287.

126. Sec. 8 of the high license act 13 May 1887 (since amended by act 9 June 1891, Brightly's Purdon 227) is not unconstitutional; it does not deny the equal protection of the laws nor grant to individuals a special privilege, neither does it impose a taxation which is not uniform. *Hoffman v. Bowman*, 1 Dist. Rep. 562.

127. The act 23 May 1887 (Brightly's Purdon 677), requiring the licensing of detectives, is not unconstitutional. *In re Amour*, 1 Dist. Rep. 620.

128. The limitation of six months in

the act of 11 April 1889 (Brightly's Purdon 2071), within which a practising veterinary surgeon must register, is contrary to the bill of rights that no man shall be deprived of his property unless by the judgment of his peers or the law of the land. *Ritter v. Rodgers*, 8 C. C. 451; s. c. 2 Northam. 207.

129. The fine of "not less than one hundred dollars" imposed by the act 4 May 1889, sec. 2 (Brightly's Purdon 1325), for a violation of the act regulating transient retailers, was *held* to be in violation of article I., secs. 1, 8, 9 and 13 of the constitution. *South Bethlehem v. Hackett*, 4 Northam. 381; s. c. 12 Lanc. 196.

130. The act 9 May 1889 (Brightly's Purdon 499), providing for the punishment of bankers receiving a deposit with knowledge that the bank is insolvent, is not in violation of article I., sec. 15, of the constitution, that the person of the debtor shall not be continued in prison after delivering up his estate for the benefit of his creditors; where attorneys at law are the proprietors of a banking institution they are amenable as bankers under that act; it is no defence that the defendant intended to return the money. *Comm'th v. Sponsler*, 16 C. C. 116; s. c. 1 Lack. L. N. 61.

131. The act 15 April 1891 (Brightly's Purdon 1657) and the Philadelphia ordinance 11 April 1893 passed in pursuance thereof, forbidding the peddling of fish, fruit or vegetables in Philadelphia without a license, and providing that the act shall not prevent citizens of this commonwealth from vending or peddling the proceeds of his, her or their farm or garden, are unconstitutional and void and in violation of article IV., sec. 2, of the Constitution of the United States, guaranteeing to citizens of each state all the privileges and immunities of citizens of the several states. *Comm'th v. Simons*, 15 C. C. 550; s. c. 35 W. N. C. 511.

132. The ballot act of 19 June 1891 does not transcend the powers of the legislature in dealing with the subject of elections; it carefully preserves the right

of each elector to vote for whom he pleases, without any unnecessary inconvenience; it is not in violation of the constitutional provisions that elections shall be free and equal, and that election laws shall be uniform throughout the state; its title is sufficient, and it applies to all public offices throughout the state. *De Walt v. Bartley*, 146 P. S. 529; affirming s. c. 1 Dist. Rep. 199. See *Repple v. County Commissioners*, 1 Dist. Rep. 202.

VIII. Eminent domain.

(a) Exercise of right.

(1) Generally.

133. Where land is condemned by a municipality for a public purpose, the municipality has the right to the exclusive possession of the land, and it is a technical trespass if the former owner attempts in any way to use it, even though his use may not interfere with the public use. *Reading v. Davis*, 153 P. S. 360.

134. The education of the public by exhibiting artistic, mechanical, agricultural and horticultural products is a public use for which the legislature can grant the right of eminent domain. *Rees's Appeal*, 12 Atlan. 427.

135. Though the act of 14 June 1887 (Brightly's Purdon 861), providing for the incorporation of exhibition companies for the encouragement of arts and sciences and conferring upon them the right of eminent domain, fails to make provision for compensation, the owner has his remedy at common law under the constitution of 1874. *Rees's Appeal*, 12 Atlan. 427.

(2) Bridges.

136. Where land was appropriated for an overhead bridge across a street, and the owner's agent entered into an agreement with the city as to the price, and the owner also owned land on the opposite side of the street by a different title; it was *held*, that the agreement as to the price did not estop the owner from recovering consequential damages for the injury done to his other land by the construction

of the bridge. *Beaver v. Harrisburg*, 156 P. S. 547.

137. The right to free a toll bridge by the exercise of the right of eminent domain, is not relinquished by a provision in the charter of a bridge company by which the legislature reserved the right to purchase the bridge after the expiration of twenty years. In such a proceeding evidence is admissible as to the erection and maintenance of free bridges a short distance below the one in question. *Lock-Haven Bridge Co. v. Clinton County*, 157 P. S. 379.

See HIGHWAYS, XX.

(3) Canal companies.

138. Where a canal company places upon its dam permanent splashboards, which raises the water and increases the area of the dam, it is liable to a property owner for the injury resulting from the consequent increased overflow of his land occasioned by the enlargement of its works. *Fredericks v. Pennsylvania Canal Co.*, 148 P. S. 317.

See CANALS.

(4) Coal and iron companies.

139. A coal and iron company was properly enjoined by preliminary injunction from entering upon and laying its tracks upon the lot of a gas and water company, acquired by the latter under the right of eminent domain, and in necessary use for the purposes of its business. *Scranton Gas & Water Co. v. Northern Coal & Iron Co.*, 145 P. S. 21.

(5) Electric light companies.

140. An electric light company will be enjoined from locating its poles on the side of a country road until a bond be given for the payment of such damages as an abutting land-owner may sustain by their location. *Haverford Electric Light Co. v. Hart*, 13 C. C. 369.

See ELECTRIC LIGHT.

(6) Natural gas companies.

141. The use of natural gas is a public one, and such companies are vested with the right of eminent domain. *Johnston's Appeal*, 5 Cent. 564.

142. A natural gas company having the right of eminent domain may, upon entering a proper bond, enter upon a sidewalk, dig the same up and proceed to lay pipes thereunder. *McDevitt's Appeal*, 7 Atlan. 588.

143. An owner of coal *in situ*, who has been released from the obligation of surface support, is entitled to an injunction restraining a natural gas company from entering upon the surface to conduct a pipe line, until payment of, or security for, compensation for the easement of support; not, however, if the corporation agrees to be bound by the release and to accept the risk of subsidence. *Penn Gas Coal Co. v. Versailles Fuel Gas Co.*, 131 P. S. 522.

144. If a natural gas company enters upon land containing coal, and files a release of all damages by reason of the mining and taking away of the underlying coal, the owner is not entitled that the right to surface support should be taken into consideration in adjusting the damages. *McGregor v. Equitable Gas Company*, 139 P. S. 230; s. c. 27 W. N. C. 197.

145. Where a natural gas company appropriates land for a right of way for a pipe line, it may insist on the right of subjacent support from underlying coal strata; and this, whether the surface and the underlying coal are owned by the same or by different persons. This right, in its effect upon the tract over which it is exercised, is an element for consideration in the ascertainment of compensation to the coal owner, to the extent to which the value of the tract as a whole is affected. *Davis v. Jefferson Gas Co.*, 147 P. S. 130. See *Wallace v. Jefferson Gas Co.*, 147 P. S. 205.

146. In estimating the market value of land taken by a gas company, it is competent to show that the land, though

used as a farm, was ripe for building improvements, or for any other purpose that enhanced its value. *Wilson v. Equitable Gas Co.*, 152 P. S. 566.

147. Under the act 29 May 1885 (Brightly's Purdon 1593), a natural gas company which has obtained the municipal consent to the use of a street may lay its pipes under the sidewalk without subjecting itself to liability for damages under condemnation proceedings. If the owners have suffered direct injury by the disturbed condition of the sidewalk, or consequential injury due to the proximity of the pipe line, they may proceed either by an action of trespass or upon the company's bond, if such has been given. *McDevitt v. People's Natural Gas Co.*, 160 P. S. 367; *Provost v. New Chester Water Co.*, 162 P. S. 275.

148. An incorporated natural gas company, although authorized by ordinance to enter upon the streets of a city, cannot take the land over which said streets are laid without the consent of the owners thereof, nor without first making just compensation therefor. *Mallory v. Bradford*, 2 Lack. Jur. 399.

See NATURAL GAS.

(7) Pipe line companies.

149. Whenever the lawful rights of an individual in the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is taken *pro tanto* and he is entitled to compensation; where viewers, to assess damages for laying a pipe line across the plaintiff's farm, assessed damages for land taken, the court dismissed exceptions which were taken on the ground that the land was not actually taken, the petition and bond filed sufficiently indicating a taking of the land. *Bollinger v. Southern Pipe Line Co.*, 9 Lanc. 265.

150. In proceedings to assess damages for locating a pipe line, where the defendant's petition for leave to file a bond described the ground proposed to be taken,

it was not necessary that the report of the viewers should set forth fully the ground taken. *Mayer v. Southern Pipe Line Co.*, 5 York 1.

151. Where land is taken for a pipe line company, the viewers may take into consideration the matter of consequential damages, but the act 2 June 1883 (Brightly's Purdon 3692) does not require the viewers to report that they had regard to the advantages to the plaintiff in the construction of the line. *Mayer v. Southern Pipe Line Co.*, 5 York 1.

152. Where damages were awarded upon the condemnation of land for a pipe line company, and an appeal was taken and exceptions filed to the report; it was held, that the taking of the appeal made the question of damages one for the jury, and such question could not be passed on in exceptions to the report. *Mayer v. Southern Pipe Line Co.*, 5 York 1.

See PIPE LINE COMPANIES.

(8) Railroads and street railways.

153. The legislature may authorize the building of a railroad on a street or other highway. *Simpson v. Philadelphia & Reading Railroad Co.*, 4 Montg. 102.

154. Where the chief engineer of a railroad company surveyed and staked out the centre line of a proposed railroad and returned a map thereof to the officers of the company, but no action was taken by the board of directors adopting the location; it was held, that the act of the engineer did not confer such a title upon the railroad company as would justify them in asking for an injunction restraining another company from proceeding regularly to appropriate land for its roadway; and this, though the land in question was owned by the plaintiff company. *Williamsport & N. B. R. R. Co. v. Philadelphia & Erie R. R. Co.*, 141 P. S. 407; reversing s. c. 8 C. C. 10.

155. Where an elevated railroad is erected entirely on the property of the company separated from that of the plaintiff by a city street fifty-one feet wide, such construction and operation discloses

no injury actionable under article XXI, sec. 8, of the constitution. *Dooner v. Pennsylvania R. R. Co.*, 142 P. S. 36.

156. The franchises of a railroad company may be taken by eminent domain where a necessity for such taking exists; where the proposed construction of plaintiff's railroad across defendant company's yard upon an elevated structure occupying but a trifling part of the yard would cause comparatively little injury easily compensated in damages and was absolutely necessary, the plaintiff's right to effect such crossing was sustained. *Pittsburgh Junc. R. R. Co. v. Allegheny Valley R. R. Co.*, 146 P. S. 297.

157. A market house maintained by a mere private business corporation may be taken by a railroad company for a railroad station; and this, though the act of incorporation declared the purpose to be the maintenance of buildings to be appropriated and used as a public market house. *Twelfth Street Market Co. v. Philadelphia & Reading Terminal R. R. Co.*, 142 P. S. 580; affirming s. c. 10 C. C. 25.

158. The lessee of a market stall has no such estate as will entitle him to damages from a railroad company which condemns the market house. *Strickland v. Pennsylvania R. R. Co.*, 154 P. S. 348.

159. A decree preventing a grade crossing does not conflict with article XVII, sec. 1, of the constitution, which provides that every railroad company shall have the right with its road to intersect with, connect with or cross any other railroad. *Perry County Railroad Extension Co. v. Newport & Sherman's Valley R. R. Co.*, 150 P. S. 193.

160. Where a railroad company owned the corner lots diagonally opposite to each other at the intersection of two streets, and with the consent of the city it threw a bridge across the street and built the abutments on its own land and the plaintiff owned a dwelling-house at one of the other corners; it was held, that the only element of damage was the additional servitude imposed upon the plain-

tiff's land by the exclusion of light and air from his dwelling; the damages could not be fixed by a comparison of the value of the plaintiff's property before the railroad was built and after. *Jones v. Erie & Wyoming Valley R. R. Co.*, 151 P. S. 30.

161. Where an inclined plane railroad was built across a street and was built upon piers upon lots owned by the company in fee and the structure did not rest upon or overhang any other person's land; it was held, in an action by a landowner for damages, that evidence was not admissible that access to his property was obstructed; but the company was liable for damages caused by the discharge of water from the structure against the brick wall of the plaintiff's house. *Hartman v. Pittsburgh Incline Plane Co.*, 159 P. S. 442.

162. It is not necessary to provide compensation to abutting owners for the construction and operation of a street railway operated by means of an overhead electric system. The act of 14 May 1889 (Brightly's Purdon 1823) is not unconstitutional. *Lockhart v. Craig Street Railway Co.*, 139 P. S. 419; affirming s. c. 8 C. C. 470; 37 P. L. J. 479.

163. The act 14 May 1889 (Brightly's Purdon 1823) confers power on street railway companies to use electricity as a motive power and to erect poles on the sidewalks with the consent of the local authorities, and such a use of the street is not the imposition of an additional servitude as will entitle adjoining owners to compensation. *Comm'th v. West Chester*, 9 C. C. 542.

164. The legislature may authorize the placing of railways upon streets without provision for compensation of adjoining landowners. *Dilley v. Wilkes-Barre & Kingston Pass. Ry. Co.*, 12 C. C. 270.

165. Street railway companies formed under the act 14 May 1889 (Brightly's Purdon 1823) have the right to use electricity for motive power, and may, with the consent of supervisors, lay their track and erect poles on a township road; abutting property owners are not

entitled to compensation for such a use of the highway. *Gillette v. Chester & Media Ry. Co.*, 5 Del. 106.

166. The operation of a street railway, either by horses, cable or electricity, when authorized by law on a public street, is not an additional servitude which will entitle the owner of abutting property to compensation under article XVI., sec. 8, of the constitution. If the owner has occasion for the presence of vehicles in front of his property, he may exercise that right for such reasonable time as is necessary for his purpose, and if the passage of street cars is thereby impeded, the street cars must wait. *Rafferty v. Central Traction Co.*, 147 P. S. 579; reversing s. c. 39 P. L. J. 15.

167. The act 14 May 1889 (Brightly's Purdon 1823) was not intended to provide for long distance lines of transportation connecting widely separated cities and towns by electric railways and traversing country roads; the municipal authorities of boroughs and cities may impose the additional servitude of a street railway upon the streets, but the township authorities cannot impose such an additional servitude upon roads without the consent of the abutting landowners. *Pennsylvania R. R. Co. v. Montgomery County Pass. Ry. Co.*, 167 P. S. 62; s. c. 11 Montg. 58; reversing s. c. 10 Montg. 97; 9 Montg. 202; 14 C. C. 88; and overruling *Pennsylvania R. R. Co. v. Braddock Electric Ry. Co.*, 1 Dist. Rep. 626.

See RAILROADS.

(9) Reservoirs.

168. Land seized by and appropriated to the use of the state for the purpose of a reservoir for the Pennsylvania canal vests in the commonwealth. *Delosier v. Pennsylvania Canal Co.*, 11 Atl. 400.

169. In proceedings to assess damages for property taken for a reservoir, the measure of damages is the fair market value of the property at the time it was taken; where the plaintiff's witnesses

upon direct examination expressed opinions of the value of the land if it were cut up into lots opened through it, and they were elaborately cross-examined; it was held, that the court properly refused to strike out the testimony upon a motion made after the trial had progressed for two days and all of the plaintiff's witnesses had been examined and he had rested. *Warden v. Philadelphia*, 167 P. S. 523.

(10) Water companies.

170. A water company can take a spring or stream of water under the right of eminent domain; but only after having made or secured compensation to those deprived of the use of the water. *Lord v. Meadville Water Co.*, 135 P. S. 122; s. c. 26 W. N. C. 110.

171. A water company incorporated under the general corporation act of 29 April 1874 may, under the right of eminent domain, take the works and improvement of a private water company, but it cannot take and condemn springs and streams. So, its right of eminent domain is a continuing one, and it may take other property after the original completion of its works. *Edgewood Water Co. v. Troy Water Co.*, 7 C. C. 476.

172. Where a water company has condemned land under the right of eminent domain, and given security which has been approved by the court, the landowner is restricted to the proceeding instituted for the recovery of damages for the property so taken. *Degen v. Meadowbrook Water Co.*, 3 Lack Jur. 233.

See WATER COMPANIES.

(11) Water pipe.

173. Proceedings to assess damages against the city of Lancaster for laying water pipe through private property are under the special act 21 March 1836; that city has never adopted the act 25 May 1887 (Brightly's Purdon 772), and the act of 1836 has not been repealed by the act of 1887. *Schroeder v. Lancaster*, 15 C. C. 467.

174. The city of Lancaster never hav-

ing adopted the act 25 May 1887 (Brightly's Purdon 772), proceedings to assess damages against it for laying water pipe through private property must be had under the local act 21 March 1836, P. L. 134. *Schroeder v. Lancaster*, 11 Lanc. 257, 390, 72.

See MUNICIPAL ASSESSMENTS.

(12) Streets and sewers.

175. The act of 16 May 1889 (P. L. 228), relating to streets and sewers in cities of the second class, was held to be unconstitutional. *Whitney v. Pittsburgh*, 138 P. S. 401; overruling *Howard v. Pittsburgh*, 38 P. L. J. 87. See act 16 May 1891, P. L. 65 (Brightly's Purdon 1534).

176. The act of 14 May 1874 (Brightly's Purdon 1877), authorizing the assessment of damage by the jury laying out a road, is not unconstitutional. The landowner cannot disregard their determination and apply for reviewers to assess damages. *Road in West Whiteland*, 4 Montg. 11.

177. So much of the act 23 May 1889 (Brightly's Purdon 1563) as relates to the assessment of damages for opening streets in cities of the third class, is unconstitutional and void; legislation affecting the assessment of damages for land taken under the right of eminent domain must be uniform throughout the commonwealth. *Gardiner v. Chester*, 5 Del. 69; s. c. 9 Lanc. 246. See s. c. 5 Del. 237, 293.

178. Where a public street has been appropriated by a railroad, a person who is not the owner of land abutting upon the street has no right to damages upon the ground that the street has been made inconvenient and dangerous for travel; so a lot owner, whose lot is not nearer than one or two hundred feet from the road, cannot recover damages for the consequential injury from noise and dust produced by the ordinary operation of the road. *Pennsylvania Company for Insurance on Lives & Granting Annuities v. Pennsylvania Schuylkill Valley R. R. Co.*, 151 P. S. 334.

179. Under the act 16 May 1891, sec.

12 (Brightly's Purdon 1402), no person is entitled to recover damages for any buildings or improvements which may be placed upon or within the lines of any located street or alley after the same shall have been located by councils; that act is not in conflict with article XVI., sec. 8, of the constitution. *Busch v. McKeesport*, 166 P. S. 57.

180. Compensation for change of grade is not limited merely to property fronting or abutting on the particular street whose grade is changed; where the plaintiff's house fronted on a street running along the line of a railroad, and the city depressed two cross streets so that they could go under the railroad, and, by reason of such depression, access to plaintiff's house by vehicles was entirely cut off; it was held, that plaintiffs were entitled to recover. *Mellor v. Philadelphia*, 160 P. S. 614. See *Tucker and Frankford Streets*, 166 P. S. 336.

181. Under article VI., sec. 8, of the constitution, an owner of property upon a street is entitled to damages for a change of grade, rendered necessary in order to construct sewers to abate a nuisance prejudicial to the health of the neighborhood, and the municipality cannot set off against his special damage a subsequent increase of value common to the entire neighborhood in which the particular property is situated. *Rudderow v. Philadelphia*, 166 P. S. 241.

182. Where a property owner had petitioned a borough for a change of grade, and the change was made without objection; it was held, that after his death, under article XVI., sec. 8, of the constitution, his heirs might recover damages for such change unless the constitutional right had been waived. *Lewis v. Darby*, 166 P. S. 613; s. c. 6 Del. 128.

183. A municipality has the same control over a sidewalk as it has over the carriage-way; it may use both to whatever depth below the surface it may desire to go for sewers, gas and water mains, and any other urbane uses, and for such use the owners of abutting property are not

entitled to damages. *McDevitt v. People's Natural Gas Co.*, 160 P. S. 367; *Provost v. New Chester Water Co.*, 162 P. S. 275.

184. Where three viewers to assess damages for the construction of a sewer, were appointed under the act of 24 May 1887 (afterwards declared unconstitutional in *Ayar's Appeal*, 122 P. S. 266), and the city defendant appealed to the common pleas and assisted in the selection of a trial jury; it was held, that the city had waived the irregularity of the original appointment of but three viewers instead of seven as required by the act of 23 May 1874. *Wilson v. Scranton*, 141 P. S. 621; s. c. 2 Lack. Jur. 8.

185. Entering on the plaintiff's land by a municipality without agreeing for compensation or tendering security, and constructing a covered sewer across the surface, constitutes a taking. In such case the city is entitled to exclusive possession and the owner is entitled to full damages. A suit for compensation by the owner divested his title and vested it in the city. *Noon v. Scranton*, 7 C. C. 123.

186. A municipal corporation is not liable for damages to property occasioned by the inadequacy of a sewer constructed by it. *Bear v. Allentown*, 148 P. S. 80.

See HIGHWAYS.

(b) Proceedings to assess damages.

187. Where there has been such an actual taking under the power of eminent domain as invests the donee of the power with title, and gives to the landowner a vested right of compensation, the former cannot be permitted to discontinue condemnation proceedings without the consent of the latter. *Wood v. State Hospital for the Insane*, 164 P. S. 159.

188. It has been the universal practice to designate a fixed sum as a penalty in bonds securing compensation in condemnation proceedings; there is no appeal from an order of the common pleas approving such a bond as adequate in amount and executed by sufficient sureties. *Twelfth Street Market Co. v. Philadelphia*

& Reading Terminal R. R. Co., 142 P. S. 580; affirming s. c. 10. C. C. 25.

189. The approval of the bond is not an adjudication of the right to proceed with the condemnation. *Edgewood Water Co. v. Troy Water Co.*, 7 C. C. 476.

190. In condemnation proceedings, a witness who has known the property for ten or fifteen years and knows of sales of like property in the neighborhood, is competent to testify to the market value of the property condemned. *McElheny v. McKeesport & Duquesne Bridge Co.*, 153 P. S. 108.

191. The act of 21 April 1858 (P. L. 386), authorizing the assessment of benefits for, *inter alia*, the vacation of streets, is constitutional and in force. *Howard Street*, 142 P. S. 601; affirming s. c. 24 W. N. C. 491-520.

192. Article IX., sec. 1, of the constitution does not prohibit local assessments for benefits. *Howard v. Pittsburgh*, 38 P. L. J. 87.

193. Damages in condemnation proceedings are not limited by the amount of the bond; under the constitution upon an appeal from an assessment, the amount of damages must be determined by a jury according to the course of the common law. *Michael v. Crescent Pipe Line Co.*, 159 P. S. 99.

194. Interest, as such, is not allowed on damages in condemnation proceedings, but it is proper for the jury to consider the lapse of time between the taking of the land and the time of trial, in making up the damages for which to render a verdict. *Klages v. Philadelphia & Reading Terminal R. R. Co.*, 160 P. S. 386.

195. Where a land-owner appeals from an award and afterwards withdraws his appeal, the court will not allow interest from the date of the award, but from the date of the withdrawal of the appeal by the entry of judgment as of the latter date. *Donaldson v. Pennsylvania R. R. Co.*, 5 C. C. 62 n.; s. c. 160 P. S. 391 n.

196. A county may appeal from an assessment of damages under the act of 13 June 1874 (Brightly's Purdon 772) and

article XVI., sec. 8, of the constitution. *Grant Street*, 7 C. C. 84.

197. In a proceeding under the act 10 June 1893 (Brightly's Purdon 426), for the termination of an easement which has been abandoned by a corporation possessing the right of eminent domain, where it appears that there are no facts in dispute, the court will not frame an issue requiring the intervention of a jury. *Delaware & Hudson Canal Co. v. Genet*, 169 P. S. 343; affirming s. c. 15 C. C. 215.

198. Where land is taken by the right of eminent domain the right of appeal is mutual; an appeal, however, is fatally defective when the required affidavit that the same is not intended for delay is omitted. *Hanover Borough Alley*, 4 Dist. Rep. 160.

See HIGHWAYS.

IX. Regulation of commerce.

199. The office license tax, when imposed under the act of 7 June 1879 upon a foreign railroad corporation engaged in interstate commerce, is in violation of the commercial clause of the constitution of the United States. *Norfolk & Western Railroad Co. v. Comm'th*, 26 W. N. C. 189; reversing *Norfolk & Western Railroad Co. v. Comm'th*, 114 P. S. 256.

200. The act of 4 June 1883 (Brightly's Purdon 1815), forbidding discrimination by common carriers in rates and facilities for transportation, is unconstitutional so far as it undertakes to regulate interstate commerce. *Wigton v. Pennsylvania Railroad Co.*, 8 C. C. 191.

201. The right to import liquor into a state and sell it therein in its original packages cannot be interfered with by prohibitory or license laws. *Leisy v. Hardin*, 38 P. L. J. 35. For interesting reviews of this decision, see articles by C. Stuart Patterson and A. H. Wintersteen, Esqrs., in 26 W. N. C. 205, 289.

202. Whether a barrel of beer or whiskey in pint bottles can be sold in single bottles, as "original packages," was not decided. *Comm'th v. Zelt*, 138

P. S. 615; s. c. 27 W. N. C. 131; *Comm'th v. Swihart*, 138 P. S. 629; *Comm'th v. Pendergast*, 138 Ibid. 633.

203. State laws prohibiting the sale of liquors to minors and to persons of known intemperate habits, are valid regulations as applied to imported liquors sold in the original package. *Comm'th v. Zelt*, 138 P. S. 615; *Comm'th v. Silverman*, 138 P. S. 642.

204. The act of 21 May 1885 (Brightly's Purdon 1621), prohibiting the manufacture and sale of oleomargarine, is constitutional. *Walker v. Comm'th*, 11 Atlan. 623. See *Comm'th v. Paul*, 10 C. C. 332; s. c. 48 L. I. 4.

205. The act of 21 May 1885 (Brightly's Purdon 1621), prohibiting the sale of oleomargarine, does not apply to a person who has received it from another state and sold it in its original package. *Comm'th v. Paul*, 48 L. I. 4.

206. The act 21 May 1885 (Brightly's Purdon 1621), prohibiting the manufacture or sale of oleomargarine, is not unconstitutional. Where oleomargarine was brought into this state in a package containing ten pounds, and out of this package two pounds were sold and delivered in a paper package; it was held, that there was a breaking of the original package, the contents of which thereby became a part of the common mass of property within this state. *Comm'th v. Paul*, 148 P. S. 559. See *Comm'th v. Paul*, 10 C. C. 332.

207. Where a case stated avers that the defendant was an agent of a non-resident manufacturer of oleomargarine, and that he sold at his stores in this state a package weighing eighty pounds, made and stamped and branded in Rhode Island, for use as an article of food; it was held, that the statement did not amount to an assertion that the sales were made in the original package of commerce. *Comm'th v. Schollenberger*, 156 P. S. 201; reversing s. c. 12 C. C. 442, 535.

208. The act of 20 April 1854, relating to hawkers and pedlers in Lehigh, Dauphin, Sullivan, Wyoming and Bucks

counties, is a constitutional exercise of the police powers of the state. *Comm'th v. Lippincott*, 7 C. C. 32.

209. The act of 9 May 1889 (Brightly's Purdon 1655), prohibiting hawking and peddling without a license, is a valid exercise of the police power of the state. *Comm'th v. Winslow*, 7 C. C. 667.

210. The act of 8 April 1861, prohibiting the buying of produce in the counties of Berks and Franklin without a license, with intent to send the same for sale to markets outside the county, does not discriminate against citizens of other states more than citizens of our own state, and is valid as respects the purchase of goods for sale within this state. *Rothermel v. Meyerle*, 136 P. S. 250; s. c. 26 W. N. C. 422; reversing s. c. 7 C. C. 616. See *Rothermel v. Ziegler*, 7 C. C. 505.

211. A city ordinance requiring the payment of a license fee from all persons soliciting orders was *held*, in its operation upon an agent for a business house in Chicago, to be a tax upon interstate commerce; the subject-matter of such an ordinance is not within the limitation of the police power of the state. *Brennan v. Titusville*, 153 U. S. 289; reversing s. c. 143 P. S. 642.

212. The ordinance of the borough of Warren of 13 April 1894, regulating vending, hawking and peddling in the borough, is manifestly in restraint of legitimate trade and cannot be justified as a police regulation. *Warren Borough v. Lewis*, 16 C. C. 176.

213. The act 17 April 1846 (Brightly's Purdon 1656), prohibiting hawking and peddling in Schuylkill county, and the various acts extending that act to other counties, are repugnant to the powers of Congress to regulate interstate commerce. *Comm'th v. Mooney*, 12 Lanc. 209. The same was *held* of an ordinance of the borough of Port Allegheny in McKean county. *Comm'th v. Walker*, 12 Lanc. 210.

214. A borough ordinance which provided that all persons selling liquors within the borough should, in addition to other licenses, pay the treasurer, for a

saloon twenty-five dollars, and for peddling with a wagon fifty dollars, annually, and that any person selling liquor within the borough without paying said tax should be fined fifty dollars for each offence, was *held* to be invalid, as imposing a tax for revenue. *DuBoistown v. Rochester Brewing Co.*, 9 C. C. 442.

215. A license tax imposed by a borough upon hawkers and pedlers for revenue purposes only, cannot be enforced against a citizen of another state whose business is not dangerous to the health, morals or general welfare of the community, and does not violate any police regulation. *Comm'th v. Walker*, 14 C. C. 586.

216. The act 6 February 1830 (Brightly's Purdon 1657), forbidding the peddling of clocks without a license, does not interfere with interstate commerce, and is not in violation of the constitution of the United States. *Comm'th v. Harmel*, 166 P. S. 89.

217. The act 10 May 1893 (Brightly's Purdon 1325), authorizing cities, boroughs and townships to impose a license fee upon all persons engaging in a transient retail business, but excepting those engaged in a permanent business, does not allow a tax to be imposed upon non-residents having their permanent business place out of the state but employing an agent to do a transient business in the state; such a tax would be a tax upon interstate commerce. *South Bethlehem v. Hackett*, 4 Northam. 381; s. c. 12 Lanc. 196.

218. Article XVII. of the constitution does not forbid the leasing by a street railway company of the franchises and track of another street railway company operating on a parallel street. That article does not apply to street railways. *Gyger v. Philadelphia City Pass. Railway Co.*, 136 P. S. 96; s. c. 26 W. N. C. 437.

219. The imposition by a municipality of a license tax on the maintenance of telegraph poles is not a regulation of interstate commerce forbidden by the constitution of the United States. Where an ordinance required the poles to be

inspected by the police department and the payment of a license fee of one dollar per annum for each pole, the tax was upheld, it not appearing that the discretion of the city councils had been abused or that the license fee was unreasonable. *Allentown v. Western Union Telegraph Co.*, 148 P. S. 117. See *Chester v. Philadelphia, Reading & Pottsville Telegraph Co.*, 148 P. S. 120; affirming s. c. 4 Del. 601.

220. In an action by a city against a telegraph company to recover an annual charge for poles and wire, an affidavit of defence is insufficient which avers that the ordinance imposing a charge is void because all taxes upon the value of said poles and wire were included in and represented by its capital stock, upon which taxes had been paid to the commonwealth; that the poles and wires were principally employed in the transmission of messages between the different states and were therefore instruments of interstate commerce, and that the fees and charges produced a revenue to the city and were therefore not an exercise of its police power. *Philadelphia v. American Union Telegraph Co.*, 167 P. S. 406.

221. Under the act 23 May 1889, art. V., sec. 3, clause 4 (Brightly's Purdon 1545), a city of the third class is expressly authorized to levy a tax of one hundred dollars for general revenue purposes on the capital stock of a telephone company; so, a city ordinance providing for the payment of a license fee for permission to maintain poles, is valid as a police regulation, and the company can be required to pay both of said charges in one year. *Harrisburg v. Pennsylvania Telephone Co.*, 15 C. C. 518.

222. A borough ordinance providing for a pedler's license which does not apply to persons holding a mercantile license within the borough, is invalid as a trade regulation. *West Pittston v. Dymond*, 8 Kulp 12.

X. Police regulations.

223. A charitable institution is not exempt from liability for a municipal claim

for the cost of constructing a new sidewalk in place of an old and dangerous one. Such construction is the exercise of the police power and not of the power to tax. *Wilkesborough Borough v. Home for Aged Women*, 131 P. S. 109; affirming s. c. 7 C. C. 75.

224. An institution of purely public charity, whose property is exempt by statute from taxation, is not exempt from assessment for the cost of curbing. *Philadelphia v. Pennsylvania Hospital*, 143 P. S. 367. See as to water pipe, *Philadelphia v. Pennsylvania Hospital*, 143 P. S. 171; affirming s. c. 8 C. C. 72.

225. Laws regulating the time and appliances for catching fish are within the police powers of the state. They may prohibit a land-owner from fishing in a small stream running through his own property. *Comm'th v. Bender*, 7 C. C. 620.

226. The act 4 February 1870 (Brightly's Purdon 514, 1059), prohibiting the issue of fire policies by others than corporations, is not in violation of sec. 1 of the bill of rights of the constitution, but is a valid exercise of the police power of the state. *Comm'th v. Vrooman*, 164 P. S. 306; reversing s. c. 15 C. C. 92; 51 L. I. 152. See *Lloyd's Association*, 15 C. C. 586.

227. In an action by a city against a telegraph company to recover an annual charge for poles and wire, an affidavit of defence is insufficient which avers that the ordinance imposing a charge is void because all taxes upon the value of said poles and wire were included in and represented by its capital stock, upon which taxes had been paid to the commonwealth; that the poles and wires were principally employed in the transmission of messages between the different states and were therefore instruments of interstate commerce, and that the fees and charges produced a revenue to the city and were therefore not an exercise of its police power. *Philadelphia v. American Union Telegraph Co.*, 167 P. S. 406.

228. As to the police power of the state,

see note to *New Hampshire v. Campbell*, 13 Atl. 587.

See CONSTITUTIONAL LAW, IX.

XI. Obligation of contracts.

229. A change by the court of its former rulings does not offend against article I., sec. 10, of the federal constitution, prohibiting the impairing of contracts. To bring a case within the prohibition it must be the constitution, or a statute, or some legislative enactment which impairs the obligation. *Ray v. West Pennsylvania Natural Gas Co.*, 138 P. S. 576; s. c. 27 W. N. C. 230.

230. The proviso of the act 10 February 1852, P. L. 42, exempting the Philadelphia & Erie R. R. Company from taxation upon its stock until the net earnings of the company shall realize at least six per cent per annum upon the capital invested, is not a mere gratuity but a contract, and such exemption cannot be taken away by the commonwealth; it was not repealed by the state tax law of 7 June 1879 (P. L. 112). *Comm'th v. Philadelphia & Erie R. R. Co.*, 164 P. S. 252.

231. The act 8 June 1881 (Brightly's Purdon 651), providing that all defeasances shall be in writing, is not in violation of article I., sec. 10, paragraph 1, of the constitution of the United States, forbidding states to pass laws impairing the obligation of contracts. *Fuller v. East End Homestead Loan & Trust Co.*, 157 P. S. 646.

232. The act 8 June 1891 (Brightly's Purdon 1310), that no contract between an owner and a contractor shall operate to defeat the right of a subcontractor to file a lien unless such subcontractor shall have consented in writing to be bound by such contract, is unconstitutional. *Waters v. Wolf*, 162 P. S. 153; *McMaster v. West Chester State Normal School*, 162 P. S. 260; affirming s. c. 13 C. C. 481; *Lee v. Lewis*, 13 C. C. 567.

233. The act 6 June 1893 (Brightly's Purdon 362), authorizing the taking of certain public burying-grounds for school purposes, is unconstitutional as a local act

and passed evidently for the purpose of taking a certain burial-ground in the city of York, and it is also unconstitutional as impairing the obligation of a deed from John Penn to John R. Coates for the burial-ground in question, dedicating it to the purpose of a public burial-ground. *York School District's Appeal*, 169 P. S. 70; affirming *In re Potter's Field*, 8 York 145.

234. Where, prior to the term of a sheriff, his compensation for boarding vagrants had been fixed at four cents per day and no more; it was held, that a retrospective order of court providing nine cents a day was void as impairing the obligation of a contract; such a power is not vested either in the legislature or in the court. *Strock v. County Commissioners*, 4 Dist. Rep. 321.

235. Upon the question of state charters being contracts within the prohibition of the federal constitution against the impairment of obligation, see notes to *Pennsylvania Railroad Co. v. Duncan*, 5 Atl. 747; and *New Jersey v. Morris & Essex Railroad Co.*, 7 Ibid. 842.

236. As to the constitutional inhibition against impairing the obligations of contracts, see note to *Biddle v. Hooven*, 13 Atl. 929.

See CONTRACT, III.

XII. Ex post facto laws.

237. The act of 10 May 1889, permitting judgment for want of an appearance in foreign attachment at or after the third term, if a declaration has been filed fifteen days before the entry of judgment, is applicable to actions pending at the passage of the act and is constitutional. *Lane v. White*, 140 P. S. 99; affirming s. c. 24 W. N. C. 380.

XIII. Taxation.

238. Under the constitution, the legislature has the power to tax real estate held by a municipality which is not used for municipal purposes, but no such law having been passed, a collector of taxes will be restrained by injunction from selling such property for taxes.

Newcastle v. County Treasurer of Lawrence, 2 Dist. Rep. 95.

239. Where a municipal corporation has the power to impose a tax upon brokers, it may tax merchandise brokers and real estate brokers without taxing other classes of brokers, without violating the constitutional provision that taxation shall be uniform. *Pittsburgh v. Coyle*, 165 P. S. 61; affirming s. c. 41 P. L. J. 352.

240. The act 5 May 1876 (Brightly's Purdon 1528), entitled "an act providing for the classification of real estate for the purpose of taxation and for the appointment of assessors in cities of the second class," is constitutional; its subject is sufficiently expressed in its title, and is a proper one for class legislation. *Bruce v. Pittsburgh*, 166 P. S. 152.

241. The act 25 June 1885 (Brightly's Purdon 1992), regulating the collection of taxes in boroughs and townships, has its subject sufficiently expressed in its title, and is constitutional. *Comm'th v. Frutchey*, 11 C. C. 112.

242. The acts 30 June 1885 and 1 June 1889 are not in conflict with either the state constitution or the constitution of the United States. *Comm'th v. New York, L. E. & W. R. R. Co.*, 150 P. S. 234. See *Comm'th v. Delaware & Hudson Canal Co.*, 150 P. S. 245.

243. The revenue act of 8 June 1891 is not rendered unconstitutional by the divisions of corporations into classes, viz., those which elect to pay a tax of eight mills upon each dollar of the capital stock and those which do not so elect; that act is not in conflict with the United States statute that the taxation of a national bank shall not be at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens. That act is not in conflict with amend. XIV., sec. 1, of the federal constitution. *Comm'th v. Merchants' and Manufacturers' Nat. Bank*, 168 P. S. 310; s. c. 36 W. N. C. 291.

244. The act 12 June 1893 (Brightly's Purdon 1881), providing a method by which taxpayers may acquire the right

to make and repair public highways and bridges and thereby prevent the levy and collection of road taxes, is not unconstitutional because by its adoption in some townships and not in others local results may be produced. *Lehigh Valley Coal Co.'s Appeal*, 164 P. S. 44; reversing s. c. 14 C. C. 621; *Philadelphia & Reading Coal & Iron Co.'s Petitions*, 164 P. S. 248.

245. The act 12 June 1893 (Brightly's Purdon 1881), enabling taxpayers of townships and road districts to contract for making the roads at their own expense, is in violation of article III., sec. 7, of the constitution, because it will be productive of local and special results as to the care of roads and bridges and as to the compensation of township officers. *Lehigh Valley Coal Co.'s Petition*, 7 Kulp 271.

246. Under the act 7 June 1879, where one railroad company paid moneys to another railroad company for the use of its tracks, it was held, that as the receipts for transportation by the company paying the tolls was taxable against that company and the tolls paid were taxable against the company receiving them, it was not double taxation. It was further held, that the tax under that act upon the receipts of tolls was not in violation of the commerce clause of article I., sec. 8, of the constitution of the United States. *Comm'th v. New York, Penna. & Ohio R. R. Co.*, 145 P. S. 38.

247. The tax upon the whole of the gross receipts of an express company is not illegal double taxation, although the amounts paid by the express company to railroad companies for transportation are included in the gross receipts of the railroad company and taxed as such. *Comm'th v. United States Express Co.*, 157 P. S. 579; affirming s. c. 13 C. C. 225.

248. In an action by a city against a telegraph company to recover an annual charge for poles and wire, an affidavit of defence is insufficient which avers that the ordinance imposing a charge is void because all taxes upon the value of said poles and wire were included in and represented by its capital stock, upon which

taxes had been paid to the commonwealth; that the poles and wire were principally employed in the transmission of messages between the different states, and were therefore instruments of interstate commerce, and that the fees and charges produced a revenue to the city and were therefore not an exercise of its police power. *Philadelphia v. American Union Telegraph Co.*, 167 P. S. 406.

249. The fourth section of the act of 7 June 1879, making corporations liable to taxation on their capital stock, was held not to be in conflict with article IX., sec. 2, of the constitution, requiring uniformity of taxation. *Comm'th v. United States Electric Light Co.*, 7 C. C. 90.

250. The act 10 June 1881, prohibiting peddling without a license, and the Pittsburgh ordinance of 4 December 1886, are not in conflict with article IX., sec. 5, of the constitution, providing that taxes shall be uniform. *Kneeland v. Pittsburgh*, 11 Atl. 657.

251. The fourth section of the act of 30 June 1885 (Brightly's Purdon 1968), assessing a three-mill tax upon the nominal value of corporate loans to be deducted from the interest, is not in conflict with article IX., sec. 1, of the constitution of Pennsylvania, nor in violation of article V. or article XIV. of the amendments to the constitution of the United States. *Coal Ridge Improvement Co. v. Jennings*, 127 P. S. 397; *Comm'th v. North Pennsylvania Railroad Co.*, 129 Ibid. 429, 458, 460; *Comm'th v. Clearfield Coal Co.*, Ibid. 461.

252. Claims for paving are not subject to limitations to taxation prescribed by statute or by article IX., sec. 1, of the constitution. *Greensburg v. Laird*, 138 P. S. 533; affirming s. c. 8 C. C. 608.

253. The proviso to sec. 20 of the act 30 June 1885 (since amended by the act 8 June 1893, Brightly's Purdon 1970), excepting from the tax exemption, corporations engaged in the manufacture of liquors or gas, is not in conflict with secs. 1 and 2, article IX., of the constitution providing for uniformity of taxation.

Comm'th v. Germania Brewing Co., 145 P. S. 83.

254. A city street having been paved under an ordinance pursuant to the act of 24 May 1887 (which act was declared unconstitutional in *Ayar's Appeal*, 122 P. S. 266), the legislature could, subsequently, by the act of 23 May 1889 (Brightly's Purdon 1570 n.), authorize viewers to be appointed to assess the cost upon the abutting properties. The act of 1889 is not in violation of article IX., sec. 1, of the constitution, providing for a uniformity of taxation. *Chester v. Black*, 132 P. S. 568; s. c. 25 W. N. C. 480. See *Dunbar v. Williamsport*, 9 C. C. 451.

255. The act 1 June 1889, P. L. 420, making the capital stock of corporations a distinct class of investments for the purpose of taxation, was held not to violate article IX., sec. 1, of the constitution as to uniformity of taxation. *Comm'th v. National Oil Co.*, 157 P. S. 516. The same was held of the act 8 June 1891 (Brightly's Purdon 1969). *Comm'th v. Mill Creek Coal Co.*, 157 P. S. 524.

256. The state tax law of 8 June 1891 (Brightly's Purdon 1963) is not in conflict with article IX., sec. 1, of the constitution of Pennsylvania or article XIV., sec. 1, of the constitution of the United States, requiring that all taxes shall be uniform upon the same class of subjects. *Comm'th v. Edgerton Coal Co.*, 164 P. S. 284; affirming s. c. 14 C. C. 449. See *Comm'th v. Pittsburgh & Western Ry. Co.*, 166 P. S. 453.

257. Ordinances of the city of Williamsport, imposing city licenses upon merchants classified according to the laws for state license, were held to be unconstitutional where they exempted certain classes of dealers from the payment of any license tax whatever. *Williamsport v. Stearns*, 12 C. C. 625. See *Wilcox v. Knoxville*, 12 C. C. 641.

258. Upon the transition of the city of Allegheny from a third class to a second class city, it became subject to the act 22 March 1877, providing for the levy and collection of taxes in cities of the second

class. That act is not a local tax law in violation of article IX., sec. 1, of the constitution. *Comm'th v. Macferron*, 152 P. S. 244; affirming s. c. 39 P. L. J. 471.

259. The act 8 June 1891 (Brightly's Purdon 1963), providing for the collection of state taxes, is not in conflict with the constitution of Pennsylvania either because of defect in its title or for any other reason. *Comm'th v. Wilkes-Barre & Scranton R. R. Co.*, 162 P. S. 614; affirming s. c. 14 C. C. 205.

260. The title of an act declaring it to be a supplement to a former act is a sufficient statement of the subject-matter, where the subject of the supplementary act is germane to the subject of the original act; the act 8 June 1891, providing for the collection of state taxes, is not in conflict with article III., sec. 3, of the constitution. *Comm'th v. Edgerton Coal Co.*, 164 P. S. 284; affirming s. c. 14 C. C. 449. See *Comm'th v. Pittsburgh & Western Ry. Co.*, 166 P. S. 453.

261. The act 16 April 1879, sec. 5, providing that taxes thereafter registered in cities of the first class shall be a lien until fully paid, was repealed by implication by the act 19 April 1883 (Brightly's Purdon 1473), providing that, where taxes remained for one year, it shall be the duty of the receiver to file a lien and keep the same revived. It is doubtful whether a statute providing a perpetual lien for taxes in cities of the first class would be constitutional. *Philadelphia v. Kates*, 150 P. S. 30.

262. An orphans' court sale is a judicial sale, and divests a lien for taxes in the city of Pittsburgh; the act 27 March 1877, sec. 11, P. L. 18, providing that all taxes in cities of the second class shall remain liens until fully paid and satisfied, and shall not be divested by any judicial sale, except to the extent to which distribution shall be made out of the proceeds, is unconstitutional. *Pittsburgh v. Hughes*, 13 C. C. 535.

263. Poor taxes are not a lien upon real estate; the act 2 June 1881 (Brightly's Purdon 1988), by which they are made

such, does not apply to cities of the first, second and fourth classes, and is unconstitutional. *Smith v. Meadowbrook Brewing Co.*, 3 Lack. Jur. 145. See *Lancaster County v. Stormfeltz*, 8 Lanc. 194.

264. The act 14 May 1874 (Brightly's Purdon 1986), in connection with the constitution of 1874, repeals all tax exemptions enacted after the constitutional amendment of 1857. *Philadelphia v. Masonic Home*, 160 P. S. 572.

265. The proviso of the act 10 February 1852, P. L. 42, exempting the Philadelphia & Erie R. R. Company from taxation upon its stock until the net earnings of the company shall realize at least six per cent per annum upon the capital invested, is not a mere gratuity, but a contract, and such exemption cannot be taken away by the commonwealth; it was not repealed by the state tax law of 7 June 1879, P. L. 112. *Comm'th v. Philadelphia & Erie R. R. Co.*, 164 P. S. 252.

See TAXES.

XIV. Increase of indebtedness.

266. Borrowing money from one party to pay an overdue indebtedness to another, and actually paying it, is not an increase of indebtedness within article XVI., sec. 7, of the constitution. *Powell v. Blair*, 133 P. S. 550; affirming s. c. 7 C. C. 492.

267. Bonds for an increased indebtedness of a school district cannot issue in the absence of a weekly notice of election for thirty days prior thereto, an omission to levy an annual tax to pay the interest, and the failure to file the statement as required by the act of 20 April 1874 (Brightly's Purdon 1396). The basis of values should be the valuation as adjusted by the commissioners for the preceding year. *Witherop v. Titusville School Board*, 7 C. C. 451.

268. The mortgage of property is an increase of indebtedness, and bonds and mortgages issued in disregard of article XVI., sec. 7, of the constitution are invalid and void. *Pittsburgh & State Line Railroad Co.'s Appeal*, 4 Cent. 107; affirm-

ing *Rothschild v. Pittsburgh & State Line Railroad Co.*, 1 C. C. 620.

269. In proceedings to increase the debt of a borough, a remonstrance of citizens and taxpayers to the statement filed will be stricken off as irrelevant. *Laird v. Greensburg*, 8 C. C. 621.

270. The debts of a manufacturing corporation accruing in the employment of labor and the purchase of materials, do not constitute such an increase of indebtedness as, under sec. 7 of article XVI. of the constitution and the act of 18 April 1874 (Brightly's Purdon 420), requires a previous meeting and consent of stockholders to validate them. *Manhattan Hardware Co. v. Phalen*, 128 P. S. 110.

271. To a bill to declare railroad bonds and mortgages invalid as issued in violation of article XVI., sec. 7, of the constitution, the bondholders must be made parties. *Harrisburg & Eastern Railroad Co.'s Appeal*, 1 Mona. 692.

272. Bonds issued by a water company, in excess of one-half of its capital stock, to contractors who built the works, are valid in the hands of *bona fide* purchasers for value. *Wood v. Corry Water Co.*, 38 P. L. J. 169.

273. Upon a bill to restrain a borough from undertaking the erection of an electrical plant on the ground that the borough indebtedness would be increased beyond the constitutional limit, the burden is on the plaintiff to prove that the indebtedness would be necessarily increased to an amount exceeding the legal limit. *Linn v. Chambersburg Borough*, 160 P. S. 511.

274. The act 20 May 1891 (Brightly's Purdon 242), authorizing boroughs to manufacture electricity for commercial purposes, is constitutional; it is not in conflict with article IX., sec. 7, of the constitution. *Linn v. Chambersburg Borough*, 160 P. S. 511.

275. The supreme court will assume jurisdiction over a bill filed by a citizen of a municipal corporation to restrain the municipality from issuing bonds authorized by ordinance and a special election,

where it is alleged in the bill that such issue will involve an increase of indebtedness beyond the limits provided by law. *Bruce v. Pittsburgh*, 161 P. S. 517.

276. Under article IX., sec. 8, of the constitution, the debt of a municipality which is limited, means the net debt of the city, which is the amount actually owed by the city after the holdings of the sinking fund are deducted from the total indebtedness. *Brooke v. Philadelphia*, 162 P. S. 123; *Bruce v. Pittsburgh*, 166 P. S. 152.

277. The constitution and subsequent legislation confer additional power to increase municipal indebtedness and to levy additional taxation without any necessity for repealing pre-existing limitations. *Millvale Borough*, 162 P. S. 374; affirming s. c. 14 C. C. 79, 82.

278. The quarter sessions has jurisdiction to sustain a complaint of citizens of a borough, alleging that the issue of bonds and the making of contracts for the construction of water-works had not been authorized as required by law by ordinance, and that such issue of bonds and making of contracts violated the law limiting the power of taxation. *Millvale Borough*, 14 C. C. 79, 82; affirmed in 162 P. S. 374.

279. An annual sum to be paid annually for the lighting of the streets of a borough for a limited term, is not the incurring of a new indebtedness within the meaning of the constitution; where the contracts and engagements of a municipal corporation do not overreach its current revenue, no objection can be lawfully made to them; and this, no matter how great the indebtedness of the municipality may be. *Wade v. Oakmont Borough*, 165 P. S. 479.

280. The provision of the constitution that the debt of any city shall not exceed seven per cent upon the assessed value of the taxable property therein means, the assessed value fixed by the city authorities as a basis of taxation for city purposes, and not the valuation made by county officers for county purposes. *Bruce v. Pittsburgh*, 166 P. S. 152.

281. Under the acts 20 April 1874 and

9 June 1891 (Brightly's Purdon 1396, 1397), an ordinance providing for the increase of a municipal debt is invalid which does not provide for the levy and collection of an annual tax, equal to at least eight per centum of the amount of such increased debt; and this, though eight per centum annually would more than pay the loan within the time fixed for its payment. It is not necessary that the loan should be issued redeemable by annual instalments; the intent of the act is that a certain sum shall be annually raised in anticipation of payment, and whether paid out in redemption of the bonds annually or into the sinking fund for their payment at the expiration of a term of years, it is, within the meaning of the act, applied annually to the redemption of the bonds. *Bruce v. Pittsburgh*, 166 P. S. 152.

282. The local act 6 April 1850, P. L. 408, limiting the debt of the city of Pittsburgh to one million and a half of dollars, is repealed by the constitution and the act 20 April 1874 (Brightly's Purdon 1396). *Bruce v. Pittsburgh*, 166 P. S. 152.

283. The act 9 June 1891 (Brightly's Purdon 1397), providing for the manner of increasing the indebtedness of municipalities, does not require that the vote cast in a township or borough shall be counted by the court. *Clough v. Shreve*, 10 C. C. 398.

284. A street railway company cannot increase its stock or its indebtedness except by compliance with article XVI., sec. 7, of the constitution, after sixty days' notice of the meeting to be held for that purpose. *Shepp v. Norristown Pass. Ry. Co.*, 13 C. C. 254.

285. The courts have no power either under the constitution or acts of assembly to assume jurisdiction of a contest of a borough election for authority to increase its indebtedness. *Fowler v. Gable*, 3 Dist. Rep. 23.

286. Where a township's indebtedness had reached the limit beyond which it could not be increased without the consent of the electors, the court confirmed

the report of a jury of view in favor of a road, but directed the order to open to be held by the clerk awaiting the opinion of the electors as to the desirability of increasing said indebtedness. *Road in Green*, 3 Dist. Rep. 256.

287. The creation of an aggregate increase of indebtedness of more than two per cent is forbidden, although the contract is to be performed in the future, if the present indebtedness equals the constitutional limit, unless the annual revenues will be sufficient, over and above the payment of the interest of its indebtedness and the ordinary expenses, to meet the obligations incurred at the time they are to be performed. *Nankivill v. Yeosock*, 7 Kulp 518.

288. A borough has the right to contract for the lighting of its streets by electricity or otherwise without first having submitted the question to a vote of the taxpayers; it is only when the general fund of the borough raised by the usual taxation is not sufficient to defray the expense of lighting and a special tax is necessary for the purpose that a vote of the taxpayers is requisite. *Severs v. Winton Borough*, 1 Lack. L. N. 103.

289. Where the indebtedness of a city is not within the constitutional limit, it is unnecessary to submit to the electors an ordinance to borrow more money to pay off a judgment. *Lancaster County v. Lancaster City*, 12 Lanc. 201.

290. An agreement between a city and a railroad company by which the city is to construct a subway for the railroad, so as to avoid grade crossings, and the railroad company is to reimburse the city to the amount of one-half the expenditure, is not a loan of the city's credit to the railroad company in violation of article IX., sec. 7, of the constitution. *Brooke v. Philadelphia*, 162 P. S. 123.

291. The general election law of 10 June 1893 is unconstitutional so far as it relates to elections for the increase of indebtedness. *Evans v. Willistown*, 168 P. S. 578; affirming s. c. 15 C. C. 326.

CONSTRUCTION.

See CONTRACT, VI.: DEED, IX.: DE-
VICE: LIBEL: RAILROAD COMPANIES:
STATUTE, III.: WILLS, VI.

- I. General principles.
- III. Of deeds.
- IV. Of contracts.
- V. Particular words and phrases.

I. General principals.

1. Where the clauses of an instrument of writing *inter vivos* are repugnant or incompatible, the earlier will prevail. *Kraber v. Nes*, 3 York 123.

2. A provision contained in a contract which is capable of two or more meanings should be construed most strongly against the person whose undertaking it is. *Bole v. New Hampshire Fire Ins. Co.*, 159 P. S. 53.

III. Of deeds.

3. A grant should always be so construed as to give it effect. *McCracken v. Gumbert*, 131 P. S. 36.

4. Where the premises of a deed conveyed a fee, but the *habendum* clause conveyed but an estate *durante viduitate*, it was held that the latter was the controlling clause. *Whitby v. Duffy*, 135 P. S. 620; s. c. 26 W. N. C. 245; affirming s. c. 7 Lanc. 201.

5. The ambiguity in a deed as to boundary may be explained by the original contract, but not by a paper signed by the vendees alone, though produced from the custody of the agents of the vendors. *Everhart v. Dolph*, 133 P. S. 628.

6. The question of the location of the property conveyed or the application of the grant to its proper subject-matter is a question of fact to be determined by the jury with the aid of extrinsic evidence. *Steigleder v. Marshall*, 159 P. S. 77.

IV. Of contracts.

7. In the interpretation of a partly written and partly printed contract, the written words are entitled to a greater effect than those which are printed. *Duffield v. Hue*, 129 P. S. 94.

8. In the construction of a contract a special manuscript addition to a printed form is entitled to especial weight. *Dick v. Ireland*, 130 P. S. 299.

9. Members of a copartnership will be held to a construction of their articles of dissolution, which they themselves had agreed to as the meaning thereof. *Wilson v. Fenimore*, 3 Cent. 538.

10. A policy of insurance should be construed most strongly against the insurance company. *Philadelphia Tool Co. v. British American Assurance Co.*, 132 P. S. 236; s. c. 25 W. N. C. 370; *Allemania Insurance Co. v. Pittsburgh Exposition Co.*, 11 Atlan. 572.

11. In the construction of a written contract, a usage of trade known to the parties, not unreasonable or in conflict with positive law, is admissible to explain the intention and give effect thereto. *First Nat. Bank v. Fiske*, 133 P. S. 241; s. c. 25 W. N. C. 454.

12. There being no latent ambiguity, the construction of a contract is for the court. *Duffield v. Hue*, 129 P. S. 94; *Palmer v. Farrell*, *Ibid.* 162.

13. If a written lease be unambiguous, the court should construe it as a matter of law. *Harris v. Kelly*, 13 Atlan. 523.

14. The construction of a contract, containing no words pertaining to art or trade, written in plain and popular language, and the facts attending the execution of which are undisputed, is for the court and not for the jury. The parties are bound according to the plain terms of the contract. *Shafer v. Senseman*, 125 P. S. 310; affirming s. c. 1 Northam. 389.

15. A plain and unambiguous contract, containing no words pertaining to art or trade, should not be referred to the jury for construction. *Ibid.*

16. The language of a stipulation in a bill of sale being unambiguous, parol evidence was held to be inadmissible to contradict it. *Coen v. Adamson*, 11 Atl. 74.

17. There being no ambiguity in a written instrument, evidence to explain it is inadmissible. *Kirk's Estate*, 5 Montg. 107.

18. An article of agreement, without acknowledgment or words of inheritance, in which the vendor, in consideration of certain covenants, agrees to sell and "does sell and convey," is but an executory contract of sale. Equity, in the absence of positive proof of fraud, accident or mistake, will not reform such a contract by inserting words of inheritance. *Pierce v. McCracken*, 5 Cent. 283.

19. An oil lease providing that if the first well produce ten barrels per day for thirty days, the lessor should receive \$500, and if the second well should produce fifteen barrels in like manner he should receive \$1000: held, that the lessee was bound for the payment on the second well, though the first well produced nothing. *Brushwood Development Co. v. Hickey*, 16 Atl. 70.

20. In covenant against the lessors by the lessees of a mine, who had been enjoined by the owners of the surface from "robbing back" the breast pillars, the lessees not being authorized to do so by the lease, it was incompetent for them to show what the lessor understood to mean by the words in the lease that the mining was to be done "in the most skilful, workmanlike, and proper manner according to the most approved manner of mining." *Hecksher v. Sheaffer*, 14 Atl. 53; s. c. 12 Cent. 444.

21. Construction of a contract to sell land, and to hold the lumber cut by the vendee as collateral security for the purchase money. *Hunter v. Thompson*, 5 Cent. 247.

22. Words in a contract which have no fixed technical meaning should be taken in their natural and obvious sense, but the circumstances surrounding the par-

ties when the contract was made and affecting the subject to which it relates, form a sort of context which may be resorted to in doubtful cases to aid in arriving at the meaning of the contract. *Bole v. New Hampshire Fire Ins. Co.*, 159 P. S. 53.

23. Either party to a written contract has a right to show that an agreement was had when the contract was entered into, that its words were to have a different meaning from their meaning in law, but the evidence to establish such an agreement or understanding must be clear, precise and indubitable. *Cochran v. Shenango Natural Gas Co.*, 40 P. L. J. 82.

See CONTRACT, VI.

V. Particular words and phrases.

24. An agreement to mine iron ore a certain number of tons per annum, so long as the same can be "advantageously" mined, means so long as it can be beneficially, conveniently, profitably and gainfully mined. *Garman v. Potts*, 135 P. S. 506; s. c. 26 W. N. C. 305.

25. The word "between" was construed in the sense of "among." *Hick's Estate*, 134 P. S. 507; affirming s. c. 8 C. C. 30.

26. Construction of the word "district" in the general corporation act of 29 April 1874, referring to the incorporation of water companies. *Monongahela Water Co.*, 9 C. C. 57.

27. In the construction of a contract to use natural gas on the streets of a borough, the court refused to enjoin the use of open lamps. The word "lamp" in such a contract must be construed according to its popular understanding in regions where natural gas is used. *Saltsburg Gas Co. v. Saltsburg*, 138 P. S. 250; s. c. 38 P. L. J. 148.

28. The word "dividend" was construed to include a dividend of the assets of a corporation received after dissolution. *Cozad v. McKee*, 130 P. S. 406.

29. If the words used by a testator be

appropriate to express the fact of a gift, the meaning of the words must be left to the jury. The words were, "where are the notes I gave you?"—"take them and keep them." *Jacques v. Fourthman*, 137 P. S. 428; s. c. 26 W. N. C. 491.

30. The word "may" in the act of 12 May 1887, for the removal of the dead from burying-grounds, should not be read "shall"; a discretion is vested in the court. *Zion's German Reformed Congregation's Appeal*, 1 Mona. 635.

31. The meaning of the word "mechanical" is considered in *Mechanical Business Cases*, 9 C. C. 1.

32. Upon a devise to "nearest relatives," the testator leaving two sisters and children of a deceased sister, the sisters take, to the exclusion of the nephews and nieces. *White's Estate*, 48 L. I. 5.

33. In a lease for the purpose of working for oil, and if no oil be found in a certain time the lease to be void, the word "oil" is not synonymous with "gas." The production of gas will not satisfy the lease. *Truby v. Palmer*, 4 Cent. 925. See *Palmer v. Allen*, 136 P. S. 556; s. c. 26 W. N. C. 514.

34. In a suit for the "profits" on the sale of unproductive lands, the "profits" are ascertained by charging the adventure with the purchase money, interest thereon and taxes, and crediting it with receipts from rentals, sales, and interest. *Hentz v. Pennsylvania Co.*, 134 P. S. 343; s. c. 26 W. N. C. 90.

35. The word "road" in the act of 8 May 1889 is not synonymous with "street." *Sewer Street*, 47 L. I. 188.

36. The meaning of the words "satisfied" and "satisfactory" in a contract is considered in notes to *Singerly v. Thayer*, 2 Atlan. 235, and *McClure v. Briggs*, Ibid. 585.

37. A codicil making a different disposition of the "shares" of two devisees under the original will was held to pass every possible interest or share of such devisees. *Eisiminger v. Eisiminger*, 129 P. S. 564.

38. The word "stock" in a bequest

was held to include stock, bonds, notes, cash, and other personal property. *Sweitzer's Estate*, 142 P. S. 541; affirming s. c. 9 C. C. 49.

39. The words "such switches and turnouts" were held to refer to their antecedent "sidings for standing or passing trains," and not to exclude turnouts connecting with business houses. *Philadelphia v. River Front Railroad Co.*, 133 P. S. 134; s. c. 25 W. N. C. 457.

40. Where a contract for paving with vitrified brick required the contractor "to prepare all necessary beds of gravel, sand or other material"; it was held, that the contractor might show by parol that the words, "beds of gravel, sand or other material," had a definite and well-known meaning in the trade, and related to the thin bed of light material placed at the top to receive the bricks, and did not embrace the coarse material at the bottom. *McDonough v. Jolly*, 165 P. S. 542.

41. Where a lease was made for one year at a certain rent per month, payable monthly, "so long as he shall occupy the said house and lot of ground," and the tenant moved out during the year; it was held, that the word "occupy" did not mean an actual dwelling on the premises, and that the provision quoted did not give the tenant the right to terminate the tenancy at will, and that the tenant was liable for the whole year's rent. *Lane v. Nelson*, 167 P. S. 602; affirming s. c. 7 Kulp 286.

CONSTRUCTIVE NOTICE.

See NOTICE, VI.

CONSTRUCTIVE TRUSTS.

See USES AND TRUSTS, V.

CONTEMPT.

See ARREST, V.

- I. Jurisdiction.
- II. What amounts to a contempt.

I. Jurisdiction.

1. Borough auditors have no power to arrest and imprison a witness who refuses to answer a question in relation to the conduct of borough officers; the power to inflict imprisonment for contempt is limited to courts of record and to such other tribunals as have been invested therewith by statutory enactment. *Llewellyn's Case*, 13 C. C. 126.

2. Where an auditor holds a question to be competent and requires the witness to answer it, the court, upon the fact being certified to it, will issue an attachment for contempt against the witness if he persist in refusing to answer. *Enos v. Garrett*, 2 Dist. Rep. 86.

3. An attachment will not issue in the orphans' court to enforce the award of an auditor where the record does not disclose that any decree was ever made and served. *Johnson's Estate*, 11 C. C. 666.

4. Where a decree for alimony was served by leaving it at the respondent's last known residence, with an adult member of his family, and a rule for an attachment was served on the respondent's brother-in-law, being an adult member of his family, and upon a member of the bar having his office with the respondent's counsel and being closely associated with him; it was held, that an attachment would issue against the respondent. *Tobin v. Tobin*, 12 C. C. 374.

5. In a proceeding for divorce brought by the husband under the act 8 May 1854 (Brightly's Purdon 684), for cruel and barbarous treatment, payment of alimony allowed the wife, may be enforced by a *feri facias* or attachment; there is no act, however, which authorizes the employment of a *ca. sa.* for such purposes. *Elmer v. Elmer*, 150 P. S. 205; reversing s. c. 11 C. C. 623.

6. An injunction is binding on all who know of it, and any one who is present, aiding and abetting an act which is in violation of an injunction, or who permits such an act done in his presence and without remonstrance, is himself guilty of actual breach of the injunction and will be attached for contempt. *Shiffer v. Youngstown Bridge Co.*, 2 Lack. Jur. 288.

7. Where the answers of the garnishee are so deficient as to entitle the plaintiff to move for an attachment for contempt, the plaintiff is entitled to a rule on the garnishee for judgment for not making more specific answer; the plaintiff is entitled to an attachment for contempt but he is not confined to that remedy. *Henwood v. American Legion of Honor*, 2 Lack. Jur. 339.

8. A witness who declines to answer a question upon the ground that it tends to criminate himself, is not the final arbiter as to whether the interrogatory has such a tendency; under sec. 10 of the act 23 May 1887 (Brightly's Purdon 818) the decision of that question is committed to the trial judge, who, therefore, necessarily has the power to enforce his decision by punishing a refusal to obey it. *Comm'th v. Bell*, 145 P. S. 374.

9. Where a petition for a writ of *habeas corpus* sets forth that the relator is in custody by virtue of an order of the court adjudging him guilty of contempt and sentencing him to imprisonment for refusing to testify as a witness in a criminal case, it is immaterial that the sheriff's return to the writ does not set out the contempt, or state facts showing the jurisdiction of the court to commit the relator. *Comm'th v. Bell*, 145 P. S. 374.

10. When a witness has been sentenced to imprisonment for contempt in refusing to testify for the commonwealth upon the trial of an indictment, the sufficiency of such indictment cannot be considered upon petition for a writ of *habeas corpus*. *Comm'th v. Bell*, 145 P. S. 374.

11. The court refused to attach a witness for contempt where it appeared

that he was served with a subpoena on Wednesday morning to appear in court the same day at 10 o'clock at Lancaster, which was eighteen miles distant from his home, and that the subpoena was served at his mill one-half a mile away from his home. *Comm'th v. Heisey*, 10 Lanc. 13.

II. What amounts to a contempt.

12. An attorney was suspended from practice for six months for contempt of court in saying in open court that his client was refused the privilege of entering bail after conviction, because he had no "political pull." *In re Logue, Public Ledger*, 25 October 1890.

13. If the committee of a lunatic, guardian, or other trustee confesses to using the trust funds in his business, resulting in a loss to the estate, the court has no discretion but to attach his person for contempt. *Croop v. Freas*, 8 C. C. 107.

14. A defendant ordered to support his wife and child and refusing to give his own bond, will be remanded to prison; and this, though he has suffered three months' imprisonment for non-compliance with the order. *Comm'th v. James*, 142 P. S. 32; affirming s. c. 9 C. C. 145.

15. The refusal of a physician, sworn as a witness, to give his opinion as to the effect of the medicines administered and to describe the decedent's condition and symptoms, is a contempt for which the coroner can hold him to bail to answer. Such contempt is indictable as an obstruction of justice. But the coroner cannot compel him to enter bail before a justice. *Comm'th v. Higgins*, 5 Kulp 269.

16. Entering a court of justice in an intoxicated condition is a contempt. *Comm'th v. Clark*, 13 C. C. 439.

17. One who is guilty of disturbing the peace and good order of a case upon trial before a justice, or of disturbing or obstructing or interfering with the justice in disposing of a matter before him judicially, may be indicted for a con-

tempt, and if found guilty may be fined or imprisoned. *Comm'th v. Clark*, 13 C. C. 439.

18. Where the directors and treasurer of a school district are commanded to pay a judgment out of the first unappropriated money of the district, they must use due diligence to get the money and pay the debt; unnecessary delay and obstructive operations would be a contempt of court for which they might be either removed or imprisoned for contempt. *Burgess v. Northmoreland Township School District*, 2 Lack. Jur. 106.

19. Upon a *habeas corpus* for the custody of a child, the court has no power to make an order on the respondent to take the child into a neighboring state and submit her right to its custody to the courts of that state, and a respondent would not be held guilty of a contempt in disregarding such an order. *Comm'th v. Sage*, 160 P. S. 399; reversing s. c. 2 Dist. Rep. 553.

CONTINGENT REMAINDERS.

See DEVISE, V. (b).

CONTINUANCE.

See CRIMINAL LAW, XIV.: PRACTICE.

CONTRACT.

See ASSIGNMENT: CONSTITUTIONAL LAW: CONSTRUCTION: COVENANT, III.: DAMAGES: DEBTOR AND CREDITOR: EQUITY, XII., XIII.: HUSBAND AND WIFE: INTEREST: LIEN: LIMITATION: LUNACY, VI.: MUNICIPAL CORPORATIONS: PHILADELPHIA, VII.: SALE: VENDOR AND PURCHASER.

- I. Execution of contracts.
- II. Consideration.
- III. Obligation of contracts.
 - (a) General principles.
 - (b) Performance.
 - (c) What will excuse performance.
 - (d) Part performance.
 - (e) Extra work.

- IV. Dependent contracts.
- V. Rescission of contracts.
 - (a) General principles.
 - (b) Contracts respecting real estate.
 - (c) Contracts respecting personal property.
 - (d) Fraud.
- VI. Construction of particular contracts.
- VIII. Illegal contracts.
 - (b) Contracts in violation of a statute.
 - (c) Illegal considerations.
 - (d) Contracts contrary to public policy.
- IX. Contracts in restraint of trade.
- X. Stock-jobbing.

I. Execution of contracts.

1. The signing of a bond in a blank left at the head for the names of the obligors is sufficient; a signature at the foot is not necessary. *Benedict v. Hood*, 134 P. S. 289; s. c. 26 W. N. C. 37.
2. A bond, not filled up at the time of signing, but subsequently filled up in the manner contemplated by the parties, is a valid obligation. *Bugger v. Cresswell*, 12 Atlan. 829; affirming s. c. 4 Montg. 47.
3. If a lessee who has not signed a lease accepts it when signed and sealed by the lessor, such lease binds the lessee the same as if he had executed it. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.
4. The signing of a judgment note opposite to a place for a seal indicated by a printed blank and the letters "L. S." does not imply a seal, and where judgment is entered on such a note more than six years after its execution, the court will open the judgment to allow the plea of the statute of limitations. *Bennett v. Allen*, 10 C. C. 256.
5. In the absence of a plea of the statute of limitations the presence of but one seal to a joint note of two persons will not release either maker from the liability

incurred by his signature. *McKinney v. Nolf*, 9 Cent. 804.

6. Whether an obligor against whose name there is no seal, adopted the seal opposite the name of another obligor as his own, is a question of fact; a finding of an auditor upon such fact approved by the court below will not be disturbed on appeal except for plain error. *Hess's Estate*, 150 P. S. 346.

7. Any flourish or mark is a good seal provided the parties intend it to be a seal; where a person writes his name to a printed form of note to the left of the printed word "seal" he adopts the act of the printer in putting the word there for a seal. *Lorah v. Nissley*, 156 P. S. 329; reversing s. c. 9 Lanc. 177.

8. Where a judgment note under seal was dated April 1, 1876, and contained the following indorsement not under seal, "April 1, 1876. After my decease the within note shall become null and void and of no value whatever"; it was held, that the execution of the note and of the indorsement would be regarded as simultaneous acts, and that, notwithstanding the seal to the note, the two instruments were parts of one and the same transaction. *Geisinger's Estate*, 13 C. C. 88.

9. Where a promissory note, apparently intended to be negotiable, had certain scrolls in the lower right-hand corner of the border, which were so ingeniously and deceitfully turned as to make the two letters "L. S." appear on close inspection; it was held, that such letters would not destroy the negotiability of the note. *Bancroft v. Haines*, 13 C. C. 116; s. c. 31 W. N. C. 248.

10. That a bond of subcontractors to secure the owner of a house against mechanic's lien was to be of no force unless signed by all the subcontractors, which was not done, will not invalidate it against the owner, who had no knowledge of such agreement. *Bugger v. Cresswell*, 12 Atlan. 829; affirming s. c. 4 Montg. 47.

11. One partner of a firm not engaged in the real estate business cannot bind his

copartners by an agreement to purchase real estate; so, his agreement to purchase should be regarded as contingent on the assent of his copartners. *Martin v. Frank*, 26 W. N. C. 361.

12. If parties have entered into a written agreement with express stipulations, the presumption is that they have expressed all the conditions by which they intend to be bound. *Kellow v. Jory*, 2 Northam. 229.

13. A contract authorizing the sale of another's stocks is not waived or modified by subsequent letters to the owner advising him to sell them. *Neilson's Appeal*, 13 Atlan. 943; affirming *Well's Estate*, 45 L. I. 44.

14. Where defendant wrote to plaintiff to have him prepare some advertising leaflets, and plaintiff prepared a leaflet endorsed, "One hundred dollars if satisfactory," and, not proving satisfactory, plaintiff sent a second leaflet, with a letter in which he said, "I put down in my book two hundred dollars against you, but I will wipe it all out if I can't suit you," and defendant replied, "The primers are good, but I do not care to pay the price you name"; it was held, that the evidence did not disclose a contract. *Powers v. Curtis*, 147 P. S. 340.

15. Where no conversation took place at the signing of a telephone contract, and it was not read, but a master found that certain parol negotiations as to future abatement of rates were omitted by mistake, the supreme court did not reverse, but intimated that signing upon mere suppositions, without knowledge or inquiry, came dangerously near negligence. *Martinsburg Bank v. Central Pennsylvania Telephone & Supply Co.*, 150 P. S. 36.

16. Where a surety signed a bond upon condition made with the principal that two other parties would sign with him, but the obligee had no notice or knowledge of such representation; it was held, that the surety was liable, and it was further held, that a seal for an additional name did not charge the obligee with implied notice, and further, that the

principal was not the agent of the surety for the purpose of delivery so as to put the obligee upon inquiry as to the secret condition. *Winters v. Robison*, 14 C. C. 264.

17. Where a witness to a promissory note testifies that he has no recollection of having signed his name as a witness, but does not positively deny his signature, the presumption is that he did sign it, and this is *prima facie* evidence of the execution of the note by the maker. *Davidheiser's Estate*, 10 Montg. 50.

18. Where a party signs a paper which is put before him for execution, without reading it or having it read to him, he will be held to be guilty of such negligence that he will not be protected either in law or in equity. *Klein v. Daney*, 3 Northam. 75.

19. Where an owner invites proposals to erect a building, he is not thereby obliged to award the contract to the lowest bidder; where, upon the opening of the bids, the owner said to the lowest bidder, "You are the lucky man"; it was held, that this did not amount to an award of the contract; in such a case, proof of a custom that the lowest bidder is entitled to a contract is inadmissible. *Leskie v. Haseltine*, 155 P. S. 98.

20. An offer to buy or sell without more is an offer in the present, to be accepted or refused when made, and until it is accepted it may be withdrawn, though that be at the next instant after it is made, and a subsequent acceptance will be of no avail. *Vincent v. Woodland Oil Co.*, 165 P. S. 402.

21. An action will not lie upon a brief memorandum not intended as a complete contract. *Baird v. Aetna Insurance Co.*, 3 Cent. 111.

II. Consideration.

22. Forbearance is a good consideration to support a parol promise to pay a mechanic's lien against the promisor's land, for which he was not personally liable. Such a promise is not within the statute of frauds. *Bell's Estate*, 4 Montg. 175.

23. An extension of time upon the original obligation is sufficient consideration for a promissory note given as collateral therefor. *Van Gorder v. Freehold Bank*, 7 Atlan. 144.

24. An agreement for the division of profits arising from the manufacture of iron by the defendant has a sufficient consideration, if it rests upon the sale of the iron works on the previous day by the plaintiff to the defendant. *Ahl's Appeal*, 129 P. S. 26.

25. Where a bank clerk and his surety had executed a bond in which the principal's position in the bank was left blank, and he afterwards became a defaulter; it was held, that the delivery of the said bond to the surety was a good consideration for a new bond and mortgage executed and delivered by the surety to the bank at the same time. *Vogely's Appeal*, 15 Atlan. 878.

26. A subsequent absolute unconditional promise to pay, with a partial payment, will revive a debt which has been discharged by proceedings in bankruptcy. *Huffman v. Johns*, 4 Cent. 658.

27. A payment of interest, after the maturity of a debt, is not a sufficient consideration to support an agreement to extend the time of payment; such a promise of extension will not discharge a surety. *Boring's Appeal*, 9 Cent. 394.

28. A contract to pay rent will not spring out of daily visits to plaintiff's store, with no demand for rent, under circumstances which show that the privileges of the defendant were gratuitous. *Kneedler v. Goodman*, 47 L. I. 4.

29. The contract of a married woman to pay a valid debt of her husband out of her separate estate, creates a moral obligation which is a sufficient consideration to support a bond and mortgage for the same debt executed after her husband's death. *Holden v. Banes*, 140 P. S. 63.

30. Whether there might or might not be a valid contract for compensation for the use of a man's name or his credit, was not decided, the court being of the opinion that the plaintiff's claim failed upon

the proofs. *Hoffeditz v. Maiden Creek Iron Co.*, 141 P. S. 58.

31. Where partners executed an agreement that all property of every nature and kind held by one of them, whether separately and individually or jointly with the other, and whether severally or in common with others, was in fact owned by them both in equal shares or interests, and that in settling the affairs of the partnership, the first named partner should receive a certain salary for attending to said business to be taken out before the division of said profits; it was held, that there was ample consideration for the agreement, and that such agreement embraced property of every nature and kind, real and personal, including accounts, notes and choses in action held and owned at the date of making the agreement. *McCullough v. Barr*, 145 P. S. 459.

32. An agreement to compromise a claim in consideration of the defendant entering into the plaintiff's service cannot be said to be without consideration because the defendant was to be paid for his services. *Potter v. Hartnett*, 148 P. S. 15; reversing s. c. 28 W. N. C. 120.

33. Where a married woman repudiates a note which she has given as consideration for a release, she destroys the consideration upon which the release was given and recovery may be had against her upon the original debt. *Saeger v. Runk*, 148 P. S. 77; affirming s. c. 3 Northam 13.

34. Substantial compliance with the terms of a building contract is sufficient to entitle a party to recover the contract price less deductions for any minor matters left incompleting; but not the full contract price. *Moore v. Carter*, 146 P. S. 492.

35. Services rendered by the grantee in a deed to the grantor, and recognized by the grantor, are a valid consideration; it is not necessary that there should be an original contract to compensate for the services. *Doran v. McConlogue*, 150 P. S. 98.

36. A mortgage voluntarily executed by a grantee to a third party, but at the request of the grantor to secure the latter's debt, is a valuable consideration in support of the deed; and this, although the mortgage was executed after the deed was made; such a mortgage is binding upon the grantor by way of ratification of the original deed and also by way of estoppel. *Doran v. McConlogue*, 150 P. S. 98.

37. A promise to let a legacy stand cannot be enforced against the testator's estate without direct and positive proof of a sufficient consideration. *King's Estate*, 150 P. S. 143; affirming s. c. 9 Lanc. 99.

38. A promise to pay the debt of another, although in writing, is of no force unless founded upon a consideration either actual or by the existence of a seal, and where the promise is to pay an overdue debt, mere forbearance without an agreement to that effect is no consideration. *Hess's Estate*, 150 P. S. 346. See *Kanada v. Duckworth*, 8 Montg. 208.

39. An agreement under seal to give in place of promissory notes amounting to over seven thousand dollars, the sum of three thousand in cash and four thousand dollars in securities and to pay the attorney's fee in the suit on the notes, was held to be supported by sufficient consideration. *Hosler v. Hursh*, 151 P. S. 415.

40. A promise to release a debt does not amount to an actual release, and if such a promise is not supported by a sufficient consideration, it is *nudum pactum*. *McNutt v. Loney*, 153 P. S. 281.

41. The transfer of a judgment by a husband to a wife at a time when the husband is out of debt is a valid gift; the consideration of natural love and affection will sustain it. *Reese v. Reese*, 157 P. S. 200.

42. An assignment of an expectancy will be enforced as an executory agreement to convey where it is sustained by a sufficient consideration; the sum of \$625 was held to be a sufficient con-

sideration for the assignment of an expectant interest amounting to \$771. *Fritz's Estate*, 160 P. S. 156.

43. Where a mortgage is given to secure the debt of a third person, the agreement by the mortgagee to extend the time for the payment of the debt is a sufficient consideration for the mortgage. *Saalfeld v. Manrow*, 165 P. S. 114.

44. Upon a rule to open a judgment where it appeared that it was confessed to a life tenant of several promissory notes or their proceeds, and who yielded up the notes upon the delivery of the judgment; it was held, that the agreement was based upon a sufficient consideration and the judgment would not be opened. *Woodring v. Woodring*, 11 C. C. 603.

45. Where a conveyance in trust is to take effect upon delivery and vests absolute interest, it is not testamentary and is irrevocable; and this, although the grantor has, until his own death, the exclusive enjoyment of the income. Blood relationship is a sufficient consideration to support such a deed. *House's Estate*, 14 C. C. 654.

46. The transfer, by the payee of a promissory note, to the maker, of a note of a third party, is a good consideration. *Newbold v. Bernard*, 15 C. C. 118.

47. Where a dispute over the terms of a settlement under a written contract is ended by giving a promissory note, no defence to the note can afterwards be set up except as to matters arising since the date of the note or upon an allegation of fraud, accident or mistake. *Newkirk v. Scott*, 5 Del. 12.

48. A contribution by one partner to the assets of a partnership is a sufficient consideration to support an assumption by the co-partnership, of such partner's indebtedness to a person, from whom he borrowed the money to make such contribution. *Huston v. Heyer*, 3 Dist. Rep. 533.

49. Where a loan was made to a married woman in 1869 and suit was brought in 1888, and it appeared that the defend-

ant died in 1885 and had been discovered for about one year prior thereto, during which time she paid twenty-five dollars on the loan and promised to pay the balance; it was *held*, that the evidence warranted a verdict for the plaintiff, and that the moral consideration of having received the money during coverture was a sufficient consideration for the second promise to pay. *Murray v. Kelly*, 2 Lack. Jur. 181.

50. Where a widow promised to pay a note made by her husband and herself which would, on its face, be the husband's debt; it was *held*, that the moral obligation to pay was sufficient consideration to support the widow's promise. *Root's Estate*, 11 Lanc. 225.

51. A promise of the true owner of a chattel based upon a condition that possession of the property which is wrongfully withheld from him, be surrendered to him, is without consideration and not enforceable; so, a promise which is based upon a fact which does not exist is void; and this, though both parties assumed it to be a fact. So, it is of doubtful public policy to enforce a contract where the right to property is made to turn on a verdict in a criminal prosecution in which both parties to the contract are witnesses. *Fink v. Smith*, 170 P. S. 124; s. c. 37 W. N. C. 46; reversing s. c. 12 Lanc. 164.

52. Where an agreement to waive the exemption is not made at the time the debt is contracted, but is made subsequently, it must be clearly shown that such agreement was based on a good consideration. *Klein v. Daney*, 3 Northam. 75.

53. The moral obligation which rests upon a parent to provide for a bastard child is sufficient consideration to support a trust declared for such child; where a parent addressed a letter to an illegitimate child asserting that certain premises had been bought by him for the use and benefit of the child, to be held in trust for such purposes as long as desirable, and a request to the child

to accept as a token of his affection, together with a provision for a reversion to the father in case the child should die before him without issue, and such letter was delivered to the child's mother for the child; it was *held* to be a perfect declaration of trust and enforceable against the heirs and devisees of the father who had taken possession of the premises after his death. *K— X— v. A— Y—*, 34 W. N. C. 145.

III. Obligation of contracts.

(a) General principles.

54. Where an agreement is signed by one party and accepted by the agent of the other party, who acted in the transaction, it binds the latter though not signed by him. *Cowan v. Watkins*, 1 Lack. Jur. 129.

55. If one, unable to protect himself by reason of excessive drinking, is induced by means of false statements to enter into a contract, he is not bound by it. A decree adjudging him an habitual drunkard, made a year afterwards, is admissible in evidence. *Stirling v. Hinckley*, 2 Cent. 824.

56. An agreement to play base-ball for the plaintiff for a period, which might at the plaintiff's option equal the term of the player's life, with power in the plaintiff to discharge on ten days' notice without cause, is so unfair and wanting in mutuality that equity will not enforce it by injunction. *Philadelphia Ball Club v. Hallman*, 8 C. C. 57. See *Harrisburg Ball Club v. Athletic Association*, *Ibid.* 337.

57. The president of a school board acting for the same, or pretending to act for it, in making a contract which the board had no power to make, thereby becomes individually liable thereon. *Forcey v. Caldwell*, 9 Atlan. 466.

58. Where a contractor to erect a building insured it in his own name under a contract with the owner that the indem-

nity in case of fire should be divided between them according to their interests; upon the building being destroyed by fire and the payment of the policy to the owner upon its assignment to him, it was *held*, that a material man who had supplied lumber had no right of action against the owner. *Mosser v. Donaldson*, 10 Atl. 766.

59. A party to a contract cannot by his "order" upon the other party relieve himself of his own contract obligations. He who seeks to compel performance by others must show his right to ask it by showing his own performance of all that is preliminary, and his readiness to perform what is coincident to that which he asks done by others. *Mink's Appeal*, 128 P. S. 163.

60. Upon an agreement to drive an oil well at so much per foot, the owner of the land who takes possession after the well becomes producing, is liable for the contract price. *Holmes v. Charters Oil Co.*, 138 P. S. 546; s. c. 27 W. N. C. 156.

61. Where a person desires to take advantage of a change in a contract made by the other party, he must do so within a reasonable time; if he continues for a long period to treat the contract as still in force, he will be bound by it, subject to the modification introduced. *Margut v. United Brethren Mutual Aid Society*, 148 P. S. 185.

62. In an issue to determine the validity of a judgment note given for a bottling establishment, it may be shown by parol that the number of bottles in the hands of customers was much less than the number represented by the plaintiff; and this, though the number of such bottles was not stated in the bill of sale. *Volkenand v. Drum*, 154 P. S. 616; affirming s. c. 6 Kulp 519.

63. The lessee of an organ who had agreed to insure the organ against loss or damage by fire or water, and who failed to do so, was *held* to be liable for its value where the same was subsequently destroyed by fire; and this, though the

conflagration destroyed almost the entire town and might be within the designation of "*actus Dei*." *Smith Organ Co. v. Abbott*, 11 C. C. 319.

64. Contracts entered into between different corporations are not void or voidable from the mere fact that such corporations have directors common to both. *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, 42 P. L. J. 345. See CONSTITUTIONAL LAW, XI.

(b) Performance.

65. Under the act of 13 April 1834, fixing a ton at 2000 pounds, it was *held* to be incompetent to show that by a custom of a particular trade a ton consists of 2240 pounds. A party will, however, be held to his stipulated agreement to deliver that number of pounds to the ton. *Harrison v. Mora*, 8 C. C. 224.

66. There being no dispute as to the terms of a contract of hiring, and as to the servant's conduct, his performance is a question for the court. *Elliott v. Wanamaker*, 9 C. C. 497; s. c. 155 P. S. 67.

67. The defendant agreed to accept the lease of an ore mine, the plaintiff agreed to give him possession as soon as he obtained it and to tender him a good and sufficient marketable title; *held*, that performance by the plaintiff should be tendered in a reasonable time, that a delay by plaintiff of four years and eight months to take steps to obtain possession (the value becoming deteriorated in the meantime) was unreasonable, and evidence of abandonment, and that the defendant was not bound to accept the lease. *Kille v. Reading Iron Works*, 141 P. S. 440; affirming s. c. 47 L. I. 464.

68. In a suit on a contract to cut and deliver all the logs upon a tract of land, the leaving back of a few of the logs, covered with brush and snow, was *held* not to be such a failure of substantial performance as would defeat the plaintiff's right to recover. *Pallman v. Smith*, 135 P. S. 188.

69. Matters connected with the performance of a contract are governed by

the law prevailing at the place of performance; where a contract for the loan of money to a person about to embark in business was made in consideration of a share of the profits and executed in Pennsylvania, but the business was to be conducted in New York; it was *held*, that the question whether there was a liability as partners as to third persons, was to be determined by the law of New York. *Waverly National Bank v. Hall*, 150 P. S. 466.

70. Where the evidence as to the performance of an entire contract is conflicting, the court will leave the question to the jury. *Bachler v. Cooper*, 150 P. S. 533.

71. Where the defendant agreed in writing to pay a sum in cash and a sum in securities to be satisfactory to the plaintiff, the above to be in lieu of two notes upon which plaintiff had brought suit; it was *held*, that the agreement was executory and contemplated the performance of the promise, and a tender of performance, though made promptly and in good faith, was not satisfaction. *Hosler v. Hursh*, 151 P. S. 415.

72. In an action on a building contract which provided that the balance should be paid only on receipt of releases of liens; it is no defence that a lien was filed against a building and reduced to judgment; the court will adjust the amount actually due the contractor when execution is issued upon the judgment. *Huckestein v. Kelly*, 152 P. S. 629.

73. Where there has been a substantial compliance with a building contract, the contractors are not chargeable with repairs and changes subsequently made which were not due to the plaintiff's defective work. *Coon v. Citizens' Water Co.*, 152 P. S. 644.

74. Where one party to a contract, before the time of its performance has arrived, announces to the other that he does not intend to perform, the latter may treat the contract as broken, and bring an action immediately for the breach. *Hocking v. Hamilton*, 158 P. S. 107.

75. Where a building contract provided that certain parts of the work should be done with a particular kind of plaster, and a sub-contractor, with the consent of the architect, who was the owner's agent, substituted an inferior plaster; it was *held*, that the owner could not claim, as a set-off to the contract price, damages sustained by the substitution of the inferior plaster. *Robinson v. Baird*, 165 P. S. 505.

76. Where a building contract provided that no sum should be due thereon unless all work done and material furnished should be in strict compliance with the plans and specifications and to the satisfaction of the owner; it was *held* not to be improper to leave it to the jury whether the contract had been substantially complied with, and what deductions, if any, should be allowed where the evidence was conflicting. *Crawford v. McKinney*, 165 P. S. 605. See *Crawford v. McKinney*, 165 P. S. 609.

77. Where time is of the essence of the contract, equity will not relieve a party from strict performance; especially is this so when due notice is given of an intention to enforce the contract. *Chester Foundry & Machine Co.'s Estate*, 5 Del. 301.

(c) What will excuse performance.

78. A request to inspect books, though authorized by the contract, can be properly refused if accompanied by another demand which is unwarranted. *Dick v. Ireland*, 130 P. S. 299.

79. Upon a contract to pay the plaintiff, six months after he should lose his situation, the defendant is not liable if the plaintiff voluntarily resign. *Shafer v. Senseman*, 125 P. S. 310; affirming s. c. 1 Northam. 389.

80. Upon a "lease" of a printing press at a rent or hire of three thousand dollars, payable in monthly instalments of one hundred dollars each, "to be further evidenced by the lessee's notes bearing legal interest"; it was *held*, in an action on certain of the notes, that it was a good

defence, that at a date subsequent to their maturity, the plaintiff took possession of the press in the exercise of his right to do so reserved in the lease; the lease and notes were part and parcel of the same transaction, and when the agreement was rescinded by taking possession of the press, the notes fell with it for want of consideration. *Campbell P. P. & M. Co. v. Hickok*, 140 P. S. 290.

81. Where the plaintiff and defendant entered into a contract that plaintiff should put a saw-mill on defendant's land to make into lumber all the pine timber on said land, and the plaintiff erected the mill and began the making of lumber; it was held, that the contract was broken by the defendant, by the issuance and maintenance of writs of ejectment and estrepement at the suit of others. *Rogers v. Davidson*, 142 P. S. 436.

82. Under a contract for drilling wells, where the contractor is prevented by the other party from performing the work, he is not entitled to recover the whole contract price, but only damages for the breach of the agreement, and where the plaintiff's statement claims damages for the whole contract price, the court will not enter judgment, although the affidavit of defence may be insufficient. *Emig v. Spatz*, 155 P. S. 642.

(d) Part performance.

83. Upon a *bona fide* intention to perform and a partial failure not involving a fraudulent purpose, there may be a recovery of the contract price, less the amount required to put the work in that condition which the contract calls for. *Austin v. Hughes*, 5 Kulp 225. See *Lecker v. Hartley*, Ibid. 299.

84. A repudiation of a contract of sale by the purchaser entitles the seller to recover for the part performance, to that time, of his contract to deliver. *Stewart v. Short*, 130 P. S. 395.

85. In an action on an entire contract for plumbing, etc., the evidence as to

compliance being conflicting, if the plaintiff acted honestly, and in good faith substantially performed the contract, that is sufficient; but if in minor particulars it was not fully complied with, the jury may deduct the difference between the value of the work as done, and what it would cost to have it completed in strict conformity with the contract. *Sticker v. Overpeck*, 127 P. S. 446. See *Gallagher v. Sharpless*, 134 P. S. 134.

86. In such a case the defendant, under the plea of set-off, might set off the loss and damage occasioned by plaintiff's default, but the jury could not give a certificate for the defendant for an excess. *Sticker v. Overpeck*, 127 P. S. 446.

87. Where the vendee retained part of the purchase money until the vendor should procure releases of outstanding claims, part of which the vendor procured and part the vendee; it was held, that the vendor's performance of the entire contract was not a prerequisite to his recovery, and that he was entitled to the excess in the hands of the vendee. *Gansz's Appeal*, 15 Atlan. 883.

88. A contract to drive different kinds of lumber into a boom at a stipulated price per log, piece, or thousand feet respectively, is a severable contract, but there can be no recovery for lumber partly driven, or which was carried by the force of a flood into and through the boom. *Gill v. Johnstown Lumber Co.*, 151 P. S. 534.

89. In an action on an entire contract for plumbing work, it is proper to charge that if the plaintiff fail to perform any material portion of his contract, he could not recover, and that the jury had no right to find that the contract was changed by the omission of some of the items, unless the evidence was clear, convincing and without doubt. *Wilkinson v. Becker*, 155 P. S. 194.

90. Where the part of a contract to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, such a con-

tract will generally be held to be severable. *Fullmer v. Poust*, 155 P. S. 275.

91. Where the contractor for a building uses every reasonable effort to perform his contract fully and within the period given him to perform it, and the building is completed and taken possession of, the contractor is entitled to recover the balance of the contract price and for his extra work, less such deductions as will compensate the owner for any minor imperfections and omissions; such a contractor is not responsible for delay caused by the neglect of the owner's architect, but he will be charged with delay which resulted from the condemnation of improper material. *White v. Braddock Borough School District*, 159 P. S. 201.

92. Where a building contract provided that the whole building should be constructed for a certain sum and that a specified sum should be paid upon the completion of the foundation walls, a second specified sum when the roof was on, a third sum when the plastering was completed and the balance when the house was completed; it was *held*, that such payments were distinct and separate and could be sued for as they matured. *Crawford v. McKinney*, 165 P. S. 605; *Crawford v. McKinney*, 165 P. S. 609.

93. Where a building contract provided that retained percentages should not be paid until the contract should be completed according to the specifications, and before the contract was completed the contractors abandoned the work and the owners paid all the subsequent wages and supply bills under the supervision of one of the contractors; it was *held*, that an attachment execution would not lie on the part of a judgment creditor of the contractors to recover from the owners the retained percentages. *American Forcible Powder Mfg. Co. v. Malone*, 166 P. S. 289.

94. Where the plaintiff agreed to furnish to the defendants all of his milk for a year at a certain price per gallon, but no specific amount of milk was men-

tioned; it was *held*, that the contract was severable, and that the plaintiff could recover for milk furnished during a portion of the year although he failed to comply with his contract during the rest of the year. *McLaughlin v. Hess*, 164 P. S. 570.

(e) Extra work.

95. A building contractor may recover for extra work required by changes in the original plans ordered by the building inspectors; and this, although the contract provided that no extra work should be paid for unless agreed to in writing and signed by the parties. *Cunningham v. Fourth Baptist Church*, 159 P. S. 620.

IV. Dependent contracts.

96. Where land is conveyed in consideration of covenants to support and maintain the grantor and his wife, and neither the grantor nor his widow complain that the grantee did not perform his covenant, ejectment will not lie by collateral heirs as for condition broken. *McLaughlin v. Collins*, 138 P. S. 198.

V. Rescission of contracts.

(a) General principles.

97. One who seeks to rescind a contract must first restore what he has received thereunder. *Guilinger v. Zahnizer*, 5 Cent. 303.

98. Equity will not rescind an executed contract where the parties have a complete remedy at law, and the interests of a third party are involved. *Travis's Appeal*, 8 Atlan. 601.

99. Under a right to cancel a contract on thirty days' notice, a letter that "we wish to cancel," etc., amounts to an absolute and complete rescission. *Dick v. Ireland*, 130 P. S. 299.

100. Upon the sale of a horse the title not to pass until a note for the purchase money is made. Upon the non-payment

of the note, the right of rescission may be exercised by a peaceable resumption of possession. *Levan v. Wiltten*, 135 P. S. 61; s. c. 26 W. N. C. 114.

101. If a contractor attempt to rescind without cause, anything occurring afterwards can be no ground for such rescission. *Becker v. Philadelphia*, 16 Atlan. 625; affirming s. c. 45 L. I. 35.

102. A contractor to build a sewer, with the right to all the stone excavated, except as may be necessary for the support and protection of the work, cannot, in the middle of his work, rescind because a certain private owner, through whose ground the sewer was being built, refused to allow him to take excavated stone away. *Ibid.*

103. One who buys property subject to certain judgment liens, the purchase money to be paid in instalments, may apply the purchase money to satisfy the incumbrances; if he fail to do so, and the property be sold under the liens, he cannot rescind and recover from the grantor the purchase money paid. *Boyd v. McCullough*, 137 P. S. 7; s. c. 26 W. N. C. 559.

104. If a survey be duly returned and accepted, no title can pass to the holder of a subsequent survey. If one person owns both surveys and they interfere, his grantee of the younger survey cannot claim against his subsequent grantee of the older; he cannot appropriate his grantor's adjoining lands, he must either rescind the contract or proceed against the grantor on his covenants. *Midland Mining Co. v. Lehigh Valley Coal Co.*, 136 P. S. 444; s. c. 26 W. N. C. 549.

105. Where a sale of personal property is rescinded and the article which was paid for is returned to the seller, there is no implied liability on the part of the buyer to pay for the use of the article during the time it was in his possession. *Ziegler v. McFarland*, 147 P. S. 607.

106. Where defendants, on notice by the plaintiff, produced a contract upon which was endorsed an agreement to cancel the contract, signed by the plaintiff; it was

held, that the agreement of cancellation was not admissible, there being no evidence that it was ever assented to by the defendants. *Cook v. Matlack*, 148 P. S. 331.

107. A purchaser of goods cannot rescind a contract by writing to the seller that "we think it would be well for you to come here and see them and say what you wish to have done with them. We are obliged to reject them as utterly unfit for our use and wish you to take them away." *Sternbergh v. Chickies Iron Co.*, 156 P. S. 34.

108. The parties to a contract may at any time rescind it either in whole or in part by mutual consent, and the surrender of their mutual rights is a sufficient consideration; where, after a personal conflict between the owners of timber land, and the assignees of the contract for cutting the timber, the parties came together and agreed upon a settlement, and put its terms in writing which was signed by both and partly carried out; it was held, that such an agreement was not an accord, but a compromise and a binding contract, and an action for the price of the timber could be brought in the name of the assignee of the contract. *Flegal v. Hoover*, 156 P. S. 276.

109. Where a bill of sale is taken by a creditor in satisfaction of an antecedent debt, he is entitled to hold the goods as against the equities of an original vendor who claims that the goods were obtained from him by fraud; but in such a case the burdep of proof is on the creditor to show that he took the goods in payment of a debt. *Bughman v. Central Bank*, 159 P. S. 94.

110. Where the lessees under an oil and gas lease have an absolute right to rescind the lease at any time, and such lessees never enter into possession, the rights and privileges under the lease may be rescinded by parol. *Hooks v. Forst*, 165 P. S. 238.

111. Where the defendant bought a lot of tobacco from the plaintiff under a written contract and refused to pay the

price, alleging defects, and offered the plaintiff a check for two-thirds of the price, which the plaintiff accepted without further protest; it was *held*, upon a suit for the balance, that the offer and acceptance of the check amounted to a mutual rescission of the contract and the making of a new one. *Smith v. Cohn*, 170 P. S. 132; affirming s. c. 11 Lanc. 103.

(b) Contracts respecting real estate.

112. That a parol contract is not enforceable against the vendor, does not entitle the purchaser to rescind and recover back his purchase money paid, the vendor being willing to perform. *Hathaway v. Hoge*, 1 Cent. 339.

113. A purchaser is relieved from his contract of purchase, by the existence of a street across the land, laid out but not opened, and which was not disclosed to him when the bargain was made. *People's Savings Bank v. Alexander*, 3 Cent. 388.

114. One who buys at an executor's sale upon the assurance of the executor that he will take a clear title, and relying upon such assurance, expends a considerable sum in improvements, has so far executed the contract that it would be against equity to adjudge a rescission thereof. *Reimer's Appeal*, 12 Atlan. 850.

115. If a vendor sue in ejectment for specific performance and take back the land, it is a rescission of the contract and he cannot afterwards recover on a note given by the vendee for the purchase money. *Reynolds v. Northup*, 5 Kulp 421.

116. There was *held* not to be sufficient evidence of a rescission of written articles for the sale of lands. *Hutchinson v. Welsh*, 14 Atlan. 328; s. c. 12 Cent. 68.

117. Where the assignee of a mining lease has allowed it to become forfeited and disabled himself from performing his covenants contained in a bond given to his assignor, the assignor may either sue from time to time for royalties due or other damages, or he may treat the contract as rescinded and claim dam-

ages in one action for the entire breach. *Keck v. Bieber*, 148 P. S. 645.

118. A contract in writing for the purchase and sale of land may be rescinded by parol or by such conduct of the parties as clearly shows an intention to rescind; a surrender by the vendee and the acceptance by him of a lease from another person is admissible to establish the rescission of such a contract. *Brownfield v. Brownfield*, 151 P. S. 565.

119. Where a father conveyed a property to his daughter on the agreement that he was to have his home with her for the remainder of his life, and the deed was delivered to her but not recorded, and she returned the deed to the father with a distinct agreement between them that the property was to be conveyed by the father as if no conveyance had ever been made to her; it was *held*, that it was not material to inquire whether such a course of conduct was effectual to work a rescission of the deed, and that a claim of the daughter against the father's estate for the purchase money received by him on a subsequent sale could not be sustained by reason of the fact, that she wholly failed to perform the service which was the consideration of the deed. *Fink's Estate*, 157 P. S. 292.

120. In an action on a promissory note given in payment for lands, where the maker claims that he was induced to buy the lands by fraudulent representations, a written statement made by the vendor at the time of the sale as to the value and character of the land is admissible in evidence. *Martin v. Kline*, 157 P. S. 473.

121. A sale of land will be rescinded where the vendee was induced to purchase at twice its value by false representations that there was a large demand for building lots, that a railroad company was about to build its shops in the neighborhood, that a syndicate of prominent capitalists had been formed to secure the land, and that a large sum had been offered for it. *Sutton v. Morgan*, 158 P. S. 204; affirming s. c. 41 P. L. J. 47.

122. Where a lessor is in possession and he gives notice to the lessee that the lease is forfeited, it is substantially a declaration that he will refuse to give the lessee possession, and if the lessee assents to this action and accepts a new lease, he thereby rescinds the former lease and terminates all his rights thereunder. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

123. Where an elderly woman executed a deed to her physician, and it appeared that the deed was not delivered to the defendant but had been retained by the plaintiff's attorney, that the deed was signed without consideration, that plaintiff's attorney had assured plaintiff that she could revoke the deed at any time, that the effect of the deed was never properly explained to the plaintiff, and that defendant was both physician and attorney in fact of the plaintiff, and had great influence with her and influenced her to make the deed, the court decreed a reconveyance of the property to the plaintiff. *Unruh v. Lukens*, 166 P. S. 324.

124. Where a vendee seeks to rescind a contract for the purchase of land upon the ground of failure of title, he must deliver up possession of the land; he cannot recover back the purchase money and at the same time retain the possession. *Wright v. Wright*, 12 C. C. 238.

125. Upon a bill for specific performance of a contract for exchange of lands, where an allegation as to false and fraudulent representations as to liens is made a ground by the defendant for a rescission of the contract, the burden of proof rests upon the defendant, and in the absence of an affirmative finding of fraudulent representation or of fraudulent concealment, the record of the liens is as effectual notice as actual notice. In such a case it is incumbent on the defendant to make his election to rescind promptly, and where the time originally fixed for delivery of the deeds passed without such delivery, both parties concurring, and the defendant elected to treat the contract as

enforced; it was *held*, that he could not afterwards rescind the contract without full notice of his intention, and after the expiration of a reasonable time for performance; in such a case there can be no right to rescind except for gross negligence or inability to perform. *Williams v. Thomas*, 7 Kulp 371.

126. Upon a voluntary agreement without consideration either party may recede, and where the contract is by parol, and is for the sale of real estate, the court will not decree specific performance. *Kennedy v. McCloskey*, 10 Montg. 204.

(c) Contracts respecting personal property.

127. The licensees of a patented article are liable for their royalties so long as they manufacture; they cannot rescind by neglecting, under a forfeiture clause, to make monthly statements and payment. *Bovaird's Appeal*, 5 Atlan. 26.

128. If the owner of a patent agrees for a specific sum to assign an interest in it, and subsequently, having received the larger part of the consideration, he, in consequence of the non-payment of the balance, assigns the entire patent to other parties; that is a rescission of the first contract, and the purchaser may recover back the consideration paid by him. *Bellis v. Henwood*, 2 Mona. 68; affirming s. c. 6 C. C. 78.

129. A vendee seeking to rescind a contract of sale, executed by delivery, because of defect in quality, must return or offer to return as soon as the defect is discovered, or might have been discovered, by ordinary care. *Longacre v. Dinan*, 2 Northam. 325.

130. Where, after the sale of a horse and an allegation by the purchaser that it was unsound, the vendor agreed that it should be examined by a veterinarian, and if he should pronounce it sound, the purchaser should retain it, and the vendor would pay one-half of the expense of the examination, and the veterinarian pronounced the horse "a roarer," and four days afterwards the

vendor sent for the horse and still retained him, and none of such averments were denied by the affidavit of defence; it was *held*, that the conduct of the defendants in sending for the horse and retaining the horse was only consistent with the theory of a compliance with plaintiff's demand for a rescission of the contract, and defendants were liable for the purchase money and one-half the expenses. *Terry v. Wenderoth*, 147 P. S. 519.

131. Upon a lease of personal property with an agreement for a bill of sale on payment of a sum named and with a provision for retaking on default in payment of any instalment, where the property is retaken for such default, the contract is at an end and a mortgage which has been given as part of the price, being part of the contract, falls with it; in such a case there can be no recovery on the mortgage, although the amount named in the lease is independent of the amount named in the mortgage, and although suit is brought by an assignee for value without notice before default. *Scott v. Hough*, 151 P. S. 630.

132. If a purchaser of bar iron does not make any objection to its quality for fifty-six days after the last car load is shipped to him, he cannot afterwards rescind the contract. *Sternbergh v. Chickies Iron Co.*, 156 P. S. 34.

133. Where a person seeks the rescission of a contract he must tender to return what he has received under it; such a tender on the day of trial was *held* not to be too late where the rights and liabilities of the parties had in no way been changed by the delay; so, such a tender is not necessary where the return would not tend to accomplish equity in the particular transaction. *Sloane v. Shiffer*, 156 P. S. 59. See *Schofield v. Shiffer*, 156 P. S. 65; *Boyd v. Shiffer*, 156 P. S. 100.

134. Where a vendor of timber made a false estimate to his vendee as to the amount of the timber on the tract, and his employees, by his directions, showed the vendee only the best part of the

timber and stated that that was the general average; it was *held*, that a bill would lie for the rescission of the contract of sale. *Brotherton v. Reynolds*, 164 P. S. 134; *Mahaffey v. Ferguson*, 156 P. S. 156.

135. A vendor of goods who claims to have rescinded the sale on the ground of fraud, cannot maintain trespass against the sheriff for the wrongful seizure and sale of the goods as the property of the vendee, where the debt of the plaintiff in the execution was contracted after the alleged voidable sale. *Schwartz v. McCloskey*, 156 P. S. 258.

136. Where a school district entered into a contract for the purchase of furniture, and it was agreed that the district would not be bound to take the furniture if it should be unsatisfactory or defective, and on examination it proved to be unsatisfactory, it was *held*, that the president of the board was competent to send the notice of rescission, that the resolution of the board rescinding the contract was properly admitted in evidence, and the plaintiff having elected to disregard the rescission by sending the furniture, it was competent for the defendant to show that the furniture was not such as had been contracted for. *Sidney School Furniture Co. v. Warsaw Township School District*, 158 P. S. 35.

137. Upon a bill for an account against a partner, where it appeared that the plaintiffs had assigned all their interest in the assets of the firm to the defendant for a money consideration, and the plaintiffs contended that the defendant had knowledge of a claim against a railroad company for discrimination, and that he had concealed the facts relating to this claim at the time the assignment was made, but the defendant averred that all parties knew of the existence of the claim and they did not deny it; it was *held*, that the bill was properly dismissed. *Wiley v. Brundred*, 158 P. S. 579.

138. Where the plaintiff contracted to sell to the defendant ten thousand dollars of his stock of goods on or before a cer-

tain day and to reduce his stock on hand to that sum by that day, and one thousand dollars was deposited in bank by each party as a forfeit, and when the day of settlement arrived the invoice showed fourteen thousand dollars of goods on hand, but the plaintiff offered to take out the excess or to sell the excess to the defendants at cost; it was *held*, that the defendants were not entitled to rescind the contract and that plaintiff was entitled to the forfeit money. *Whittle v. Moore*, 164 P. S. 451.

139. Where a contract of bailment provided for the lease of a machine at a certain hire payable in instalments, the lessor to retain title until the last instalment was paid, and the contract was accompanied by a bond and warrant to confess judgment; it was *held*, that the lessor might, upon default, either rescind the contract and take possession of the machine, or enter judgment upon the bond, but having elected to resume possession, he could not afterwards enter judgment. *Seanor v. McLaughlin*, 165 P. S. 150.

140. A seller of goods is not justified in rescinding a sale by false statements as to her financial standing made by the purchaser to a mercantile agency two years and a half before the purchase. *Sharpless v. Gumme*, 166 P. S. 199.

141. In an action for damages for failure to deliver goods sold by the defendant to the plaintiff, it is a sufficient affidavit of defence that plaintiff's agent stated to defendant that plaintiff desired to purchase the article, but that a competitor had offered to sell the article to plaintiff for a certain price and that plaintiff would give defendant the order if she would sell the article at the same price, and that plaintiff made the contract relying upon such statement, but that in point of fact the statement was a malicious lie, intentionally made for the purpose of cheating and defrauding the defendant into selling the article far below the contract price. *Smith v. Smith*, 166 P. S. 563.

142. A vendor of goods cannot rescind

a sale unless there has been artifice, trickery, or false representations made to induce the sale and to obtain possession of the goods; where an endorser of a promissory note requested a dealer in tobacco to discount it, and said, "We are all right, we are not very rich, but all our notes will be met at maturity," and the dealer discounted the note on condition that the endorser would at the same time buy a lot of tobacco from him, and the note was paid at maturity, but the endorser failed before the tobacco was all paid for; it was *held*, that the seller had no right to rescind the sale on the ground that it was induced by false representations. *Labe v. Bremer*, 167 P. S. 15.

143. Where a vendee of goods deposited them with the defendant as collateral security for an antecedent debt, and the vendor sought to rescind the sale by reason of false representations made by the vendee; it was *held*, that the testimony of the latter's confidential clerk as to the true state of his employer's business was admissible in evidence to establish the falsity of the representations, in an action of replevin by the vendor against the bailee of the vendee. *Talcott v. Brenniser*, 167 P. S. 391.

144. Upon an executed sale of a chattel upon an express warranty of quality, the buyer has no right to rescind the contract for breach of warranty, but he may sue on the warranty and recover damages, or if he has not paid the price, he may set off the damages. Where, however, the warranty was fraudulent, the buyer may rescind and return within a reasonable time, and if he has paid the purchase money, he may recover it back, or if he has not, he may defend against an action for the same. Where the contract is executory, as where a particular article has been ordered without having been seen, and it is warranted to be of a given quality or description, the buyer is not bound to keep it or to pay for it on any terms; and this, though no fraud was intended by the vendor, but in such case the buyer must elect within a reasonable time

whether to accept the article or not, and where the facts are undisputed, the question of reasonable time is for the court. *Drovers' & Mechanics' Nat. Bank v. Newton*, 6 Kulp 193.

145. An affidavit of defence setting up a custom, when made by a person with presumable knowledge of the custom, should not be made on information and belief without an averment of expectation of ability to prove it; where the custom was said to be one "known to dealers in bonds and stocks," the affidavit should allege that the plaintiff was such a dealer. A custom among dealers in bonds and stocks that an option to sell at the end of any given period expires on the last day of said period, was *held* not to apply to an option to demand a rescission of a sale after a year of obligatory retention by the purchaser of the article sold. *Weld v. Barker*, 153 P. S. 465.

146. Where, on a contract of sale of certain bonds, the vendors bound themselves to repurchase the bonds at the option of the plaintiff, "at the end of one year from the date of the contract," which was dated 21 April, 1890; it was *held*, that plaintiff's option became exercisable on 22 April, 1891. *Weld v. Barker*, 153 P. S. 465.

147. Where a bank has agreed to discount a note and discovers before it has paid the money that the borrower is insolvent, it may tender back the note given for discount and refuse payment to the borrower; the latter's assignee for creditors has no superior rights to the borrower himself. *Warner v. Hare*, 154 P. S. 548.

148. Where a person has been induced by the misrepresentations of the officers of a corporation to subscribe to its stock, he may rescind the contract and sue in deceit the corporation and its officers for the amount paid for the stock. *Lare v. Westmoreland Specialty Co.*, 155 P. S. 33.

149. Where a mother gave certain bonds and stock to her daughter, and the evidence showed that the gift was a

voluntary one and that the mother was not impoverished by the gift, and made no complaint during the life of her daughter, and it further appeared that the mother had a strong will and was not controlled by her daughter or anybody else; it was *held*, that she could not rescind the gift after the death of her daughter. *Yeakle v. McAtee*, 156 P. S. 600.

150. Where the plaintiff brought suit against the promoter of a corporation and sought to rescind the contract for subscriptions and it appeared that the plaintiff had directed the defendant to sell the stock at a certain price and that the plaintiff had also given a proxy to vote his stock, and that he had attended and participated in the business of a stockholders' meeting; it was *held*, that such acts were *prima facie* acts of ownership inconsistent with the demand for rescission, and that the jury might infer from them an acquiescence in the defendant's refusal and an abandonment or waiver of such demand. *Jessop v. Ivory*, 158 P. S. 71.

151. In an action to recover back moneys paid for an interest in alleged valuable banking concessions from the Chinese government, it was *held* to be a good defence that the concessions were in actual existence at the time of the plaintiff's purchase, that the plaintiff personally examined and read the concessions, that a special trust was formed with the plaintiff's consent, and that certificates of the plaintiff's interest were issued by the trust and were always ready for delivery to him; that after the trust was created, the concessions were revoked by the Chinese government, that plaintiff's money had been applied to expenses, and that defendant made no misrepresentations concerning the transaction. *Frishmuth v. Barker*, 159 P. S. 549.

152. A bill in equity does not lie to compel the reconveyance of shares of stock sold to the defendant under fraudulent representations made by him where

the relief sought is merely compensation in damages; in such a case there is an adequate remedy at law. *Edelman v. Latshaw*, 159 P. S. 644; affirming s. c. 9 Montg. 83.

153. In an action on a life policy where the defendants set up a release but the plaintiff's testimony tended to show that when she applied for payment the agent of the company refused to pay because the assured had declared that she had never been treated for heart disease, and he read a letter to the beneficiary from a doctor that she had been so treated, and it further appeared that this letter was false, and the beneficiary had signed the release in reliance upon the letter; it was *held*, that the case was properly submitted to the jury. *Silk v. Mutual Reserve Fund Life Association*, 159 P. S. 625.

(d) Fraud.

154. Vague and unsatisfactory evidence of fraud is not sufficient to decree the rescission of a fully executed contract for the conveyance of real estate. That the grantor made a bad bargain is insufficient. *Kern v. Middleton*, 24 W. N. C. 393; s. c. 16 Atlan. 640. See *Kern v. Simpson*, 126 P. S. 42.

155. On the general subject of rescission of contracts on the ground of fraud, see notes to *Gray v. Bowman*, 14 Atlan. 905, and *Dennis v. Jones*, *Ibid.* 913.

156. One who seeks to rescind a contract on the ground of fraud should act promptly; in an action on a promissory note given in payment of a subscription to the stock of a bank alleged to have been obtained by fraud, where it appeared, that prior to the failure of the bank and the institution of the suit, the defendant took no steps to rescind the contract, but on the contrary, indicated his willingness to join with other stockholders in their efforts to reorganize the bank; it was *held*, that he was liable for the amount of the note. *Howard v. Turner*, 155 P. S. 349.

157. Execution creditors of the vendee of goods have a standing to contest the right of the vendor to rescind a sale on the ground of alleged fraudulent representation. *Schofield v. Shiffer*, 156 P. S. 65.

158. Where the vendor of goods does not rely on the fraudulent representations made by the vendee and does not part with his goods upon the faith of such representations, he cannot rescind the contract on the ground of fraud; a vendor does not, however, lose his right to rescind because he demanded payment or security from the vendee before declaring a rescission of the contract. *Boyd v. Shiffer*, 156 P. S. 100.

159. Where a vendee seeks to rescind a contract on the ground of fraud, he must do so promptly when the parties can be restored to their original position; whether they can be so restored is ordinarily a question for the jury. *Mahaffey v. Ferguson*, 156 P. S. 156.

160. Where the vendor of goods claims to rescind the sale on the ground of fraud, he must tender back any part of the purchase money received by him; and this rule applies even when the goods are in the hands of the sheriff at the time the rescission is claimed. *Schwartz v. McCloskey*, 156 P. S. 258.

161. If an intending purchaser has a right to regard himself as solvent and firmly believes that he is so, and therefore asserts his solvency to one who sells him goods, such assertion is not a fraud and will not justify a rescission of the contract by the seller, even though insolvency actually arises before payment for the goods is made. *Wessels v. Weiss*, 156 P. S. 591.

162. In an action on the fifth of six promissory notes payable at intervals of six months and given in payment for oil leases, where the first four had passed into the hands of *bona fide* holders and been paid; it was *held*, that it was not too late for the defendant to set up fraud as a defence where he claimed that he was induced to buy the leases by the

fraudulent representations of plaintiff's agent, and that he failed to discover the fraud until about a year after the contract was executed. *Smalley v. Morris*, 157 P. S. 349.

163. A purchase is not rendered fraudulent by the mere fact of the intended buyer being insolvent and intending, at the time of the purchase, not to pay for the goods; any additional circumstance, however, which tends to show trick, artifice, false representation or conduct which reasonably involves a false representation will take the case out of the rule, as where a purchaser about the time of the delivery confesses judgment and gives a bill of sale to a creditor of, substantially, all his assets. *Bughman v. Central Bank*, 159 P. S. 94.

164. Where a vendor rescinds a contract of sale on account of fraud and seeks to recover the value, he may bring suit at once, although the goods may have been sold on a time credit which has not yet expired, but such suit must be in trover and not in assumpsit. *Jones v. Brown*, 167 P. S. 395; affirming s. c. 15 C. C. 202.

165. To entitle a seller to rescind a contract of sale on account of false statements, it is not necessary that the false statements should be such as would necessarily convict him in a criminal court. *Eastern Lumber Co. v. Gill*, 9 C. C. 630.

166. A contract of sale procured by a vendee by false representations as to his solvency may be rescinded by the vendor upon the discovery of the fraud, but where the vendor has received any note, security or thing of value on account of the sale, he must, in moving to rescind, at some stage of the case, return or offer to return the same to the vendee before the rescission will be enforced. *Dornan v. Shiffer*, 2 Lack. Jur. 350.

167. Where a firm made a false representation as to its credit to a mercantile agency, and subsequently a new firm was formed containing one of the old partners and a new man, and the latter firm retained the name of the old firm; it was

held, that one who sold goods to the new firm could not rescind the sale on the ground of a false statement, especially when such statement had not been learned by him until after making the sale. *Manhattan Brass Co. v. Reger*, 168 P. S. 644; s. c. 36 W. N. C. 342.

See FRAUD.

VI. Construction of particular contracts.

168. Where the meaning of an agreement is doubtful, its terms will be construed in the light thrown on them by proved or admitted illustrative facts. *Meigs v. Lewis*, 164 P. S. 597; reversing s. c. 33 W. N. C. 483.

169. In the construction of a contract, reference may be made to the uniform practice of the parties as shown by their course of dealing with each other. *People's Natural Gas Co. v. Braddock Wire Co.*, 155 P. S. 22.

170. Where there is no dispute as to the meaning of terms contained in a contract, and no ambiguity which needs explanation, the construction of the contract is for the court; but where terms are not used in their ordinary sense, and it is shown that, by custom or usage, they are to be used in a different sense, it is for the jury to determine what the contract is. *Elliott v. Wanamaker*, 155 P. S. 67; s. c. 9 C. C. 497.

171. Where the shares in a foreign building association were redeemable in cash after a certain number of payments had been made; it was held, that the word "redeemable" should be construed to mean, at the option of the association. *Peters v. Granite State Provident Ass'n*, 12 C. C. 192.

172. The meaning of the words "satisfied" and "satisfactory" in a contract is considered in notes to *Singerly v. Thayer*, 2 Atlan. 235, and *McClure v. Briggs*, Ibid. 585.

173. A contract "to divide equally the expense of making the American Steam Heater and the profits on the same on all heaters sold" was held to call for a

division of the cost of heaters purchased, as well as of those made. *Halberstadt v. Bannan*, 149 P. S. 51.

174. Under a contract for driving a well and guarantying "to get the water from the bed rock unless we should find good water acceptable to you at a less depth"; it was *held*, that where the contractors drove the well to the bed rock and got water, they were entitled to recover, although the water was salt and unfit for drinking purposes, and parol evidence was inadmissible to show that the water referred to in the contract was intended and meant to be good water to be used for drinking purposes. *Book v. Newcastle Wire Nail Co.*, 151 P. S. 499.

175. Where the plaintiff water company had means of supplying pure water from a mountain stream, and could also supply water from a river contaminated by acids from mines, and it agreed in writing to furnish the defendant with pure water for the "generation of steam, for fire hydrants and hydraulics and for stores and dwellings," for a certain price per annum, and such "other water" as might be required for other purposes; it was *held*, that the right of the defendant to pure water was confined to such a supply as was necessary for the generation of steam, for fire hydrants and hydraulics, and for stores and dwellings; the words "such other water" had no reference to the "pure water" which was to be supplied for those purposes. *Scranton Gas and Water Co. v. Lackawanna Iron and Coal Co.*, 167 P. S. 136.

176. A contract to manufacture and sell patented jars was construed to impose no obligation to account for and pay royalties on broken jars not merchantable. *Dick's Appeal*, 5 Atlan. 30.

177. Where, in partition, certain heirs were allotted certain coal land, between which and the river lay another tract of land owned by the decedent, and across the latter ran a narrow gauge railroad, built for transporting coal from the mines, and by agreement of the parties, the heirs who were allotted the first-men-

tioned tract of coal were also allotted the railroad, with the right to maintain and renew the same forever, and to build branch railroads on ten specific streets laid out on the partition plot; it was *held*, that such provision did not justify an attempt fifty years afterwards to build a branch railroad not necessary and not to be used as an appurtenance to the coal property. *Republic Iron Works v. Burgwin*, 139 P. S. 439.

178. Where the plaintiff agreed to release to a railroad company a right of way through his land, "the damages to be assessed when the road is located, and the amount of said damages to be paid in stock of said railroad. Cost of fencing not included in damages, provided no damage is done to my buildings, race or water power"; it was *held*, that the proviso did not relate to the whole agreement, but simply meant that if no damage was done to the buildings, race or water power, then no damages were to be allowed for the cost of fencing. *Hoffman v. Bloomsburg & Sullivan R. R. Co.*, 143 P. S. 503; s. c. 157 P. S. 174.

179. Where plaintiffs agreed in writing to place a dredge at defendant's "Philadelphia work" and to do the dredging for a certain sum per cubic yard, and they also agreed to permit the defendants to use a particular dredge at League Island, for which the defendants were to pay a certain sum per day, which dredge was used at League Island but no work was done by plaintiffs at Smith's or Windmill Islands, and defendants claimed that they should only be charged for the actual amount of the material removed; it was *held*, that the court properly left it to the jury to say what was the meaning of the parties as to the words "Philadelphia work." *National Dredging Co. v. Mundy*, 155 P. S. 233.

180. Where the plaintiff had a contract with the World's Fair Steamship Supply Company, entitling him to sell soda water on the company's boats, for which he agreed to pay the company at the close of each day's sale fifty per

cent of the gross receipt and ten per cent further until the total percentage should amount to five thousand dollars, and he transferred this contract to Dilworth, who agreed to pay over to the company at the close of each day sixty per cent of the gross receipts until the total percentage paid to the company should amount to five thousand dollars, and thereafter to pay to the company fifty per cent of such gross receipts, and twelve and one-half per cent to the plaintiff of the gross receipts of each day; it was *held*, that the plaintiff was entitled to twelve and one-half per cent for each day from the beginning of the contract and not merely from the time when the sixty per cent reached the amount of five thousand dollars. *Matchette v. Colburn*, 166 P. S. 265.

181. Where a father and son entered into a contract by which the father agreed to devise certain real estate to his son in consideration of the latter supporting his father and mother during life, the father, however, to furnish all the grain and provisions for both families, and the father died and devised the real estate to his son; it was *held*, that the son was entitled to be furnished the grain and provisions by his father's executors during the widow's lifetime, or their equivalent in money. *Zorger's Estate*, 3 York 1.

182. Where the driver of an ice wagon entered security to the company for the prompt return of all moneys collected and the prompt settlement of all shortages and in the event of a dispute as to the amount of moneys due, the settlement was to be made by the bookkeeper, and the defendant refused to account for overdue ice bills, which he had been unable to collect, and the bookkeeper settled the account and charged the defendant with the bills; it was *held*, that as the dispute was in regard to the construction of the contract, its settlement was not committed to the bookkeeper, and further, that the defendant was not liable for the unpaid bills. *Knickerbocker Ice Co. v. Smith*, 147 P. S. 248.

183. Where a building contract provided that there should not be any legal or lawful claims against the party of the first part for work or materials furnished, and further, that the last payment should not be made until a complete release of liens should be furnished "by the party of the first part" and the party of the first part was the builder; it was *held*, that the sub-contractor was not prevented from filing a lien; and this, even if the owner was intended instead of the builder, by the words "party of the first part." It was further *held*, that in construing the contract the court would have no right to change the words "first part" to "second part." *Loyd v. Krause*, 147 P. S. 402.

184. Where a contract for the sale of bricks was not in writing and the plaintiffs alleged that the bricks were to be counted in the wall, while the defendants alleged that they were to be measured in the wall; it was *held*, that the question was for the jury, and it was competent to show by the testimony of persons in the trade what was meant by the expression "measured in the wall," and how such measurement was made. *Welsh v. Hucklestein*, 152 P. S. 27.

185. Where a building contract provided for tiles for fireplace fronts to be estimated at forty dollars each, and that the owner should have the privilege of selecting "within the above figure," and the plaintiffs who were sub-contractors proposed to put in the tiles and the owner selected tiles of less price than forty dollars, and the architect directed the plaintiffs to put in the tiles at the less price named and to do it as part of the contract of the builders, reporting it to them; it was *held*, that the owner had the right to select tiles less in value than forty dollars, and that the decision of the architect acting as arbitrator was probably not within the latter's function, but evidence should have been received as to the action of the architect, leaving the consideration of it for the court upon all the evidence. *Harrison v. Reeves*, 160 P. S. 134.

186. Where the plaintiff assigned to defendant certain oil and gas leases in consideration that if the said defendant or his assignee operate thereon, then on each of said leases he so operates, and if oil is found in paying quantities, defendant shall pay to plaintiff one hundred dollars for the lease upon which a paying well is found, and the plaintiff averred that the defendant did not operate but surrendered the leases to the landowner and took new leases in his own name which he thereupon sold to innocent purchasers; it was *held*, that no breach of the contract was shown and there was no cause of action to recover the stipulated payments. *Smith v. Munhall*, 139 P. S. 253.

187. A mining lease, the grantees to pay "for all fine zinc ores, sulphurets of zinc and iron ores" forty cents per ton washed and dressed and taken away; where a refuse from the separation of ore contained about seven and one-half per cent of zinc ore, and was treated as waste and was not utilizable as ore; it was *held*, that it could not be regarded as ore under the contract before its conversion, and the grantor was entitled only to recover its value as damages. *Doster v. Zinc Co.*, 140 P. S. 147.

188. Where the plaintiff proposed to drill an oil well for the defendant company, and further proposed that if the defendant company should decide to drill any more wells upon said leases or in the vicinity he, the plaintiff, should have the contract, and the president of the defendant company endorsed the proposition "accepted, contract to be drawn in accordance with the above proposition or bid," and the plaintiff without a contract sank a well which proved a dry one, and the defendant company abandoned the enterprise of sinking any other wells on about one thousand acres of contiguous land, but they subsequently sank wells about two miles distant; it was *held*, in an action for a breach of contract, that the plaintiff's proposition was not intended to be an actual agreement, and the

fact that the first well was sunk and paid for could not operate to turn the proposition to sink the others into a contract. It was further *held*, that the sinking of wells two miles distant was not in the vicinity and was not therefore a breach of the proposition. *Sparks v. Pittsburgh Co.*, 159 P. S. 295.

See CONSTRUCTION, IV.

VIII. Illegal contracts.

(b) Contracts in violation of a statute.

189. A contract by county commissioners to give to the county solicitor, whose salary is fixed by law, additional compensation for services within the sphere of his official duties is *ultra vires*; it is incapable of ratification. *Lancaster County v. Fulton*, 128 P. S. 48.

190. Betting is gambling within the act of 22 April 1794, and a check given in pursuance of a bet is void, even in the hands of an innocent third party for value. *Durr v. Barclay*, 8 C. C. 285.

191. The purchase by a school board, of one of their number, of a lot of ground for school purposes, is not illegal under the 66th section of the act of 31 March 1860 (Brightly's Purdon 532). That act does not apply to contracts for the purchase of real estate. A contract in contravention of that act would be cured by its ratification by a new and disinterested board. *Trainer v. Lower Chichester School Board*, 4 Del. 344.

192. The 66th section of the act 31 March 1860 (Brightly's Purdon 532), forbidding any member of any corporation to be interested in any contract for the sale or furnishing of supplies or materials, cannot be extended by implication to apply to a purchase by a school board, of real estate in which one of the directors is interested as an owner; such a purchase may be ratified by a new and disinterested board. *Trainer v. Wolfe*, 140 P. S. 279.

193. A contract by a third party to pay a surety on a liquor license bond of an applicant for so becoming such surety,

the money to be paid back if the application is refused, is not unenforceable as contrary to public policy; and this, though the contract is made to enable the applicant to answer negatively an interrogatory as to whether he had paid money to obtain sureties upon his bond. *Bing v. Willey*, 146 P. S. 381.

194. Where the plaintiffs were manufacturers in Chicago and shipped oleomargarine to the defendant at factory prices in the city of Chicago less five per cent, defendant paying freight at Pittsburgh, the point of delivery, and to receive for his services whatever price he could obtain above the bill price and freight; it was *held*, that the contract was one of sale and not of agency, and the price was recoverable from the defendant in this state notwithstanding the prohibitory provisions of the act 21 May 1885 (Brightly's Purdon 1621). *Braunn v. Keally*, 146 P. S. 519.

195. The authority given by the revised statutes to national banks to lend money on personal security means the personal responsibility of the borrowers and their sureties; it does not mean the lending of money on the security of personal property; but where a national bank had sold asphalt blocks to the defendant and nothing remained for him to do but to pay the consideration; it was *held*, that he would not be allowed to set up that the contract was *ultra vires*. *Montgomery National Bank v. McCleaster*, 13 C. C. 392.

196. A proposal by the owners of suburban lots to pay a sum of money to the person who would suggest the best name for a village, the choice to be determined by a committee, was *held* not to be within the act of 31 March 1860 (Brightly's Purdon 517), prohibiting lotteries, and it seems that under such a contract each person who sent in the selected name was entitled to a prize of the amount advertised. *Holt v. Wood*, 14 C. C. 499.

(c) Illegal considerations.

197. An affidavit of defence that the note in suit was without consideration and given under threat of prosecution by plaintiff's husband of defendant for illicit connection with plaintiff, is sufficient. *Donaldson v. Woodward*, 8 Atlan. 192.

198. A judgment note given in settlement of a prosecution for fornication and bastardy is valid; that is not an illegal consideration. *Romig v. Hinkle*, 7 C. C. 145.

199. A judgment on a bond given in settlement of a prosecution for fornication and bastardy will not be opened on an averment that it was executed while the defendant was in prison, that he was innocent, that no living child had been born of the obligee, who had died unmarried and without issue. The duress was one of law. *Pflaum v. McClintock*, 130 P. S. 369.

200. An agreement to pay to the mother of an illegitimate child a stipulated sum for its maintenance is a valid contract; and this, though it disclose on its face that it is executed to stifle a prosecution for bastardy. *Rohrheimer v. Winters*, 126 P. S. 253.

201. That the knowledge of the vendor that the article sold is to be put to an illegal use will not defeat an action for the price, see note to *Fisher v. Lord*, 3 Atlan. 928.

202. A note given in settlement of a prosecution for obtaining money by false pretences is not invalid. *Rothermel v. Hughes*, 134 P. S. 510.

203. That part of the consideration of a contract is immoral cannot be set up as a defence to a confessed judgment after the contract has been executed by the delivery of goods representing the legal part of the contract. *Adams v. Grey*, 154 P. S. 258.

204. A judgment will not be opened on the ground that the bond was given to compound a felony where the evidence shows that there was no actual agreement not to prosecute, and that the

obligor, although charged with a felony, did not actually commit it. *Woelfel v. Hammer*, 159 P. S. 446. See s. c. 159 P. S. 448.

205. An agreement not to arrest and prosecute an embezzler will constitute a defence to a mortgage, but the burden is on the mortgagor, who sets up such a defence, to establish it by competent evidence. *Saalfeld v. Manrow*, 165 P. S. 114; reversing s. c. 13 C. C. 497. As to compromise under act 31 March 1860, sec. 9 (Brightly's Purdon 547), see case in lower court.

206. A judgment confessed for the purchase money of liquors will not be opened though it appears that the sale was in violation of the act 8 May 1854, sec. 4 (see act 13 May 1887, sec. 14, Brightly's Purdon 1228), forbidding the sale of liquors on credit. *Shumaker v. Reed*, 13 C. C. 547.

207. An agreement to do work in consideration of compounding a felony is void, and where the work has been done, the plaintiff cannot recover for the work and labor done. *Connell v. Walton*, 6 Kulp 451.

(c) Contracts contrary to public policy.

208. A contract between two lien creditors by which one was not to bid at an orphans' court sale of real estate is contrary to public policy and void; and this, though the real estate was not worth the liens against it. *Barton v. Benson*, 126 P. S. 431. See *Maffet v. Ijams*, 103 Ibid. 266.

209. A contract between two or more lien creditors, by which one of them is not to bid at a judicial sale, made without the knowledge and consent of the defendant, is contrary to public policy and void; and a lien creditor who has entered into such a contract is not entitled to be subrogated to the rights of the defendant as against third parties whose interests have been affected by the lessened competition in the bidding. *Hays's Estate*, 159 P. S. 381; affirming s. c. 41 P. L. J. 7, 92.

210. An agreement between bidders at an orphans' court sale that one of them shall bid enough to cover certain liens, upon which the other was collaterally liable, the second one not to bid against him, is not unlawful. *Neely v. McClure*, 1 Cent. 230.

211. A contract to pay on the happening of a specified event, provided it happens "previous to the date of the second marriage" of the obligor, is not a contract in restraint of marriage. *Shafer v. Senseman*, 125 P. S. 310; affirming s. c. 1 Northam. 389.

212. Where a client has a claim against the government, to enforce which a legislative mandate is required, and his agreement with his attorney is for the payment of a contingent percentage of the amount recovered, and the principal service contemplated and performed is in the procurement of the necessary legislation, the contract is void as against public policy. *Spalding v. Ewing*, 149 P. S. 375; reversing s. c. 9 C. C. 471.

213. It was not decided whether a plaintiff who made checks at the request of a bank president to enable the latter to deceive an auditing committee, was forbidden by public policy from setting up the transaction as a basis for a claim against the bank. *Penn Bank's Estate*, 152 P. S. 65.

214. A contract to pay a sheriff money expended by him for the wages and costs of subsistence of special deputies selected by himself for the special benefit of the defendants, and at their instance and request and upon the faith of their promise to refund, is not void as against public policy; neither can it be said that a demand for such payment can in any sense be considered under the act 28 March 1814 (Brightly's Purdon 879) as a demand for compensation for the officer's own services or the service of his regularly appointed and authorized deputies. *McCandless v. Allegheny Bessemer Steel Co.*, 152 P. S. 139; affirming s. c. 39 P. L. J. 299.

215. Public policy forbids that the

secretary of internal affairs should receive his own individual application for a land warrant, grant it and cause a survey to be made and returned upon it, and accept the return of survey and pass upon the validity of the survey as a member of the board of property, and then cause a patent to be issued to himself for land included in the survey. *Goodyear v. Brown*, 155 P. S. 515.

216. Under the retail license act 13 May 1887 (Brightly's Purdon 1226), a contract between a brewer and an applicant for a retail license, by which the brewer furnishes the capital and is to be repaid by instalments, is not invalid, and a judgment confessed for the capital so furnished will not be opened. *German-town Brewing Co. v. Booth*, 162 P. S. 100; reversing s. c. 14 C. C. 189.

217. A contract with a county solicitor for the prosecution of a claim on a contingent fee is void, but he may still recover what his services were worth upon the proof of a new engagement after the expiration of his official term. *Fulton v. Lancaster County*, 162 P. S. 294; affirming s. c. 10 Lanc. 81.

218. Where a railroad company has contributed to the funds of a relief association composed of its employees, an agreement by a member of the association that the acceptance of benefits from the relief fund shall operate as a release from all claims for damages against the company, is not contrary to public policy and does not violate the rule, that a common carrier cannot make a valid contract against its own negligence. *Johnson v. Philadelphia & Reading R. R. Co.*, 163 P. S. 127; affirming s. c. 2 Dist. Rep. 229; *Ringle v. Pennsylvania R. R. Co.*, 164 P. S. 529.

219. A contract between a father-in-law and a daughter-in-law whose husband has deserted her, that the father-in-law will pay his daughter-in-law twenty thousand dollars, and her son, a boy two years old, ten thousand dollars when he comes of age, if the mother will permit the boy to live with his grandfather and be educated by him, she to see him whenever she de-

sires, is not against public policy. *Enders v. Enders*, 164 P. S. 266.

220. A by-law in a fire policy that it shall be optional with the board to cancel or not, as they may determine, unless the property is actually sold, was held to be in conflict with the stipulation in the standard policy required by the act 16 April 1891 (Brightly's Purdon 1047), and to be illegal and void and against public policy. *Comm'th v. Susquehanna Mutual Fire Insurance Co.*, 14 C. C. 438. The act of 1891 was declared unconstitutional in *O'Neil v. American Fire Insurance Co.*, 166 P. S. 72.

221. An agreement among stockholders not to sell or transfer their stock without the unanimous consent of all the persons signing the agreement, is a restraint upon alienation and void as against public policy. *White v. Ryan*, 15 C. C. 170.

222. A contract made by a natural gas company with its directors and stockholders, giving them a preference over the public generally in the supply of natural gas, is contrary to public policy, and is void so far as it binds the company to furnish gas to its preferred stockholders and directors and their firms in preference to other parties similarly situated, and for an indefinite period. *Crescent Steel Co. v. Equitable Gas Co.*, 40 P. L. J. 316. See *Shoenberger v. Equitable Gas Co.*, 39 P. L. J. 347.

IX. Contracts in restraint of trade.

223. In assessing damages for breach of a contract not to enter again in the same business, the jury should be restricted by the evidence, and be allowed no latitude beyond it. *Shirley v. Keagy*, 126 P. S. 282.

224. A covenant by a physician not to practise medicine in a village or its vicinity, is not broken by opening an office four miles distant and treating patients from the village who came to him. *Raub v. Van Horn*, 133 P. S. 573; affirming s. c. 7 C. C. 102.

225. Upon an agreement not to locate as a physician within seven miles, though he cannot locate within that distance he may practise anywhere. *Miller v. Keeler*, 2 Northam. 287.

226. Upon an agreement not to locate as a physician within seven miles of a certain village, the proper way to measure the distance is in a straight line upon a horizontal plane. *Miller v. Keeler*, 2 Northam. 285.

227. A contract that the plaintiff should have a monopoly of making fenders was held to be void in restraint of trade. *Pittsburgh Brass Co. v. Adler*, 2 Mona. 235.

228. Upon the subjects of the sale of the good-will of a business, what constitutes a good-will, and agreements not to go into business, see note to *Burrille v. Daggett*, 1 Atlan. 679.

229. Where the defendant sold to the plaintiffs a general country store for about six thousand dollars, and stipulated that he would not carry on the same kind of business within a radius of two miles under a penalty of one thousand dollars to be paid as liquidated damages; it was held, that the amount was not unconscionable and an offer of the defendant to show that no damages had, in fact, been sustained was inadmissible. *Kelso v. Reid*, 145 P. S. 606.

230. A combination among brewers to prevent competition among themselves is an illegal combination in restraint of trade, and equity will not, upon a bill for an account, enforce the claim of one member of such an illegal combination against the other members where his cause of action is based upon the illegal agreement. *Nester v. Continental Brewing Co.*, 161 P. S. 473; affirming s. c. 12 C. C. 417.

231. Under a contract not to engage in the business of photography in a certain borough, the defendant was enjoined from conducting or maintaining a photograph gallery within the borough, and it was decreed that he should pay damages and costs. *Stofflet v. Stofflet*, 160

P. S. 529; reversing s. c. 3 Lack. Jur. 343.

232. Where a cattle dealer claimed that he had been wrongfully charged for terminal charges by the proprietors of a stockyard, and after negotiations, the latter agreed to credit the former with the amount of the charges, and the cattle dealer entered into a bond for the exact amount of the credit allowed him, conditioned upon his carrying on his regular business at defendant's yard for the period of one year; it was held, that no general restraint upon trade was imposed by the bond. *Fuller v. Hope*, 163 P. S. 62.

233. Where the defendant, a physician, sold his practice to another physician and verbally stipulated that at the end of a certain time he would cease practising, and the vendee sold the practice to the plaintiff, who was also a physician, and the defendant again began to practise and then defendant and plaintiff entered into an agreement in writing, whereby in consideration of two hundred dollars the defendant agreed that he would not practise in the locality for a period of ten years, that he would use his influence in favor of plaintiff, that he would not manufacture or put on sale any medical preparation during the ten years, and for the true performance of the covenants he bound himself in the penal sum of four hundred dollars, and before the expiration of the ten years the defendant resumed his practice; it was held, that the penal sum was a penalty and not liquidated damages, that it was not intended that defendant should have the privilege of practice on the payment of four hundred dollars, and that plaintiff was entitled to an injunction for the specific performance of the contract. *Wilkinson v. Colley*, 164 P. S. 35; reversing s. c. 6 Kulp 401.

234. Where the defendant and his wife sold to the plaintiffs the stock and fixtures and good-will of a "hair goods" business, and the defendant covenanted not to engage in the said business of

"hair dealing or any branches thereof" within eight squares, and the defendant subsequently opened a "hair-dressing" establishment within two squares of the former store, and it was found by the master that "hair-dressing" was a part of the business of the shop which was sold to plaintiff, and that the business was really owned by the husband, and his wife was merely his agent, the court restrained the defendants by injunction from conducting the business of ladies' hair-dressing in their new shop. *Patterson v. Glassmire*, 166 P. S. 230.

235. Where the plaintiff and defendant entered into a partnership and the defendant covenanted not to engage in the drug business so long as the plaintiff should be engaged in that business in the same borough, and the partnership was subsequently dissolved with like effect as if it had never existed; it was *held*, that the defendant's covenant fell with the dissolution for want of a consideration. *Mebane v. Anwyl*, 6 Kulp 323.

X. Stock-jobbing.

236. As to the invalidity of notes given in gambling transactions, see note to *Harper v. Young*, 3 Atlan. 671.

237. Where the contract for the purchase of a large quantity of corn was alleged to be a gambling contract, evidence is admissible to show that the means of the defendants were inadequate to carry the contract into effect. *Myers v. Tobias*, 24 W. N. C. 432; s. c. 16 Atlan. 641; 2 Mona. 32.

238. A court of equity will not lend its aid to a party *sui juris* to recover money he has invested and lost in stock gambling; but a purchase and sale of stocks, although upon speculation, is not a gambling transaction, if the stocks are delivered. *Stewart v. Parnell*, 147 P. S. 523.

239. When the parties to a gambling transaction through a broker, have settled the account and the broker has paid over the profits, leaving nothing in his hands

but a deposit of his customer's money for further operations, he cannot, when sued for such deposit, set up the illegal character of the transaction. *Peters v. Grim*, 149 P. S. 163; reversing s. c. 3 Northam. 121; *Repplier v. Jacobs*, 149 P. S. 167.

240. A purchase of stock on margin is not necessarily a gambling transaction; if there is, in good faith, a purchase, the delivery may be postponed or made to depend on a future condition, and the stock may be carried on margin in the meanwhile, without affecting the legality of the operation. *Peters v. Grim*, 149 P. S. 163; reversing s. c. 3 Northam. 121.

241. A court of equity will not enjoin the collection of a mortgage or judgment given to cover past and future gambling transactions. *Smith v. Kammerer*, 152 P. S. 98.

242. Where a promissory note is given to a broker to cover losses incurred in stock-gambling operations, it is void, and whether the contract is a wagering one or not is a question for the jury, unless the entire contract, unexplained by oral testimony, is in writing. *Gaw v. Bennett*, 153 P. S. 247.

243. Where the profits of stock transactions are paid over by the broker to his customer, but the amount of the original margin is left in the hands of the broker, the customer may recover such margin in an action against the broker. *McNaughton v. Halderman*, 160 P. S. 144; affirming s. c. 5 Del. 278.

244. Where, upon a rule to open a judgment upon a note given to a broker in Chicago, to secure the broker in purchases and sales for the defendant, the court found as a fact that the contract was such that under the rules of the board a delivery was contemplated and could have been demanded when the time for delivery arrived, that the broker made daily settlements and that the reason why no grain was actually delivered was, that the defendant ordered the broker to sell before the time of delivery came around; it was *held*, that under the laws of Illinois, the contract

was not a wagering one and the court refused to open the judgment. *Champlin v. Smith*, 164 P. S. 481.

CONTRIBUTION.

See DEBTOR AND CREDITOR, 1: SUBROGATION: SURETY.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT: NEGLIGENCE.

CONVERSION.

See DEVISE, X.: TROVER.

CO-OPERATIVE ASSOCIATIONS.

See GUARANTY.

1. Where the articles of a co-operative association contain the term of the existence of the company as required by the act 7 June 1887, sec. 2 (Brightly's Purdon 389), but such term through a mistake in the office of the secretary of state, is omitted in the copy sent to the county recorder, the individual members of the company will not be personally liable for its debts. *Bendall v. Jackson*, 11 C. C. 183; s. c. 1 Dist. Rep. 726.

2. The members of a co-operative association are not rendered individually liable for its debts by a failure of the association to publish on its letter heads the notice as to credit required by the act 7 June 1887, sec. 8 (Brightly's Purdon 391); so, they are not rendered personally liable because the association sells on credit, or because it confesses judgment in good faith to one of its members for an honest debt. *Bendall v. Jackson*, 11 C. C. 183; s. c. 1 Dist. Rep. 726.

COPIES.

See EVIDENCE, XIV.: PRACTICE, V.

COPYRIGHT.

1. Where the owners of a copyright, a series of novels, published a cheap paper edition, which they sold to the trade at fifty cents, and also a fine cloth-bound edition, which they sold at one dollar and fifty cents, and the defendants bought a large consignment of the cheap paper edition and bound the same in cloth in imitation of the plaintiff's cloth-bound edition, and sold the same to the trade at forty to forty-five cents, and had sold about sixty-six thousand copies; it was held, that a preliminary injunction was properly refused to restrain the sale of the cheap edition. *Dodd v. Smith*, 144 P. S. 340.

CORONERS.

- I. Vacancy in office.
- II. Inquest.
- III. Fees.

I. Vacancy in office.

1. The governor has power to fill, by appointment, a vacancy in the office of coroner where it appears that the elected coroner has notoriously absconded from the county in which he was elected. *Erie County Coroner*, 11 C. C. 136.

II. Inquest.

2. Before holding an inquest a coroner or justice should make some reasonable inquiry into the cause of death; if there is no reason for supposing a felonious destruction of life, an inquest should not be held, and the county is not liable for the expense thereof, if held. *Pfouts's Case*, 7 C. C. 265.

3. Under the act of 30 March 1866, the coroner of Luzerne county should not hold an inquest unless the deceased shall have died from unlawful violence, or there be strong suspicion of violence. *Stoecker's Inquest*, 5 Kulp 487.

4. The coroner should not hold an inquest if there be no suspicion of crime or

violence, and it appears that the deceased "died by the visitation of God." *Bender's Case*, 8 C. C. 664.

5. A view of the body by the coroner in conjunction with the jury is an essential of every inquisition. *Burnett v. Lackawanna County*, 9 C. C. 95; s. c. 1 Lack. Jur. 410.

6. Where the return of a justice of an inquest, under the act 27 May 1841, sec. 15 (Brightly's Purdon 401), does not show that the coroner's office was more than ten miles from where the body was found, the court will allow the return to be amended so as to show that the justice had jurisdiction. *Lee's Case*, 9 C. C. 474.

7. Under the act 27 May 1841 (Brightly's Purdon 401), a justice may hold an inquest where the office of the coroner is more than ten miles distant from the place where the death occurred; and this, although the coroner has appointed a deputy resident within ten miles. *Reitnauer's Inquest*, 14 C. C. 46.

8. Where a body is found with marks of violence, and the cause of death is unknown, or where there is reasonable cause to believe that death was caused by violence or undue means, the result of criminal negligence, an inquest should be held; but no inquest should be held where death is caused by an accident, the circumstances of which are known. *Lee's Case*, 9 C. C. 474; *Watson v. Beaver County*, 9 C. C. 495; s. c. 27 W. N. C. 469.

9. Where a coroner has no reason to believe that the death was other than natural, he is not justified in holding an inquest; where an inquest is held, the presumption is that the coroner acted upon sufficient cause; but this presumption may be overthrown; he is not entitled to be compensated for his preliminary investigation. *McFadgen v. Chester County*, 10 C. C. 124.

10. It would be a misdemeanor in office for a coroner to hold an inquest for a private party. *Watson v. Beaver County*, 9 C. C. 495; s. c. 27 W. N. C. 469.

11. Where the facts are known and clearly point to a case of suicide, an inquest should not be held. *Witmore Inquest*, 14 C. C. 463.

12. The refusal of a physician, sworn as a witness, to give his opinion as to the effect of the medicines administered and to describe the deceased's conditions and symptoms, is a contempt, for which the coroner can hold him to bail to answer. Such contempt is indictable as an obstruction of justice. But the coroner cannot compel him to enter bail before a justice. *Comm'th v. Higgins*, 5 Kulp 269.

III. Fees.

13. The law provides no compensation for the coroner for the making of preliminary inquiries as to whether an inquest is necessary. *Burnett v. Lackawanna County*, 1 Lack. Jur. 410. See *McFadgen v. Chester County*, 10 C. C. 124.

14. A coroner is not entitled to fees for a preliminary investigation which shows that no inquest was necessary. *Watson v. Beaver County*, 9 C. C. 495; s. c. 27 W. N. C. 469.

15. If a coroner views several bodies in one inquest he is entitled to fees in only one case for summoning and qualifying witnesses. *Francis v. Tioga County*, 8 C. C. 163.

16. A deputy coroner is not entitled, under the act 9 May 1889 (Brightly's Purdon 399), to be paid in fees in counties containing over one hundred and fifty thousand inhabitants. That act is unconstitutional as to such counties and it seems applies only to counties already having deputy coroners. *Comm'th v. Grier*, 9 C. C. 444; *Fogarty v. Schuylkill County*, 13 C. C. 454.

CORPORATION.

See BENEFICIAL SOCIETIES: BOND, IV.:

BOROUGH: BUILDINGS ASSOCIATIONS:
CHARITY: CHURCHES: ELECTRIC
LIGHT: EQUITY, VII., XXIII.: MAN-
DAMUS, II.: MANUFACTURING COM-
PANIES: MUNICIPAL CORPORATIONS:
NATURAL GAS COMPANIES: RAILROAD
COMPANIES: STATUTES, III.: TAXES,
III.: WATER COMPANIES.

I. Erection of corporations.

(a) By the court.

(b) By the governor.

II. Validity of charters.

III. Amendments.

IV. Powers of corporations.

V. Responsibilities of corporations.

VI. Corporate property.

VII. Officers of corporations.

(a) Generally.

(b) Of the directors.

(c) Of the president.

(d) Liability of officers.

(e) Liability of a corporation
for the acts of its officers.

VIII. Stockholders.

(a) Stock subscriptions.

(b) Rights of stockholders.

(c) Individual liability of
stockholders.

(d) Dividends.

IX. Transfers of stock.

X. Corporate elections.

XI. Corporate meetings.

XII. Suits by and against corporations.

(a) Suits by corporations.

(b) Suits against corporations.

(c) Execution against corpora-
tions.

XIII. Transfer of franchises.

XIV. Dissolution and forfeiture.

XV. Insolvency.

(a) Right to prefer creditors.

(b) Assignment for creditors.

(c) Receivers.

(d) Dissolution.

(e) Effect of insolvency.

XVI. Amotion.

XVII. By-laws.

I. Erection of corporations.

(a) By the court.

1. A charter will not be granted to a number of retail coal-dealers to enable them by combination to regulate and control the supply and prices of the commodity in which they deal. *In re Richmond Retail Coal Co.*, 9 C. C. 172; s. c. 47 L. I. 504.

2. The court will not refuse to charter the "Columbus Security Order," on exception by the "Universal Order of Security." *In re Charter Columbus Security Order*, 27 W. N. C. 36.

3. The courts may grant a charter for a base-ball club. Incidental profit is no bar. *In re National League Ball Club*, 25 W. N. C. 187.

4. A charter will not be granted "to support the worship of Almighty God" and to "maintain a cemetery"; they are distinct and separate objects having no relation to each other. *In re Charter of Evangelical Lutheran Church*, 4 Del. 154.

5. Two congregations which combine for certain purposes but retain a separate existence for all other purposes cannot be incorporated so that the corporate character attach to the two as combined for the first class of purposes, and to each separately for the second class, and so that each as well as both may act under the same corporate name. *German Lutheran Church*, 9 C. C. 12.

6. If the articles of incorporation do not disclose a political purpose, a charter will not be refused because the name may indicate a certain political association or belief. *In re Charters Central Democratic Ass'n and Young Republican Club*, 46 L. I. 380.

7. A charter will not be granted upon an application setting forth the purposes merely in the words of the act as "for social enjoyment"; the special object and mode of accomplishment should be set out. *Braddock Club*, 37 P. L. J. 163.

8. The articles should give the names

and residences of the subscribers; also the number of directors or trustees for the first year with their names and residences. *Odd Fellows' Association*, 1 Lack. Jur. 181.

9. Upon an application for a charter for the purpose of maintaining a club for social enjoyments, it should be set forth particularly the character of the enjoyments and how they are to be conducted. *Jacksonian Club*, 11 C. C. 19.

10. A charter will not be granted for a double purpose under clauses 5 and 6 of sec. 2 of the act 29 April 1874 (Brightly's Purdon 405) when the proper divisions of the section are not mentioned in the application. *Pennsylvania State Sportsmen's Association*, 11 C. C. 576.

11. An application for a charter should show some necessity for the incorporation; it should state the means proposed to be employed to carry out its purposes. An ordinary political club has no right to be incorporated. A charter was refused for the purpose of maintaining a club "for acquiring literary attainments and culture and the study of political economy." *Ton-a-lu-ka Club*, 12 C. C. 26.

12. The courts have no authority to grant a charter of incorporation for the purpose of the cultivation and improvement of German manners and customs. *Germania Sangerbund*, 12 C. C. 89.

13. In stating the purpose of a proposed corporation, the application should follow the language of the statute. *Germania Sangerbund*, 12 C. C. 89.

14. In an application for a charter, it is fatal to fix the number of directors at two. *Germania Sangerbund*, 12 C. C. 89.

15. The act 29 April 1874, sec. 2, clause 7 (Brightly's Purdon 405), is mandatory; the court has no right to refuse a charter to a cemetery company if the instrument is in proper form and the purpose not injurious to the community. *Oakland Cemetery Co.*, 12 C. C. 145.

16. Where a corporation was created by a special act of assembly for the particular purpose of supplying gaslight; it was held, that it could not enlarge its

purpose to supply heat by means of gas by accepting the provisions of the act 29 April 1874 (Brightly's Purdon 405). *Keystone Fuel Gas Co.*, 12 C. C. 302; s. c. 31 W. N. C. 231.

17. There is no authority in the act 29 April 1874 authorizing the court in incorporating a college to confer upon the officers thereof the authority to confer degrees. *Duquesne College*, 12 C. C. 491.

18. A charter was granted under the name of "Duquesne College," although such name had previously been conferred upon another institution but had not been used for years, the institution having been absorbed by another college of a different name. *Duquesne College Charter*, 12 C. C. 491.

19. A charter was refused to an association for the purpose of uniting fraternally the Bohemian-Slavonian population of Allegheny county, to educate them in the English language and in their native language, to give moral and material aid and encouragement to its members in case of sickness, accident or distress, and to give pecuniary aid to the widows and orphans of deceased members, on the ground that a charter of incorporation was not necessary for such an association. *Bohemian-Slavonian Benevolent Society*, 12 C. C. 552.

20. The court refused under clause 5, sec. 2, of the act 29 April 1864 (Brightly's Purdon 405), to grant a charter, the purpose being the protection and propagation of game birds and animals, and for the enforcement of our game laws and for the promotion of kindly intercourse and generous emulation among sportsmen at the trap and such other purposes as the association may from time to time determine. *Pennsylvania State Sportsmen's Association*, 11 C. C. 576.

21. A court refused a charter of a proposed corporation to be called "The Waverly Ladies of the Red Cross" upon the remonstrance of a similar association called the "Society of the Red Cross," but the charter was subsequently granted upon the words "Order of the" being

added preceding the words "Red Cross." *In re Waverly Ladies of the Red Cross*, 12 C. C. 589; s. c. 30 W. N. C. 257.

22. The name of a proposed corporation must be distinctive; a charter will not be granted to "The Nether Providence Association." So, the words "social enjoyment" are not sufficiently descriptive of the purpose. *Nether Providence Association*, 12 C. C. 666.

23. A charter will not be granted to a military company to consist of natives of Russia and for the purpose of drill and discipline. *Russian American Guards*, 13 C. C. 148.

24. The charter of a corporation should set out the particular manner in which it is intended that its purposes are to be effected, and if funds are to be accumulated and disbursed, the manner should be stated in which they are to be raised and the purpose to which they are to be applied; the constitution should be incorporated in the charter and the charter should limit the power of the corporation to make by-laws to such as are consistent with the laws and constitution of the commonwealth; so the charter should set forth the method of regulating membership. *In re Skandinaviska Brodroforeningen Svea*, 15 C. C. 516.

25. A beneficial association will not be incorporated where it appears that all the members are of foreign birth and the court records do not show that any of them have been naturalized, and the manner of conducting the association is not stated, and it does not appear what manner of persons would be eligible to future membership; and this, though there be an affidavit that five of the signers are citizens. *Italian Mutual Beneficial Ass'n*, 15 C. C. 644.

26. The courts will not incorporate an association whose purposes are uncertain or doubtful; a Chinese social club was refused for these reasons. At least three of the subscribers and board of directors must be citizens of the state, and all, or a majority at least, should be

citizens of the United States. *Chinese Club*, 1 Dist. Rep. 84.

27. An application for a charter must set forth sufficient to enable the court to see that the association comes within the act and to enable it to certify that it is lawful and not injurious to the community. A charter will not be granted unless it appear by the articles that there is a necessity or a substantial advantage to be obtained by an incorporation. *Duch Nove Doby Lodge*, 3 Dist. Rep. 215.

28. A charter for a corporation of the first class must show how the succession of corporators is to be maintained, how new members may be admitted and undesirable ones excluded, how and by what body the by-laws may be instituted and how the charter may be amended. *Glade Relief Ass'n*, 3 Dist. Rep. 236.

29. A corporation will be chartered for the purpose of maintaining a society for beneficial or protective purposes to its members from funds collected therein, said funds to be used in assisting the members in times of sickness or disability and aiding their families in case of death; and this, although the subscribers are composed entirely of married women. *First Independent Ladies' Aid Society*, 40 P. L. J. 105.

30. Where a charter is approved by the court and delivered to the prothonotary, the prothonotary should make a minute of the proceedings and decree in the proper docket for which he is entitled to such fees as allowed by the fee bill for similar services; he cannot refuse to deliver the charter to the corporation, as the latter is entitled to the possession of the original charter upon its being recorded. *Union African Methodist Episcopal Church*, 3 York 109.

31. After a decree of incorporation, the court cannot revoke a charter upon petition of former exceptants, even for an alleged substantial defect. Proceeding must be by *quo warranto* at the suit of the attorney-general. *Christ's Church Charter*, 8 C. C. 28.

32. Where a charter of a corporation has been granted by the court of common pleas without authority, it is absolutely void, and the order of the court giving it apparent validity may be revoked, even after business has been commenced thereunder. *National Endowment Co.*, 142 P. S. 450.

33. A church charter will not be granted without the clause required by the act 25 April 1855, sec. 7 (amended by the act 2 June 1887, Brightly's Purdon 1860), requiring that property shall not be otherwise taken and held or inure than subject to the control and disposition of the lay members of the church. *Trinity Church*, 8 York 191.

(b) By the governor.

34. Certificates of incorporation should be confined to such statements as are required by the act, as a prerequisite. There should be no statement of a future purpose to take real and personal estate and issue stock therefor. *Glenwood Coal Co.*, 6 C. C. 575.

35. The governor is not authorized by the general corporation act of 29 April 1874 (nor by the acts of 7 April 1849, 18 July 1863, or 27 March 1873) to incorporate a company "for the purpose of preparing and mechanically executing designs for the decorating and furnishing of buildings, including frescoing, painting, paper-hanging and plastering, and the sale of all articles used in said decorating and furnishing, and of all commodities incident or appertaining thereto"; it is not a "mechanical business" within the meaning of that act. Neither is "dredging and excavating in rivers and executing submarine work." *Mechanical Business Cases*, 9 C. C. 1.

36. The general term "minerals" will not be allowed in the statement of purpose of a mining company. There is implied in the organization and incorporation of a mining company, for the purpose of producing any particular kind of minerals, the power of producing such other minerals as may be discovered in the prosecution

of the principal work. *Glenwood Coal Co.*, 6 C. C. 575.

37. If the certificate of incorporation neglects to state the amount of capital stock paid in property, a judgment of ouster will be granted on *quo warranto* and the company excluded from its franchise as a corporation. *Comm'th v. Gray's Mineral Fountain Co.*, 46 L. I. 118.

38. The directors are not required, by the general corporation act of 29 April 1874, to be either stockholders or corporators. *Corporate Directors*, 7 C. C. 178.

39. A certificate of incorporation of a real estate company, which adds to the "purchase and sale of real estate" the further purpose of "laying out and dividing it into streets, alleys and building lots, and dedicating and donating the same," will be rejected. *In re North Fifth Street Mutual Land Association*, 8 C. C. 17.

40. A charter to the "North Fifth Street Mutual Land Association" was granted, notwithstanding the protest of the "North Fifth Street Real Estate Co." *In re North Fifth Street Mutual Land Association*, 8 C. C. 15.

41. The executive department granted a charter to the "Dime Savings Bank of Philadelphia," notwithstanding the protest of the "Dime Savings Fund and Trust Company," because of similarity in name. *In re Dime Savings Bank*, 26. W. N. C. 77.

42. The charter of a water company cannot embrace more than one municipality, and an amendment to add other municipalities will not be allowed. *Monongahela Water Co.*, 9 C. C. 57.

43. A natural gas company is entitled to its charter under the act of 29 May 1885 (Brightly's Purdon 1593), notwithstanding exclusive privileges granted in the charter of a previous existing gas-light company. *In re Citizens' Natural Gas Co.*, 9 C. C. 290.

44. A charter will not be granted for a corporation for mining and boring for petroleum and natural gas, buying, selling, producing, storing, transporting and shipping the same with the right to purchase

land, etc., under the act 29 April 1874, where the certificate also asks for the additional privileges of a pipe line company with the right of eminent domain under the act 2 June 1883 (Brightly's Purdon 1692). *Washington Mining and Improvement Co.*, 9 C. C. 323.

45. A married woman is not competent, even since the act 3 June 1887, to be one of the five subscribers to a certificate for a corporation of the second class under the act 29 April 1874. *New Century Club Society*, 9 C. C. 355.

46. An application for a charter for the mining and manufacturing of oil and gas is too general and will not be granted; such an application should express singleness of purpose, but two pursuits may be combined when kindred and cognate. *Newton Hamilton Oil and Gas Co.*, 10 C. C. 452.

47. A charter was granted to a corporation under the name of the "Carlin Manufacturing Company," although a protest was filed by a copartnership known as "Thomas Carlin's Sons." *Carlin Manufacturing Co.*, 10 C. C. 667; s. c. 29 W. N. C. 158.

48. Where a water company has been granted the exclusive right to have and enjoy certain privileges within a certain district, a charter will not be granted to another corporation to have and enjoy the same exclusive privileges within the same district until the first corporation ceases to exist. *Bryn Mawr Water Co.*, 10 C. C. 670; s. c. 29 W. N. C. 156.

49. Where a franchise of a water company which was an exclusive right in a certain territory has been extended by the common pleas, a charter will not be granted by the governor to another company for the same territory. *Levis Water Co.*, 11 C. C. 178; s. c. 29 W. N. C. 409.

50. Electric light companies have no exclusive privileges; under the act 8 May 1889 (Brightly's Purdon 770), an electric light company cannot be chartered to supply electricity to more than one municipality. *Home Electric Co.*, 11 C. C. 179; s. c. 29 W. N. C. 383.

51. Where the law has been fully complied with and the application for a charter comes before the governor properly drawn, such charter will not be refused upon allegations that it would be inconvenient to an existing company, that it is unnecessary, that it will not pay, that it will make the stock of the old corporation worthless, or for any other reason which is not apparent upon the application itself. *Seneca Bridge Co.*, 11 C. C. 337; s. c. 30 W. N. C. 200.

52. Incline plane companies have no exclusive privilege, and it is no objection to the granting of a charter that another company has previously located its road, and that the route of the proposed corporation would interfere with the proposed extended route of the old company. *Park Incline Plane Co.*, 11 C. C. 486; *Monongahela Inclined Plane Co. v. Grandview Inclined Plane Co.*, 15 C. C. 568.

53. Proceedings in the reorganization of a corporation after a judicial sale are entitled to be filed in the department of state; disputed questions of fact must be remanded to the courts. *Fayette Fuel Gas Co.*, 11 C. C. 488; s. c. 30 W. N. C. 256.

54. Upon an application to the governor for a charter, disputed questions of fact must be remanded to the courts. *Union Water Company*, 12 C. C. 61. See *Granite Water Co.*, 12 C. C. 63; s. c. 30 W. N. C. 417; *Monongahela Water Co. v. South Side Water Co.*, 15 C. C. 603; s. c. 36 W. N. C. 55.

55. A charter will not be granted to a water company to supply water within the same district covered by an existing charter granted before the act 2 June 1887 (Brightly's Purdon 957), where there is no evidence that the existing corporation has paid the dividend defined by the act 29 April 1874, sec. 24, clause 3 (Brightly's Purdon 955). *Union Water Company*, 12 C. C. 61; s. c. 30 W. N. C. 371; *Monongahela Water Co. v. South Side Water Co.*, 15 C. C. 603; s. c. 36 W. N. C. 55.

56. Although a corporation has been

chartered to supply water to a certain township and adjacent territory, a charter will be granted to another corporation to supply water to a village three miles from the township line. *Granite Water Co.*, 12 C. C. 63; s. c. 30 W. N. C. 417.

57. A foreign corporation desiring to become a domestic corporation under the act 9 June 1881 (Brightly's Purdon 937), is not required to give notice by advertisement of its intended application; nor is it required to aver that ten per cent of the capital stock has been paid to the treasurer in cash. *Sherman Mfg. Co.*, 12 C. C. 165.

58. A charter will not be granted to a water company when it is not apparent from the application as to where the company is located and into what town, borough, city or district it proposed to raise or introduce water. *Perkiomen Water Storage, Transportation & Supply Co.*, 13 C. C. 124; s. c. 32 W. N. C. 280.

59. A charter for a water company will not be granted where it appears that another company has the exclusive privilege of supplying water in the proposed district. *South Side Water Co.*, 36 W. N. C. 55; s. c. 15 C. C. 603.

60. The governor will not grant a charter to a proposed ferry company to include practically the same termini as those of another corporation chartered by a special act of assembly giving an exclusive right. *Ritter Ferry Co.*, 14 C. C. 10; s. c. 33 W. N. C. 180.

61. A company incorporated under the act 29 April 1874, sec. 34, clause 3 (Brightly's Purdon 955), for the manufacture and supply of gas or the supply of light or heat by any other means, has an exclusive franchise until it shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to eight per cent per annum upon its capital stock; the governor will not grant a charter under the act 2 June 1887 (Brightly's Purdon 957) to another corporation for the purpose of the manufacture and supply of gas in the same district until such pre-

vious exclusive franchise has expired. *Lansdowne Gas Co.*, 14 C. C. 518; *Suburban Gas Co.* 14 C. C. 519.

62. An application for a charter may be amended by eliminating from the purpose certain unauthorized statements. *Suburban Gas Co.*, 15 C. C. 126. See s. c. 14 C. C. 519.

63. Under the act 29 April 1874, there must be five persons, free from all legal disability, to form a corporation; this number must be exclusive of married women. *Potter Gas Co.*, 15 C. C. 347. The act 8 June 1893 (Brightly's Purdon 1299) does not enlarge a married woman's capacity to become one of the persons essential to the creation of a corporation. *Piso Company*, 15 C. C. 348.

64. The governor will grant a charter to a proposed corporation under the name of "The York Wall Paper Company," notwithstanding a protest by the "York Card and Paper Company" on the ground of similarity of name. *York Card & Paper Co. v. York Wall Paper Co.*, 15 C. C. 554; s. c. 35 W. N. C. 574.

65. A charter will not be refused because the advertised notice contained more than the law would permit in the charter, provided it stated enough to constitute a notice of the object proposed. *Sowego Water & Power Co.*, 36 W. N. C. 148.

66. A charter to a water and power company for the purpose of supplying, storing and transporting water and water-power, will not be refused by the governor because of a protest filed by the commissioners of fisheries that the purposes of incorporation would injure the fishery rights. *Sowego Water & Power Co.*, 36 W. N. C. 148.

67. A corporation cannot be organized under the act 29 April 1874 (Brightly's Purdon 405) for the purpose of carrying on a mercantile business of dealing or of buying and selling. Where a manufacturing company chartered under that act is authorized to engage in mercantile business, the mercantile words are ineffectual and the company is taxable on so much of its capital stock as is invested in its

mercantile business. *Comm'th v. Thackara Mfg. Co.*, 156 P. S. 510; *Comm'th v. Lippincott Co.*, 156 P. S. 513.

68. Upon an application for a charter, a statement of purpose should be in general terms; a statement will be ordered to be corrected where it is an index to every right and privilege claimed under the charter. *McClurg Gas Construction Co.*, 4 Dist. Rep. 349.

II. Validity of charters.

69. The act 1 June 1889 (Brightly's Purdon 1968), requiring corporations to be registered in the auditor-general's office, concerns the payment of taxes only; it does not mean that the companies shall not go into operation until they register. *Pittsburgh, Virginia & Charleston Ry. Co. v. Pittsburgh, Canonsburgh & State Line Ry. Co.*, 159 P. S. 331.

70. Evidence by plaintiff that the defendant institution was managed by a board of directors through a president, vice-president and cashier, with evidence of certificates of stock similar in form to corporate stock certificates except that no corporate seal was affixed, was held to be some evidence of incorporation of the defendant. *Hallstead v. Coleman*, 143 P. S. 352; reversing s. c. 10 C. C. 434.

71. The validity of a charter cannot be inquired into collaterally; certainly not by a member who has enjoyed its privileges. *Pittsburgh & State Line Railroad Co.'s Appeal*, 4 Cent. 107; affirming *Rothschild v. Pittsburgh & State Line Railroad Co.*, 1 C. C. 620.

72. The charter of a corporation cannot be attacked in a collateral proceeding even for fraud in the obtaining of the charter. *Active Workers v. Sanders*, 28 W. N. C. 321.

73. The charter of a corporation cannot be called in question or assailed upon a bill for an injunction to restrain the exercise of powers embraced within it. *Twelfth Street Market Co. v. Philadelphia & Reading Terminal R. R. Co.*, 142 P. S. 580; affirming s. c. 10 C. C. 25.

74. The corporate existence of a corporation *de facto* cannot be inquired into collaterally; much less can a defective incorporation be set up against creditors who have contracted with the corporation on the faith of its lawful corporate existence. *Hamilton v. Clarion M. & P. R. R. Co.*, 144 P. S. 34.

75. In an action on a bond given to hold the obligee harmless from loss or damage by a marriage insurance company failing to pay him certain benefits, it was held, that the validity of the society's charter and the alleged illegality of the business that was transacted by it could not be determined. *Hassinger v. Ammon*, 160 P. S. 245.

III. Amendments.

76. The constitution of a corporation incorporated by the court can only be amended, altered or changed by the court having the authority to grant the charter. *Scanlan v. St. Matthew's Catholic Beneficial Society*, 5 Montg. 180.

77. The court permitted the name of the Citizens' Trust, Tax Indemnity and Surety Company to be amended under the act 13 June 1883 (Brightly's Purdon 410), by striking out the words "Tax Indemnity"; and this, notwithstanding the protest of the City Trust, Safe Deposit and Surety Company. *Citizens' Trust, Tax Indemnity and Surety Co.*, 9 C. C. 366.

78. The state department will not permit any change to be made in a certificate of incorporation while on file in the department, and every alteration will make it necessary to have the certificate reacknowledged and sworn to; all alterations upon a certificate must be noted before the officer taking the acknowledgment and the certificate must then be reacknowledged and again sworn to. *Amended Certificate of Incorporation*, 9 C. C. 511.

79. A corporation desiring to change the number of its directors must proceed under the act 31 May 1887 (Brightly's

Purdon 415), and as preliminary thereto, must file its acceptance of that act. *Commercial Ice Co.*, 9 C. C. 608.

80. Where the charter of a church provided that "all conveyances of property to this association shall be deeded in trust that said property shall be used, kept and maintained and disposed of for the use and benefit of the Evangelical Association of North America," the court refused an amendment that all conveyances of property to the corporation should be held in trust for the use of the members thereof. *Trinity Church*, 8 York 191.

81. Upon an application to amend a church charter, the presiding elder of a district and the pastor appointed by the lawfully constituted body in the denomination to which the church belonged when the charter was granted have no legal standing to file exceptions. *Trinity Church*, 8 York 191.

82. Where a church charter was granted in 1871, a petition to amend was refused where there was no proof that the corporation was actually operating and transacting business on 11 May 1874 as required by the validating act of that date (Brightly's Purdon 412). *Trinity Church*, 8 York 191.

83. A subsequent statute revising the whole subject-matter of a former statute and evidently intended as a substitute for it, although it contains no express words to that effect, operates to repeal the former. The act 13 June 1883 (Brightly's Purdon 410), authorizing corporations desiring to amend or alter their charters to apply to the governor therefor, repeals the act 20 April 1869, which authorized the courts of common pleas to change the name, style and title of corporations. *Fort Pitt Building & Loan Ass'n v. Model Plan Building & Loan Ass'n*, 159 P. S. 308.

IV. Powers of corporations.

84. The capital stock of a corporation can be increased only in accordance with

the provisions of the act of 29 April 1874; any other method adopted is void. *West Point Turnpike Co. v. Moyer*, 4 Montg. 28.

85. A corporation authorized to borrow money not exceeding the par value of its stock, cannot issue bonds for more than one-half of its paid-up capital. *Comm'th v. Lehigh Avenue Railway Co.*, 129 P. S. 405; affirming s. c. 46 L. I. 46.

86. The mortgage of property is an increase of indebtedness, and bonds and mortgages issued in disregard of article XVI., section 7, of the constitution, are invalid and void. *Pittsburgh & State Line Railroad Co.'s Appeal*, 4 Cent. 107; affirming *Rothschild v. Pittsburgh & State Line Railroad Co.*, 1 C. C. 620.

87. Borrowing money from one party to pay an overdue indebtedness to another, and actually paying it, is not an increase of indebtedness within article XVI., section 7, of the constitution. *Powell v. Blair*, 7 C. C. 492.

88. The debts of a manufacturing corporation, accruing in the employment of labor and the purchase of materials, do not constitute such an increase of indebtedness as, under section 7 of article XVI. of the constitution and the act of 18 April 1874 (Brightly's Purdon 420), requires a previous meeting and consent of stockholders to validate them. *Manhattan Hardware Co. v. Phalen*, 128 P. S. 110.

89. To a bill to declare railroad bonds and mortgages invalid as issued in violation of article XVI., section 7, of the constitution, the bondholders must be made parties. *Harrisburg & Eastern Railroad Co.'s Appeal*, 1 Mona. 692.

90. Bonds issued by a water company, in excess of one-half of its capital stock, to contractors who built the works, are valid in the hands of *bona fide* purchasers for value. *Wood v. Corry Water Works Co.*, 38 P. L. J. 169.

91. Two corporations consolidated by the co-operating legislation of two states, when acting in either state, act only under the authority of the state in which the act is done. The legislation of either

state has no operation beyond its territorial limits. *Pittsburgh & State Line Railroad Co.'s Appeal*, 4 Cent. 107; affirming *Rothschilds v. Pittsburgh & State Line Railroad Co.*, 1 C. C. 620.

92. A passenger railroad company, restricted in its use of public streets to those upon which no track is laid or authorized to be laid, will be restrained by injunction from exceeding its charter rights. An ordinance conferring the right to such excepted streets is void. *Coalville Pass. Railroad Co. v. Wilkes-Barre South Side Railway Co.*, 5 Kulp 340.

93. The lease of a dam by a water company to an ice company for ice purposes, properly authorized by the board, will not be set aside upon a bill by stockholders who were given an opportunity to take stock in the ice company and declined to do so. *Shaaber's Appeal*, 17 Atl. 209.

94. As to the right of the legislature or municipal corporations to create monopolies, see note to *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 10 Atl. 174.

95. A corporation has the right to purchase its own stock where the transaction is made in good faith and is not prohibited by statute; where a board of directors resolved to distribute among the shareholders certain shares of stock of the company which had been purchased by the company out of its earnings; it was held, that such resolution could not be subsequently rescinded where it was not shown that the distribution would be injurious to the business of the company. *Dock v. Schlichter Jute Cordage Co.*, 167 P. S. 370.

96. The act of 18 April 1874 (Brightly's Purdon 420), regulating the manner in which the stock and indebtedness of corporations may be increased, does not apply to a corporation which was invested with unrestricted power to make such increase before the constitution of 1874 was adopted, and has accepted the benefit of no legislation since then; and this, though the corporation by accepting

legislation in 1868 subjected itself to the act 3 May 1855 and the constitutional amendment of 1857. *Gloninger v. Pittsburgh & Connellsville R. R. Co.*, 139 P. S. 13.

97. A bill will not lie for the specific performance of a contract entered into between two incorporated insurance companies without legislative authority, for the purpose of merging one of the companies into the other, such a contract being *ultra vires*. *Home Friendly Society v. Tyler*, 9 C. C. 617.

98. It is fraudulent as against its creditors for a corporation to transfer its property to a new company a majority of whose stockholders are stockholders in the assignor. *Montgomery Web Co. v. Dienelt*, 133 P. S. 585; s. c. 25 W. N. C. 549; reversing s. c. 5 Montg. 9.

99. A foreign corporation may assign its property in this state for the benefit of its creditors although an act of the state of its incorporation forbids such an assignment in said state. *Active Workers v. Sanders*, 28 W. N. C. 321.

V. Responsibilities of corporations.

100. If the purchaser or pledgee of regularly issued (but fraudulent) stock advances money on it or parts with anything of value for it, the corporation is bound by way of estoppel to indemnify him to the extent of his expenditure; but if he has simply taken it for a pre-existing debt, he has no claim which he can enforce against the corporation. *Kisterbock's Appeal*, 127 P. S. 601.

101. If a corporation receive the benefits of money borrowed on a corporate mortgage, and the stockholders know of it, and, within a reasonable time, make no objection as to the lack of authority, neither the corporation, its stockholders, nor its creditors can set up such a lack of authority in a suit on the mortgage. *Manhattan Hardware Co. v. Phalen*, 128 P. S. 110.

102. If a corporate mortgage, signed by the president of the corporation, upon

its face represents that it was duly authorized by the directors, the mortgagee is not bound to look beyond it; he has a right to assume that all matters of internal management had been complied with. *Manhattan Hardware Co. v. Phalen*, 128 P. S. 110; *Manhattan Hardware Co. v. Roland*, *Ibid.* 119.

103. The charter of a corporation providing that its property shall be held by four trustees, a purchase-money mortgage executed by its president and secretary without the corporate seal, and not ratified by resolution, is invalid. *McElroy v. Nucleus Association*, 131 P. S. 393.

104. A corporation may be indicted for maintaining a nuisance. If it fails to appear and plead it can be compelled to answer by *distress infinite*. *Comm'th v. North & West Branch Railway Co.*, 5 Kulp 293.

105. A corporation as well as an individual may bind itself by a contract for personal services for a fixed period of time with liability for a discharge without sufficient cause before the period of employment has expired. *Hand v. Clearfield Coal Co.*, 143 P. S. 408.

106. Where it was agreed between a corporation and its creditors, that the corporation should be granted an extension of time, and during such extension it should be operated under the direction and management of a committee of three to be selected by the creditors; it was held, that such committee could bring a joint action against the corporation for their services. *Dallas v. Columbia Iron & Steel Co.*, 158 P. S. 444.

107. Under the act 16 May 1889 (Brightly's Purdon 412), the period of five years within which corporations must complete the construction of their works begins at the expiration of two years from the date of their letters patent. *Degen v. Meadowbrook Water Co.*, 3 Lack. Jur. 233.

108. A corporation organized under the railroad act of 4 April 1868 cannot make a mortgage for construction and equipment for a sum in excess of twice the amount of its capital stock actually paid

in. *Fidelity Ins., Trust & S. D. Co. v. West Penn. & Shenango Connecting Railroad Co.*, 138 P. S. 494; s. c. 27 W. N. C. 267.

109. The holders of railroad bonds issued without authority of law are entitled to the proceeds of the sale of the mortgaged property, as against the company and all persons holding under it, with notice of their position. *Ibid.*

110. One who advances money to pay coupons of a corporation under an agreement with the company (undisclosed to the bondholders), that they should be delivered to him as security for his advances, is not entitled to priority out of the proceeds of the mortgage by which the coupons are secured. *Ibid.*

111. An action lies upon coupons signed by the vice-president of a corporation, although the mortgage accompanying the bond provides that the bonds should be signed by the president. *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 161 P. S. 391.

112. It is not a sufficient affidavit of defence that the plaintiff is a foreign corporation and has not complied with the act of 22 April 1874 (Brightly's Purdon 937), prohibiting such corporation from doing business in this state, without known places of business and authorized agents therein, where such affidavit fails to aver that the plaintiff was doing business in this state. *Campbell v. Hering*, 139 P. S. 473.

113. A foreign corporation which has not complied with the act 22 April 1874 (Brightly's Purdon 937) will not be permitted to submit proposals to the state to do work or to deliver goods. *Office Specialty Mfg. Co.*, 12 C. C. 44.

114. Under the act 22 April 1874 (Brightly's Purdon 937), every foreign corporation doing business in this state must file its certificate with the secretary of the commonwealth; and this, though it does its business and sells its goods through travelling solicitors instead of at a particular place. *Gould's Manufacturing Co.*, 14 C. C. 179.

115. A foreign corporation which consigns its goods to a commission merchant in this state, who sells them for the corporation, is doing business in this commonwealth and should file the statement in the office of the secretary of the commonwealth required by the act 22 April 1874 (Brightly's Purdon 937). *Nonantum Worsted Co.*, 15 C. C. 125.

116. Where a foreign corporation made a contract in this state at a place designated upon its letter-head as its Philadelphia office, and meetings of its board were held at that place; it was *held* to be liable to an action upon such contract in this state; and this, though its office in this state was abandoned previous to the commencement of the action, and the plaintiff was not a resident of this state. *Causey v. Cedartown Land Imp. Company*, 1 Dist. Rep. 557.

VI. Corporate property.

117. A normal school, incorporated for the purpose of training teachers for public schools and receiving recognition and aid from the state under the act 20 May 1857 (Brightly's Purdon 353), is not a quasi-public corporation and its property is subject to mechanics' liens. *McLeod v. Central Normal School Ass'n*, 152 P. S. 575.

VII. Officers of corporations.

(a) Generally.

118. A stockholder or officer of a corporation is not forbidden to advance money to his company if the contract be not tainted with fraud; where such an advancement is made in good faith, he will not be restrained in the collection of his claim by the appointment of a receiver where the bill does not allege insolvency nor ask for a dissolution. *Griffin v. Burden*, 10 Montg. 184.

119. The treasurer, a director and manager of a corporation cannot sign a valid power of attorney to confess judgment against the corporation, without authority from the board of directors or an ex-

ecutive officer of the company; such a judgment will not bind the corporation and will be vacated and set aside. *Jackson v. Cartwright Lumber Co.*, 2 Dist. Rep. 680.

120. In an action by the superintendent of a corporation for a balance of salary, where he testified that the general manager agreed that his salary should be ten thousand dollars, but directed that his salary be credited on the books at seven thousand dollars and that the other three thousand dollars should be charged to the expense account kept at the general office; it was *held*, that the book entries and accounts kept under his own supervision were strong proof of a contract to serve at a salary of seven thousand dollars, but that they did not in any proper sense constitute a written contract which could not be varied or affected by parol evidence. *Chapin v. Cambria Iron Co.*, 145 P. S. 478.

121. There is no special confidential or fiduciary relation between an officer of a corporation and a person from whom he purchased the stock of the corporation; a master's finding that such an officer had no knowledge at the time of the purchase of any movement which would tend to increase the value of the stock, and had not been guilty of any misrepresentation or concealment, would not be reversed except for manifest error. *Krumbhaar v. Griffiths*, 151 P. S. 223.

122. Where a corporation has made an assignment for creditors, and an officer thereof has performed or has been ready to perform the duties of his office, he is entitled to compensation for the unexpired portion of his term during which the company's property was in the hands of the assignee; where, however, he holds over without a re-election, the presumption is against his right to recover, but if in fact the services were rendered while so holding over, such services were evidence of his continuance in office and of the subsequent right to recover the salary thereof. *Potts v. Rose Valley Mills*, 167 P. S. 310; reversing s. c. 5 Del. 491.

123. The president and directors of a corporation are not entitled to compensation for official services unless the same be preceded by an agreement for compensation, which agreement must be proven. *Martindale v. Wilson-Cass Co.*, 134 P. S. 348; s. c. 26 W. N. C. 48.

124. An officer of a corporation who is also a stockholder is not entitled to compensation for services to the company unless his salary has been fixed; where no salary was attached to the office it was held, that a payment for past services under a resolution of the board was not sufficient to entitle the officer to compensation for future services under a new election by a new board which made no provision for compensation. *Place v. Lansdale & Gwynedd Square Turnpike Co.*, 8 Montg. 63.

125. The acts of officers *de facto* of a corporation are valid only where such acts are for the benefit of strangers or the public, who are presumed to be ignorant of the defects in their title; the acts of such officers are not valid when they are for their own benefit; they cannot take advantage of their own want of title of which they must be cognizant. *Shellenberger v. Patterson*, 168 P. S. 30.

(b) Of the directors.

126. The directors of a corporation have no power to make an assignment for the benefit of creditors. *Anderson v. Eltonhead*, 26 W. N. C. 95.

127. An assignment by the directors of a corporation is valid, though made without notice or action on the part of the stockholders. *Boardman v. Keystone Standard Watch Case Co.*, 8 Lanc. 25.

128. Under a right to fill a vacancy the board of directors cannot create a vacancy by ousting a director because of an alleged but undetermined ineligibility; such questions must be determined by the courts. *Comm'th v. Detwiller*, 131 P. S. 614; reversing s. c. 1 Northam. 257.

129. The directors of a wool-growers' exchange who discounted their individual

notes for a dealer and took the latter's collateral, having subsequently paid the notes, are themselves entitled to the collateral indemnity. *Atkinson's Appeal*, 11 Atlan. 239.

130. A director occupies a fiduciary relation towards a corporation and its stockholders which forbids him to acquire title to the corporate property as against the latter by purchase at a sheriff's sale, but such a director is entitled to reimbursement for what he has outlaid in the acquisition of the property, and equity will not compel him to surrender title or possession except on condition that he be made whole. *Sebring v. Joanna Heights Ass'n*, 2 Dist. Rep. 629.

131. Contracts entered into between different corporations are not void or voidable from the mere fact that such corporations have directors common to both. *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, 42 P. L. J. 345.

(c) Of the president.

132. Where the president of a corporation was elected at a salary to be fixed by the president and a stockholder, he must show in an action for his salary that it was afterwards fixed in pursuance of said reference and subsequently ratified by the board, but such ratification may be inferred from acts done or permitted. *Bagaley v. Pittsburgh & Lake Shore Iron Co.*, 146 P. S. 478.

133. To entitle the president of a corporation to recover for salary paid by him to other persons employed by him in the service of the company, it must be shown that such employment and services were known, adopted and ratified by the board, but such action may be inferred from acts done or permitted. *Bagaley v. Pittsburgh & Lake Shore Iron Co.*, 146 P. S. 478.

(d) Liabilities of officers.

134. Where an officer of a corporation at the time of receiving an advance of money gives his individual note for the

amount, the presumption is that the note was given as the consideration and not as a security for the money; this presumption may, however, be rebutted by showing that the money was, in fact, lent to the corporation for its own use and that the note was given as a collateral security. *Van Haagen's Soap Co.'s Estate*, 141 P. S. 214.

135. Where a person assumes to act in this state as an agent for a foreign corporation which has not registered itself in the office of the secretary of the commonwealth under the provisions of the act 22 April 1874 (Brightly's Purdon 937), he must be *held* cognizant of the incapacity of his company to do business, and assuming to act for the company in this state, he is personally liable for the price of goods furnished to him in this state upon his order as such agent; and his liability is not limited to the penalty prescribed by that act. *Lasher v. Stimson*, 145 P. S. 30.

136. Where the directors of a corporation are jointly liable for its debts and one of them dies before suit brought, his executor cannot be sued jointly with the survivor, and if he dies after suit brought against all of them, it is optional with the plaintiffs to bring in his administrator or to proceed against the survivors without doing so. *Githers v. Clarke*, 158 P. S. 616.

137. Where the act of incorporation provided that the directors should be personally liable for its debts if they failed to make an annual statement or if they made a false statement, and they delayed to make such a statement for three years and then made a lumping statement in which they falsely averred that the company was solvent; it was *held*, that an affidavit of defence that the statement was made with ordinary care and prudence and in the belief that the association was solvent, was insufficient to prevent judgment. *Githers v. Clarke*, 158 P. S. 616.

138. Where two agricultural societies agreed to hold a joint fair and the treas-

urer of one society sued the treasurer of the other to recover half the net proceeds of the same; it was *held* to be a good affidavit of defence that there had never been a settlement of accounts between the two societies, that the defendant was not a party to the contract, and that he had received the money as treasurer of his own society and had paid it out in accordance with the rules of, and as directed by, that society. *Pennsylvania State Agricultural Society v. Jermyn*, 167 P. S. 359.

139. The act 29 April 1874, sec. 43 (Brightly's Purdon 1293), permitting manufacturing corporations to sell commodities not manufactured by the corporation itself, does not enable one, who has sold goods to such a corporation for a store, to recover the value thereof from the directors, on the ground that their action in maintaining the store was *ultra vires*, and that in voting to establish it they became, as to the store business, a partnership. *Smucker v. Duncan*, 10 C. C. 430.

140. A corporation incorporated for the manufacture and sale of lumber and the purchasing and selling of mills, lands, standing timber, logs and lumber is incorporated for a general manufacturing business, and is covered by the act 29 April 1874, sec. 2, clause 18 (now amended by the act 10 June 1893, Brightly's Purdon 406). That act does not repeal sections 41 and 42 of the act 18 July 1863 (Brightly's Purdon 2021), providing a method of proceeding by creditors against such a corporation; there is nothing in those sections relating to the remedy against officers of a corporation for an excess of indebtedness over the capital stock paid in, which is inconsistent with the provisions of the act 1874, but a creditor's bill to enforce such a personal liability is premature and demurrable which does not aver that the plaintiffs have complied with the provisions of those sections; such a bill should also aver the insolvency of the corporation or a demand for the payment of the

debt and a refusal thereof by the corporation. *Wagner v. Corcoran*, 2 Dist. Rep. 440.

141. Where the directors of a trading company, organized under the act 18 July 1863 (Brightly's Purdon 2020), neglect to deposit with the recorder of deeds annually in September a certificate under oath, stating the amount of capital stock paid in, the names and number of shares held by each stockholder, the amount invested in real estate and in personal estate, the amount of property owned and debts due the corporation the first day of the previous August, and the amount as nearly as can be ascertained of existing demands, such directors become liable for all the debts of the corporation contracted during the continuance of such neglect; the 33d section of the act of 1863 (Brightly's Purdon 2020 n.) is not repealed by the general corporation act 29 April 1874. *Kurtz v. Wigton*, 34 W. N. C. 219.

142. As to the right of stockholders individually to sue directors and officers for mismanagement, see note to *Davis v. Gemmell*, 17 Atlan. 266.

(e) Liability of a corporation for the acts of its officers.

143. An offer to show that the solicitor of a railroad company lessor had control of its legal business, is not sufficient proof of his authority to accept the surrender of a lease. *Jamestown & Franklin R. R. Co. v. Egbert*, 152 P. S. 53.

144. *De facto* officers of a corporation may bind the corporation in all matters within the scope of its ordinary business; where directors were ousted from their office, it was *held*, that the corporation was liable on contracts made by them for the erection of a building for a fair, and was also liable for the premiums offered to exhibitors thereat. *Zearfoss v. Farmers' & Mechanics' Institute of Northampton County*, 154 P. S. 449.

145. Upon a bill for the cancellation of satisfaction of a mortgage, it was

held, that a real estate title company was liable for the loss of a fund received by the solicitor of the company while acting within the apparent scope of his duties and embezzled by him. *Independent Building & Loan Ass'n v. Real Estate Title Company*, 156 P. S. 181.

146. The treasurer of a corporation has no authority to sign or endorse a promissory note in the name of the corporation unless expressly authorized by the by-laws or by the directors of stockholders: a note signed by the treasurer without the counter signature of the president, as required by the by-laws, is not binding upon the company if the company has received no benefit from the note. *Milward-Cliff Cracker Company's Estate*, 161 P. S. 157.

147. A corporation is bound by the acts of its board of directors in purchasing supplies and making contracts although such acts be done after a judgment of ouster against the board but while they were still in the possession of the books and papers. *Richards v. Farmers' & Mechanics' Institute*, 3 Northam. 141.

148. A corporation is bound by the action of its directors transacted at the time of its annual meeting, of which notice was given in the usual way, although one of the directors was out of the city and did not receive notice. *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, 42 P. L. J. 345.

VIII. Stockholders.

(a) Stock subscriptions.

149. A citizen of the United States, not a citizen of this state or a resident alien friend, may become a stockholder in an agricultural or scientific association incorporated by the court. So he may vote his shares and become a director. *Comm'th v. Detwiler*, 131 P. S. 614; reversing s. c. 1 Northam. 257.

150. A subscription to the stock of a railroad company is avoided by an abandonment of the road; upon evidence of

abandonment the question should be submitted to the jury. *Delaware River & Lancaster Railroad Co. v. Rowland*, 9 Atl. 929.

151. A subscription to capital stock may be withdrawn any time before the organization is completed; and this, though the withdrawing subscriber had induced others to sign. *Muncy Traction Engine Co. v. De la Green*, 13 Atl. 747.

152. Upon the assignment by a corporation for the benefit of creditors, the statute of limitations begins to run upon a subscription to the stock thereof, from the date of such assignment; not from the time of a call. *Franklin Savings Bank v. Bridges*, 8 Atl. 611.

153. Upon a bill charging defendant with owing \$4000 on his subscription to stock, he was properly credited with the sum of \$3000 which the books credited him with on "bond account." *McCullough's Appeal*, 1 Mona. 700.

154. In a suit upon a subscription to stock of a railroad company, it is a sufficient affidavit of defence that the road had not been commenced within the time limited in the charter, and its construction had been abandoned. *Delaware River & Lancaster Railroad Co. v. Weaver*, 7 Lanc. 363.

155. A bill in equity lies against a corporation and the subscribers to its stock by its creditors, to ascertain the latter's claim and for a receiver to collect unpaid stock subscriptions for the payment thereof. *Bailey v. Pittsburgh Coal R. R. Co.*, 139 P. S. 213.

156. In an action to enforce payment of a subscription for the stock of a collection company, an affidavit of defence, that the defendant subscribed on the faith of representations, that branch offices would be established, and that the same were not established, is insufficient to prevent judgment. *Guarantee Company v. Mayer*, 141 P. S. 511.

157. Where the defendant subscribed to the stock of a proposed corporation "for the purpose of erecting a manufactory in the borough of Auburn," and the

company erected its plant not in said borough but in an adjoining township; it was held, that the subscription was not enforceable. *Auburn Bolt & Nut Works v. Shultz*, 143 P. S. 256.

158. In an action against a stockholder to recover assessments on stock made while he was a director, the defendant is estopped from setting up want of notice of the assessments. *Spellier Electric Time Co. v. Geiger*, 147 P. S. 399.

159. In an action for stock assessments, where the defence is made, that notice of the assessments was not published in accordance with the statutes of the state in which the plaintiff was incorporated, the defendant must annex to his affidavit of defence copies of the statutes relied upon. *Spellier Electric Time Co. v. Geiger*, 147 P. S. 399.

160. In a suit upon a subscription for stock, where the subscription paper recites that sixty-five hundred shares are to be issued, it is a good defence that only a part of the said sixty-five hundred shares had been subscribed for in cash. *Spellier Electric Time Co. v. Leedom*, 149 P. S. 185.

161. Where a person induces others to subscribe for stock and guarantees that if they do not want it and cannot pay their subscription, he will take it off their hands, he is responsible to them for whatever loss they sustain by reason of his subsequent failure to comply with his agreement, and the measure of damages is the difference between what they were obliged to pay for the stock and what they subsequently sold it for. *Herd v. Thompson*, 149 P. S. 434.

162. Upon a creditor's bill to enforce payment of unpaid subscriptions, where other creditors subsequently intervene, the court may compel the intervening creditors to contribute to the expenses already incurred in raising the fund on which they seek to come, but will not exclude them from all participation in the fund until the original complainants in the bill have been paid in full. *Johnston v. Markle Paper Co.*, 153 P. S. 189.

163. Where a person subscribes himself for the stock of a corporation, and places the subscription in the name of his wife in order to avoid responsibility, he cannot avoid his responsibility for the subscription. *Shields v. Casey*, 155 P. S. 253.

164. Where a person has been induced by the misrepresentations of the officers of a corporation to subscribe to its stock, he may rescind the contract and sue in deceit the corporation and its officers for the amount paid for the stock. *Lare v. Westmoreland Specialty Co.*, 155 P. S. 33.

165. One who seeks to rescind a contract on the ground of fraud should act promptly; in an action on a promissory note given in payment of a subscription to the stock of a bank alleged to have been obtained by fraud, where it appeared, that prior to the failure of the bank and the institution of the suit the defendant took no steps to rescind the contract, but, on the contrary, indicated his willingness to join with other stockholders in their efforts to reorganize the bank; it was held, that he was liable for the amount of the note. *Howard v. Turner*, 155 P. S. 349.

166. Where the plaintiff brought suit against the promoter of a corporation and sought to rescind the contract for subscriptions, and it appeared that the plaintiff had directed the defendant to sell the stock at a certain price, and that the plaintiff had also given a proxy to vote his stock, and that he had attended and participated in the business of a stockholders' meeting; it was held, that such acts were *prima facie* acts of ownership inconsistent with the demand for rescission, and that the jury might infer from them an acquiescence in the defendant's refusal and an abandonment or waiver of such demand. *Jessop v. Ivory*, 158 P. S. 71.

167. In an action by a foreign corporation to recover a subscription to its stock, it is not a sufficient affidavit of defence that the plaintiff is a corporation of another state, and that it is attempting to carry on business in this state without having filed a statement in the office of

the secretary of the commonwealth as required by the act 9 June 1881 (Brightly's Purdon 937); the defendant may have purchased his stock in the other state. *Sigua Iron Co. v. Vandervort*, 164 P. S. 572.

168. In an action by a railroad company to enforce a subscription to its stock, it is no defence that the defendant was induced, by the misrepresentations of a co-subscriber, to sign his name to the articles of association without reading them for himself. *Path Valley R. R. Co. v. Brinley*, 15 C. C. 339.

169. Where the members of an unincorporated oil company organized a corporation and contributed their property at a valuation of five hundred thousand dollars, retaining one hundred and seventy-five thousand dollars of the stock themselves and selling the other stock for working capital, and it appeared that there was no over-valuation of the property and no fraud or concealment intended; it was held, that the property contributed constituted a full payment for the stock issued to the members of the original company. *American Tube and Iron Co. v. Baden Gas Co.*, 165 P. S. 489; reversing s. c. 41 P. L. J. 25, 173.

170. Where a person subscribes to the unissued stock of a corporation and such a subscription is accepted by the corporation and recognized by the stockholders and directors, the latter are estopped from asserting that the subscription is invalid because not made in writing and in the prescribed form; in such a case a stockholder has no remedy in equity to compel the issue of any portion of such stock to himself or to have the subscription declared invalid; if injured, his remedy is at law for damages. *Shellenberger v. Patterson*, 168 P. S. 30.

(b) Rights of stockholders.

171. A withdrawing stockholder of a corporation cannot maintain assumpsit to recover the value of his stock, where the corporation has incurred losses prior to

the notice of withdrawal. *White v. Philadelphia Industrial Co-operative Society*, 26 W. N. C. 202.

172. A corporation will not be compelled by mandamus to furnish a stockholder with a list of the stockholders for the mere purpose of soliciting other stockholders to join him in litigation against the company. *Comm'th v. Empire Pass. Railway Co.*, 134 P. S. 237; s. c. 26 W. N. C. 26.

173. If a stockholder or a creditor brings a suit in equity, the bill must show his right to maintain the suit; such a defect can be taken advantage of on exceptions to the master's report. *Holton v. Newcastle Railway Co.*, 138 P. S. 111; affirming s. c. 8 C. C. 430.

174. Upon the reorganization of a corporation it may provide that its shares may be issued to the old stockholders in due proportion, but that no stockholder shall receive his new stock until his debt be paid, and that the corporation may apply his stock to the debt at par, and issue the balance. *Reading Trust Co. v. Reading Iron Works*, 137 P. S. 282; s. c. 27 W. N. C. 91. See *Reading Iron Works' Estate*, 149 P. S. 182.

175. The stock of the stockholder being pledged to the corporation for his indebtedness, the statute of limitations does not destroy the company's lien. *Ibid.*

176. If practically all the stockholders of a corporation agree to contribute to a guarantee fund for the payment of the debts of the corporation, the surplus to be divided among the stockholders, one who has complied with his portion of the agreement is entitled to an account of said guarantee fund from the others; and this, though the franchises and property of the corporation have been since sold under its mortgage. *Huston's Appeal*, 127 P. S. 620; reversing *Huston v. Clark*, 45 L. I. 236.

177. Minority stockholders cannot complain of an issue of mortgage bonds for an adequate consideration to a holder of a majority of the stock and with great

benefit to the corporation; and this, though the issuance was procured by the majority stockholder for the purpose of raising money for himself and was actually so used. *Gloninger v. Pittsburgh & Connellsville R. R. Co.*, 139 P. S. 13.

178. Where a testator gave forty-eight thousand dollars of the loan of a canal company to trustees to pay the income to a legatee for life, and it appeared that forty-eight bonds were in a private box in the office of the trustee, and when the box was opened it was found that five had been registered nearly twenty-one years before in the name of the husband of a legatee, who had never claimed them nor caused them to be registered in his own name, but it appeared that the bonds had been continuously in the possession of the testator for nearly thirty-one years before his death; it was *held*, that the evidence of the testator's ownership was sufficient to overcome the presumption arising from the fact of their registration in the name of another person. *Cummings's Estate*, 153 P. S. 397; reversing s. c. 12 C. C. 45.

179. A stockholder of a mining corporation who has filed a bill to enjoin a lease of the company's land, may make a valid contract with the lessee by which, in consideration of his discontinuing his suit, he is to receive from the lessee a bonus for every ton of coal mined by the lessee, and his right to receive such bonus will not be affected by the fact that he becomes a director, where the circumstances remain the same. Where, however, such a stockholder became a director and subsequently, without revealing the secret agreement, advised a reduction of the royalty payable under the lease, which reduction was made; it was *held*, that he was bound to account to the company for the profit made by him by reason of such reduction. *Bird Coal & Iron Co. v. Humes*, 157 P. S. 278.

180. The act 26 April 1855 (Brightly's Purdon 805), forbidding foreign corporations from holding real estate in this state, does not prohibit them from hold-

ing the stock of Pennsylvania corporations holding real estate; a New Jersey corporation having authority to operate a street railway and electric light plant may acquire the majority of the stock of Pennsylvania companies chartered for similar purposes. *White v. Ryan*, 15 C. C. 170.

181. A stockholder or officer of a corporation is not forbidden to advance money to his company if the contract be not tainted with fraud; where such an advancement is made in good faith, he will not be restrained in the collection of his claim by the appointment of a receiver where the bill does not allege insolvency nor ask for a dissolution. *Griffen v. Burden*, 10 Montg. 184.

(c) **Individual liability of stockholders.**

182. Where a corporation was chartered for the purpose of manufacturing boots and shoes, and it engaged only in the business of buying boots and shoes, it was not decided whether such fact would render the officers and stockholders liable as partners. *Prouty v. Prouty and Barr Boot & Shoe Co.*, 155 P. S. 112.

183. A failure to record the certificate of incorporation "in the office for the recording of deeds in and for the county where the chief operations are to be carried on," as required by the act 29 April 1874 (Brightly's Purdon 408), will render the incorporators personally liable to persons who deal with them without knowledge of the incorporation; in such a case the mere acceptance of a note from the incorporators in the corporate name after the party dealing with them has performed his part of the contract, will not operate by way of estoppel. *Guckert v. Hacke*, 159 P. S. 303.

184. A failure to record the charter of a corporation previous to beginning business does not render the stockholders personally liable for a debt incurred to one who is no way misled by the omission but dealt with the corporation as such. *Pierce v. Hacke*, 40 P. L. J. 8.

185. In an action against a stockholder of a Kansas corporation to recover an

amount equal to the par value of his stock for a debt of the corporation as provided by the constitution of that state; it is no defence that prior to the giving of the notes to the plaintiff, the corporation had ceased to be a corporation of that state. *Sykes v. Anderson*, 14 C. C. 329.

186. Where a stockholder was sued by a corporation upon an obligation for the payment of money and he set up a defence that he entered into the obligation in order to procure money to buy the stock of the corporation which he pledged with it as collateral security, and that he was induced to enter into the transaction by false statements of the officers, it was held, that a writ of mandamus would not lie to enable the defendant to examine the books of the corporation, he not applying for the writ in aid of his rights as a stockholder, but simply as a debtor who, by means of his position as a stockholder, was endeavoring to extract material for a defence. *Investment Co. of Philadelphia v. Eldridge*, 2 Dist. Rep. 394.

(d) **Dividends.**

187. Where stock is held as collateral and stands in the name of the pledgee, he is entitled to the dividends, and where such dividends have been paid to the pledgor, the pledgee may sue the company for the amount thereof. *Boyd v. Conshohocken Worsted Mills*, 149 P. S. 363; affirming s. c. 7 Montg. 209.

188. The directors have the discretionary power to determine the circumstances under which they will or may declare dividends, and they will not be compelled to declare a dividend on preferred stock where their discretion has been properly exercised. *McLean v. Pittsburgh Plate Glass Co.*, 159 P. S. 112.

IX. Transfers of stock.

189. In the traverse of an escheat it was held, that the fact that five months before his death the decedent gave to de-

feudant a box containing a \$1000 registered bond and certain railroad stock, saying "take this and keep it for yourself," and added that she must not open it until after his death, established a gift *inter vivos* of the bond and stock. *Comm'th v. Crompton*, 137 P. S. 138; s. c. 26 W. N. C. 475; 46 L. I. 190.

190. One who gives time to an insolvent debtor, in consideration of the transfer of stock as collateral, takes no more than the debtor owned and can honorably transfer; he is not a purchaser for value. *Linnard's Appeal*, 3 Atlan. 840.

191. Where money was borrowed on a collateral note with an agreement that on the non-payment of the note the payee was to transfer the certificate of stock, put up as collateral, to himself as his own property and in payment of the note; the non-payment of the note and receipt of dividends by the payee was not such a transfer as would cancel the note. *Fullerton v. Mobley*, 15 Atlan. 856.

192. A pledgor of fraudulent stock, who himself has no claim for indemnification, cannot recover from his pledgee for value, any part of what the latter has received from the corporation by way of indemnity; and this, though such indemnity may have consisted of genuine shares which increased in value exceeding the debt of the pledgor to the pledgee. *Kistler's Appeal*, 127 P. S. 601.

193. Where a purchaser of stock was to pay for it out of "dividends," it was held that though no dividends or profits were declared, the purchaser was liable for a dividend of the assets he received on dissolution. *Cozad v. McKee*, 130 P. S. 406.

194. A vendee of stock having agreed with his vendor to pay all liabilities thereon, and being notified by his vendor of an assessment, and giving no instructions to resist payment, cannot set up the statute of limitations in a suit by the vendor, who has paid the assessment. *Baily v. Shroyer*, 1 Atlan. 717.

195. Upon the pledge of shares of stock for a single particular indebtedness, with power to sell and apply, equity has

no jurisdiction to compel a re-transfer and account. The pledgor has a complete remedy at law. *Roland v. Lancaster County Nat. Bank*, 135 P. S. 598.

196. Where stock is wrongfully transferred under a forged power of attorney, the measure of damages in an action against the company is the market price of the stock at the time of the transfer. *Pennsylvania Company for Insurance on Lives & Granting Annuities v. Philadelphia, Germantown & Norristown R. R. Co.*, 153 P. S. 160; affirming s. c. 11 C. C. 482.

197. Where an owner of stock has, by a power of attorney, signed in blank, conferred upon another all the indicia of ownership, he is estopped from asserting his title to the stock as against a third person who has, in good faith, purchased it for value from the apparent owner; but this rule does not obtain where there are circumstances to put the purchaser on inquiry. *Ryman v. Gerlach*, 153 P. S. 197.

198. Prior to the act 3 June 1887, a married woman could not transfer stock without the consent of her husband, but such consent might be shown by the fact that he filled in the blanks in the transfer and power of attorney in his own handwriting and signed the same as a witness to his wife's signature. *Souder v. Columbia Nat. Bank*, 156 P. S. 374; affirming s. c. 10 Lanc. 217.

199. A corporation is not liable in damages for refusing to transfer stock held in the name of a decedent, where the right of the executors to sell the stock is doubtful or where the executors have impeached their own title to make the transfer. *Livezey v. Northern Pacific R. R. Co.*, 157 P. S. 75.

200. A bill in equity does not lie to compel the reconveyance of shares of stock sold to the defendant under fraudulent representations made by him where the relief sought is merely compensation in damages; in such a case there is an adequate remedy at law. *Edelman v. Latshaw*, 159 P. S. 644; affirming s. c. 9 Montg. 83.

201. An agreement among stockholders not to sell or transfer their stock without the unanimous consent of all the persons signing the agreement is a restraint upon alienation and void as against public policy. *White v. Ryan*, 15 C. C. 170.

202. Stockholders of a corporation will not be enjoined at the suit of other stockholders from selling or assigning their stock to a foreign corporation having the right to do business in this state. *White v. Ryan*, 15 C. C. 170.

203. Equity will compel the specific performance of a contract for the sale of stock in a railway company or other business corporation when it appears that the remedy at law is inadequate or damages impracticable. *Norristown Traction Co. v. Slingsluff*, 7 Montg. 83.

204. Where a bill is pending between one claiming to have transferred to him certain shares of stock in a corporation, and the individual owners thereof and the plaintiff has made out a *prima facie* case, the directors of the company will be restrained from using its funds to defend the suit where the company as a corporation are in no way interested in the proceeding. *Norristown Traction Co. v. Shannon*, 7 Montg. 86.

205. Where certain stock of a corporation was in the name of an agent, who offered to assign the same as collateral for certain bonds, which were to be issued in accordance with a contract of sale for the stock of another corporation; it was *held*, in a proceeding to compel the consummation of the alleged sale, that the agent would be compelled to disclose his agency as to the ownership of the stock, or that the shares so held would be excluded in making up a sufficient number of shares to comply with the agreement. *Norristown Traction Co. v. Slingsluff*, 7 Montg. 126.

206. Where the owner of stocks signs a blank power of attorney to transfer and delivers them to another party who pledges them as collateral security for the payment of a note of the owner drawn to the order of the pledgor, the

pledgee being an innocent holder takes title and may retain the stocks until debt of the pledgor is paid; and this, although it subsequently appear that the name of the owner of the stocks to the note is a forgery. *Herd v. Pittsburgh Nat. Bank of Commerce*, 42 P. L. J. 298.

207. A power of attorney to transfer stock which has been sold is a power coupled with an interest, and is valid after the death of the principal. *Fisher v. New York & Middle Coal Field R. R. & Coal Co.*, 31 W. N. C. 502.

X. Corporate elections.

208. In a corporate election, votes cannot be added to a ballot so as to change the result after the ballot has been closed, counted and announced. *Forsyth v. Brown*, 13 C. C. 576; 33 W. N. C. 72.

209. A mandamus will issue at the relation of a stockholder of a corporation requiring the corporation to permit the relator to take a copy of the stock-list for the purpose of consulting with and obtaining proxies from other stockholders to be used at a coming corporate election; such a purpose is perfectly legal. In such a case, it is not necessary to make the receivers of the corporation parties to the proceedings. *Comm'th v. Philadelphia & Reading R. R. Co.*, 3 Dist. Rep. 115.

210. Where the by-laws provided that the annual election should either be upon sixty days' notice when a majority must be represented to constitute a quorum, or that such election might be held without such notice, provided three-fourths of the stockholders be represented at the meeting; it was *held*, that directors elected at a meeting of which sixty days' notice had not been given and at which three-fourths of the stockholders were not represented, had no power to act or to bind the corporation in any way. *Brown v. Electric Mining Machine Co.*, 39 P. L. J. 343.

211. Where a church charter contains nothing as to the mode of conducting an

election of trustees and there are no by-laws on the subject, the matter will be regulated by former usage and practice. *Seventh Day Baptists*, 4 York 29.

212. A bill in equity does not lie to compel the surrender of the property of a corporation where it appears that the real question in controversy is the validity of the election of the defendants as officers of the corporation; in such a case *quo warranto* is the appropriate remedy. *Bedford Springs Co. v. McMeen*, 161 P. S. 639.

213. If the charter provides for an annual election of officers, the court will order an election upon the application of a stockholder, and will appoint a master to conduct it. *Anderson v. Eltonhead*, 26 W. N. C. 95.

214. Under sec. 13 of the act 16 June 1836 (Brightly's Purdon 775) a court of equity has power to supervise and control the election of directors of a corporation; whenever it is made to appear that by means of fraud, violence or other unlawful conduct on the part of the corporators, a fair and honest election cannot be had, the court may appoint a master *pro hac vice* in any particular case. *Tunis v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 149 P. S. 70; affirming s. c. 11 C. C. 450, 452.

215. Where stock has been pledged with no agreement as to the voting power, the case must be decided in accordance with the common law, and the judges of election cannot, under the act 7 May 1889, P. L. 102, summarily determine such question. *Comm'th v. Dalzell*, 152 P. S. 217; reversing s. c. 40 P. L. J. 69. But see the act 26 May 1893 (Brightly's Purdon 416). See also *Comm'th v. Patterson*, 158 P. S. 476.

216. Under the act 16 June 1836 (Brightly's Purdon 775) a court of equity will supervise and control corporate elections where it is shown in advance that by reason of fraud, violence or other unlawful means a fair and honest election cannot be had; but such power will not be exercised to set aside an election regu-

larly held, and where such an election is held at the proper place and the appointed time and the meeting is regular, quiet and orderly, the only way to test its validity is by writ of *quo warranto* as provided by the act 14 June 1836 (Brightly's Purdon 773). *Jenkins v. Baxter*, 160 P. S. 199.

217. Where no other means is provided for filling vacancies in a board of directors of a corporation, a court of equity has jurisdiction to order an election to fill such vacancies. *Forsyth v. Brown*, 13 C. C. 576; s. c. 33 W. N. C. 72.

218. A corporate election will not be postponed by the court for inadequate reasons, neither will the court appoint a master to conduct the election where there is no necessity for it. *Comm'th v. Philadelphia & Reading R. R. Co.*, 3 Dist. Rep. 115.

219. Where capable and reputable men had been appointed to conduct a corporate election, the court refused to appoint a master to conduct such election where no sufficient reasons appeared in the petition. *Dick v. Lehigh Valley R. R. Co.*, 4 Dist. Rep. 56.

220. If shares of stock be pledged as collateral, the right to vote the same may be determined by agreement between the debtor and creditor, so they may appoint a third person to hold the certificate and vote the stock. *Shelmerdine v. Welsh*, 47 L. I. 26.

221. If a corporation have by its charter the right to regulate the conduct of its elections, a by-law, authorizing voting by proxy, giving a vote for each share of stock, is valid. *Comm'th v. Detwiller*, 131 P. S. 614; s. c. 1 Northam. 257.

222. At a corporate election each vote must be cast either in person or by proxy, and where stock is held by executors, who differ as to how it should be voted, it cannot be voted at all. Where a testator directed that certain stock should be voted as his son should direct and appoint, and that his executors should give a proxy to vote said stock as the son might desire to vote it, and the son was

one of the executors, it was *held*, that not having received such a proxy, the son could not vote the stock in the face of a dissent by his co-executor; whether or not he could compel the latter to give him such a proxy was not decided. *Tunis v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 149 P. S. 70; affirming s. c. 11 C. C. 450, 451. The orphans' court subsequently compelled the co-trustees to give the son the proxy and such decree was sustained by a divided court. *Lafferty's Estate*, 154 P. S. 530; affirming s. c. 2 Dist. Rep. 215.

223. Where a stockholder in a corporation entered into a contract of present sale of the stock and delivered it in escrow until the vendee should comply with the terms of the sale, and agreed that in the meantime the right to vote the stock should be in the vendee; it was *held*, that the vendor could not vote the stock. *Comm'th v. Patterson*, 158 P. S. 476.

224. Where a subscription to stock is not in writing and is made for the purpose of creating an amount of stock sufficient to equal a proposed mortgage, but is not accepted by the treasurer of the company, and such subscription has not been paid in whole or in part, the stock so subscribed cannot be voted at a corporate meeting. *Comm'th v. Patterson*, 158 P. S. 476.

225. A proxy may vote at a corporate election, upon a motion to take a ballot or to adjourn. *Forsyth v. Brown*, 13 C. C. 576; s. c. 33 W. N. C. 72.

226. Where a by-law of a hospital provided that any one contributing fifty dollars to the permanent fund should be entitled to one vote at any election for directors and one vote for each additional fifty dollars; it was *held*, that such right was a personal one which ceased at the death of the contributor, and did not vest in his executor simply because he handed over money to the hospital which the testator had given to it. *Comm'th v. Park*, 14 C. C. 481.

227. Where the charter of a corpora-

tion provided that salaried officers should not be elected directors, the fact that after the act 20 May 1891 (Brightly's Purdon 415) salaried officers were elected directors, was *held* not to make the corporation subject to the provisions of the constitution of 1874 relative to cumulative voting. *Comm'th v. Butterworth*, 160 P. S. 55.

228. Where cumulative voting is permitted, and in counting the vote a tie is found before the full board is made up, so that the remaining places in the board cannot be filled without rejecting one or more of the candidates who are in the tie, only such candidates are elected on that ballot as received each more votes than any candidate in the tie, and another ballot must be had to fill the vacant places, in which ballot all the stockholders may again vote cumulatively. *Forsyth v. Brown*, 13 C. C. 576; s. c. 33 W. N. C. 72.

229. Where the charter of a corporation antedates the constitution of 1874 and there is no averment that the company has taken advantage of legislation since that year, cumulative voting will not be allowed at an election of directors. *Dick v. Lehigh Valley R. R. Co.*, 4 Dist. Rep. 56.

XI. Corporate meetings.

230. A person who has been chosen to preside at a corporate meeting is entitled to call an adjourned meeting to order, and to continue to preside unless superseded in some orderly and recognized parliamentary manner; officers elected by stockholders who withdrew from a corporate meeting after a disorder thereat, were *held* on *quo warranto* not to be entitled to hold their positions. *Comm'th v. Patterson*, 158 P. S. 476.

231. The acts of a board of directors cannot be set aside for want of a quorum when it appears that one of the directors, whose vote would have made a quorum, refused to vote, although actually present and taking part in the discussion. *Mer-*

cantile Library Hall Co. v. Pittsburgh Library Ass'n, 42 P. L. J. 345.

XII. Suits by and against corporations.

(a) Suits by corporations.

232. A foreign corporation engaged in business in another state may sell and deliver goods to a customer in this state, and may sue and collect their value in our courts; and this, although such corporation has no place of business within this state and has not filed a statement with the secretary of state in compliance with the act 22 April 1874 (Brightly's Purdon 937). *Wile v. Onsel*, 10 C. C. 659.

(b) Suits against corporations.

233. A corporation must be sued by its corporate name. It is not sufficient to sue the officers. *Scranton Iron & Brass Co. v. Easterline*, 1 Lack. Jur. 109.

234. Upon attaching bank stock of the defendant in the hands of his assignee as collateral, it is not necessary to serve the bank with the attachment. *Geddes v. Geddes*, 7 C. C. 660.

235. A writ of foreign attachment lies at the suit of a salesman, a resident of this state, against a foreign corporation for a debt due him by the corporation; and this, though the property attached be in the hands of receivers appointed by the court of another state after the creation of the debt. Our courts will not recognize the claims of a foreign receiver where such claims conflict with the rights of citizens of this state. *Lett v. Thurber Whyland Co.*, 15 C. C. 666; s. c. 4 Northam. 335.

(c) Execution against corporations.

236. Where the property of a corporation is in the hands of a receiver, its effects are in the custody of the court, and a writ of *feri facias* cannot be executed without the consent of the court, and this rule applies to a writ of *feri*

facias issued from the United States circuit court. *Taylor v. Baltimore & Lehigh R. R. Co.*, 7 York 174.

237. A special *feri facias* against corporate franchises under the act 7 April 1870 (Brightly's Purdon 431) cannot issue until an ordinary *feri facias* has been issued and returned unsatisfied; but if the officers and creditors of a corporation permit a sale under a special *feri facias* without the issuance of a previous ordinary writ, and bid in the property themselves, they cannot object after the rights of such third parties have vested; in such a case the execution creditors in the order of priority are entitled to the proceeds of the sale to the exclusion of the general creditors. *Valle v. Arnold Electric Mfg. Co.*, 6 Del. 69.

238. Under the act 7 April 1870 (Brightly's Purdon 431), personal, mixed or real property (except lands held in fee), franchises and rights of a corporation may be levied upon and sold upon a writ of *feri facias* without a return of *nulla bona* to a former writ. *Williams v. Lawrenceville and Evergreen Pass. Ry. Co.*, 9 Montg. 126.

239. The property of a corporation in actual use, for the purposes prescribed by its charter, is not liable to levy, apart from the franchises of the company. *Boyd's Appeal*, 15 Atlan. 736; affirming *Insurance Patrol v. Boyd*, 44 L. I. 252.

240. All the property of a corporation which can properly be considered goods, chattels, lands or tenements, is subject to an ordinary execution, but such of its property, real or personal, as is necessary to the exercise of some public franchise must be taken in the lump under the special writ provided by the act 7 April 1870 (Brightly's Purdon 431), and sold together to a purchaser, whom the law authorizes to exercise the franchises possessed by the corporation. *East Side Bank v. Columbus Tanning Co.*, 15 C. C. 357.

241. Equity will not restrain the sale or attachment of corporate property upon execution issued upon a judgment bond

given by a corporation to its directors to secure them on their indorsements, the company not being insolvent when the bond was given and there being no evidence of collusion or fraudulent intent. *Neal's Appeal*, 129 P. S. 64.

242. An execution against a corporation under the act 7 April 1870 (Brightly's Purdon 431) does not create a lien; it is a mere process to convert the property for the payment of debts by an equal distribution among the creditors, and this rule applies to business corporations as well as public corporations. *McKee v. McKee's Rocks Oil Co.*, 13 C. C. 375.

243. A sale under a judgment confessed by an insolvent corporation will not be restrained on the ground that a sale of the company's property can be more advantageously conducted in the interests of all the creditors by receivers. *Fairpoint Mfg. Co. v. Philadelphia Optical and Watch Co.*, 161 P. S. 17; *Lowry v. Philadelphia Optical and Watch Co.*, 161 P. S. 123.

244. Where real estate is held by a corporation in fee and is sold at sheriff's sale for the payment of its debts, the proceeds are to be distributed among lien creditors according to priority of lien and not *pro rata*. *First Nat. Bank v. New York and W. G.-C. & C. Co.*, 137 P. S. 601.

245. A right to take natural gas from land and rights of way and appliances required in obtaining the gas and transporting it to consumers, are not "land held in fee" within the exception of the act 7 April 1870 (Brightly's Purdon 431), and a special *feri facias* may issue for their sale under that act. Where a purchase-money mortgagee of such right secured control of two junior judgments and issued a special execution, and sold subject to any mortgage existing upon the property, and such mortgagee purchased at sheriff's sale; it was *held*, that the mortgagee was not entitled to participate with other creditors in the fund realized by the sale. *Greensburg Fuel Co. v. Irwin Natural Gas Co.*, 162 P. S. 78.

XIII. Transfer of franchises.

246. Where several persons purchased the charter and stock of a corporation, and guaranteed the vendors against any claim for commissions which might be made by an agent in whose hands the charter had been placed for sale; it was *held*, that the purchasers were personally liable on the guaranty, but that the company was not liable in the absence of a clear and unequivocal ratification. *Denniston v. Home Life & Investment Co.*, 162 P. S. 86.

247. A sheriff's sale of the corporate franchises and property of a corporation will not be set aside on the petition of a stockholder, which fails to aver when the petitioner became a stockholder and his holding, or to charge collusion, misconduct or inability to act on the part of the directors. *Southwest Natural Gas Co. v. Fayette Fuel Gas Co.*, 145 P. S. 13.

248. Where the property of a corporation was sold under a mortgage, and the purchasers organized a new company and took possession of all the assets of the old company, and agreed to pay a certain amount for the personal property and to account for the book debts which they could collect; it was *held*, that the new company was not liable for the book accounts which they were unable to collect, and that they were entitled to have the value of certain fixtures to be deducted from the appraisalment of the personal property which they had agreed to pay. *Huston v. Clark*, 162 P. S. 435; affirming s. c. 3 Dist. Rep. 2.

249. Where all the franchises and property of a corporation were sold under an execution subject to a certain mortgage given to secure an issue of bonds and the corporation was reorganized under the same name; it was *held*, that the sale extinguished the original corporation, and that a second sale under judgments subsequently obtained against the original corporation did not divest the lien of the mortgage. *Reynolds v. Cridge*, 11 C. C. 306.

XIV. Dissolution and forfeiture.

250. Where one water company seeks to condemn the property of another company on the ground that the charter of the other corporation is forfeited by non-user, the proceedings must be conducted under the act 16 June 1883, sec. 5 (Brightly's Purdon 411), by the attorney-general; such a question cannot be raised upon a petition for leave to file a bond, but the court will hold under advisement the application to file a bond until the proceedings at the instance of the attorney-general are finally disposed of. *Lebanon Water Co.*, 9 C. C. 589.

251. Upon a *quo warranto* to forfeit the charter of a corporation, laches will not be imputed to the state, but the court may refuse to permit an information to be filed at the instance of private individuals where there had been unreasonable delay. *Comm'th v. New York, L. E. & W. Coal & R. R. Co.*, 10 C. C. 129.

252. The charter of a corporation will not be forfeited upon *quo warranto* on account of an isolated case of misuser of its franchise which produced no injurious consequences to any one and was not persisted in; surveying several lines of railroad by a coal and railroad company without having any lands with which to connect them, was held not to be such a misuser as to warrant a forfeiture of the charter. *Comm'th v. New York, L. E. & W. Coal & R. R. Co.*, 10 C. C. 129.

253. A trustee appointed to state an account upon the dissolution of a corporation is not chargeable with debts, expenses and losses incident to the management of the company by its directors and stockholders before the dissolution of the corporation; where an auditor so surcharged a trustee and allowed a fee to counsel for stockholders asking the surcharge and allowed stenographer's charges for taking the testimony on the surcharge, the court disallowed such credits and referred them to the contesting stockholder who

made the false claim and had not objected to the charges. *Philadelphia Shoe Mfg. Co.'s Estate*, 2 Dist. Rep. 581.

254. No charter of a corporation for public purposes can be forfeited except by the commonwealth in a direct proceeding for that purpose. *Hinchman v. Philadelphia & West Chester Turnpike Road*, 160 P. S. 150; affirming s. c. 5 Del. 414.

XV. Insolvency.

(a) Right to prefer creditors.

255. An insolvent corporation may prefer a creditor by confessing judgment to him where there is no fraud in the contracting of the debt or the confession of the judgment. *Prouty v. Prouty & Barr Boot & Shoe Co.*, 155 P. S. 112.

256. An insolvent corporation may prefer a creditor by a confession of judgment, and where no disability is imposed upon a foreign corporation by its charter, the prohibition of such a preference by a general enactment of the state where the corporation is chartered can have no extra-territorial effect. *Fairpoint Mfg. Co. v. Philadelphia Optical & Watch Co.*, 161 P. S. 17.

257. It is not unlawful in this state for an insolvent private corporation, foreign or domestic, to confess a judgment to a *bona fide* creditor not an officer or member of it, and such a judgment and an execution thereon constitute a valid lien on all the goods and chattels, lands and tenements of such a corporation. *East Side Bank v. Columbus Tanning Co.*, 15 C. C. 357.

258. Where H. and C. not being insolvent formed a corporation to which they transferred all their property, and received therefor substantially all the corporate stock, and the business of the corporation was afterwards continued in the name of H. and C., and incurring a large indebtedness became insolvent, and the partners after securing certain creditors by assignments of stock, made an assignment for creditors and unpreferred creditors sub-

sequently levied upon the property of the partnership; it was *held*, that the preference for their *bona fide* creditors was not unlawful as to those not preferred, and the latter were without legal right to levy upon the corporate assets as the property of the partnership. *Coaldale Coal Co. v. National State Bank of Camden*, 142 P. S. 288.

(b) **Assignment for creditors.**

259. An insolvent corporation may, unless restrained by its charter, make a valid assignment for the benefit of creditors; and this, through its board of directors without the authority or consent of the stockholders. *Lehigh Iron Company's Estate*, 12 C. C. 257.

260. The franchises of a manufacturing corporation do not pass under a general assignment for its creditors, and there is no authority in the court to order the assignee to sell its franchises with the other property of the corporation. *Lehigh Iron Co.'s Estate*, 12 C. C. 257.

(c) **Receivers.**

261. An officer of an insolvent corporation who has been intimately associated with the management alleged to be fraudulent, is not a proper person for assignee, and will be replaced by a receiver; the equity powers of a court of equity extend to the removal of such an assignee. *Failey v. Stockwell*, 12 C. C. 403.

262. A receiver will not be appointed for an alleged insolvent corporation where the court is not convinced that such a measure is needful and is the appropriate means of securing a proper end. *Pottsville Lumber & Feed Co. v. Kopitzsch Soap Co.*, 13 C. C. 139.

263. Where, upon the petition of an insurance company, the common pleas of Armstrong county dissolved the corporation and appointed a receiver, and on the day of such order the common pleas of Dauphin county, upon proceedings by the attorney-general under clause 8, sec. 5, of the act 4 April 1873 (Brightly's Purdon

1045), made an order on the company to show cause why its business should not be closed; it was *held*, that so much of the order of the common pleas of Armstrong as dissolved the corporation was improvidently made, but that court had power to appoint the receiver, who could retain the assets until superseded by a receiver appointed on the formal dissolution by the common pleas of Dauphin. *Kittanning Ins. Co.*, 146 P. S. 102.

264. A court of common pleas has no jurisdiction under the act 4 April 1872 (Brightly's Purdon 427) to appoint a receiver of a corporation where none of the property of the corporation is in the county, where none of the officers are resident, or are served, and the application is made by the commonwealth and not by a creditor or stockholder. *Comm'th v. Order of Vesta*, 156 P. S. 531; reversing s. c. 12 C. C. 481.

265. Upon the insolvency of a corporation the regular and ordinary course of administration of the assets is, under the act 4 April 1872 (Brightly's Purdon 1776), by the officers of the corporation as trustees, and the power to supersede this mode by the special appointment of a receiver is in the supreme court without regard to the court which rendered the judgment of ouster. The act 26 April 1893 (Brightly's Purdon 427), authorizing the appointment of receivers where corporations have been dissolved by judgment of ouster, does not apply to a case where the affairs of a corporation are, at the date of the passage of the act, in course of adjudication by a competent court. That act does not authorize the court appointing the receiver to make summary orders upon an assignee who is under the jurisdiction of another court. *Comm'th v. Order of Vesta*, 156 P. S. 531; reversing s. c. 12 C. C. 481.

266. Before the act 26 April 1893 (Brightly's Purdon 427), the court of common pleas had no jurisdiction to appoint a receiver on the motion of the commonwealth in *quo warranto* proceedings against a corporation, and where a

receiver was appointed and before the supreme court passed upon the validity of the appointment, the appeal from the order of another court of common pleas refusing to award to him the estate; it was *held*, that the receiver was not liable for the costs of the appeal. *Fraternal Guardians' Assigned Estate*, 159 P. S. 603.

267. Where a receiver has been appointed in this state for the property of a foreign corporation, and the Pennsylvania creditors have been paid, the assets will be awarded to a receiver appointed in the home state of the corporation in order that they may be distributed after the payment of all creditors, by the latter receiver, to the stockholders; our courts will not retain the assets for the purpose of distributing them to Pennsylvania stockholders. *Kean v. Iron Hall*, 15 C. C. 194.

268. The receivers of an insolvent corporation have nothing to do with the stock and internal management of the company; they are not necessary parties to a proceeding against the company by mandamus brought by a stockholder to compel an inspection of its stock list. *Comm'th v. Philadelphia & Reading R. R. Co.*, 3 Dist. Rep. 115.

269. Where a receiver had been appointed for a mutual insurance company; it was *held*, that a bill would not lie against the officers of the company by policy holders to compel them to account; and it was further *held*, that it was the duty of the receiver to deal fairly with the members of the corporation, and if access to the books of the company was denied to members by which they could prepare affidavits of defence to suits brought by the receiver, judgment on such suits would be suspended until an inspection was allowed. *Becker v. New Hanover Mutual Fire Ins. Co.*, 8 Montg. 134.

270. A receiver of a corporation cannot bring suit to recover an unpaid subscription to stock without leave of court, nor without showing that the collection

is necessary to pay debts; it is bad practice to correct such a mistake by an order *nunc pro tunc*. *Wisener v. Myers*, 42 P. L. J. 166.

271. Upon a sale of real estate by the receiver of a corporation, the court does not possess the inherent power to deprive judgment creditors of their lien by directing the sale free from the lien of judgments. *Lebanon Brewing Co.*, 3 Dist. Rep. 260.

272. Where a receiver of a foreign corporation appointed by the court of another state has once obtained rightful possession of personal property, the courts of this state will recognize his possession. *Lett v. Kirkpatrick*, 15 C. C. 212.

(d) Distribution.

273. The president of an insolvent corporation cannot, by accepting its mortgage bond, acquire a preference over its unsecured creditors, and a subsequent assignee of the bonds stands in the same position. *Sicardi v. Keystone Oil Co.*, 149 P. S. 148.

274. Where an ousted stockholder, by a decree made after the assignment, on proceedings instituted before the assignment, is awarded damages for an act antecedent to the insolvency, his claim on distribution is not inferior to that of an ordinary creditor. *Reading Iron Works Estate*, 149 P. S. 182.

275. The assignee for creditors of a corporation was allowed a credit of one hundred thousand dollars paid by him out of the proceeds of sales of real estate in satisfaction of a judgment entered before the assignment, where it appeared that the judgment note had been given by the assignor to secure a prior indebtedness of over seventy thousand dollars, as well as thirty thousand cash advanced in accordance with a resolution of the board of directors, who afterwards ratified the giving of the judgment note. *Reading Iron Works Estate*, 149 P. S. 268.

276. Upon the adjudication of the

account of an assignee for creditors of a corporation, the payment of the debts due directors will not be refused, where the evidence does not establish that the total debts of the company were in excess of the capital stock. *Trevose Model Brick Manufacturing Co.'s Estate*, 159 P. S. 496.

277. Where the certificates of a beneficial association ran twenty-eight years and at the end of each period of three and one-half years a member was entitled to receive a sum not exceeding one-eighth of the amount of the certificate; it was *held*, upon the adjudication of the account of its assignee for creditors, that members whose certificates were more than three and one-half years old had no preference on distribution over the other certificate holders. *Fraternal Guardians' Assigned Estate*, 159 P. S. 594.

278. Upon the distribution of the funds of an insolvent life insurance company, where a claim has become due before the date of the decree of dissolution, the measure of damages for failure to pay is the amount of the valid claim; but where the policies have matured by death after the date of the decree, the beneficiaries are not entitled to a dividend on the face value of their policies, but only on the net value calculated as of the date of the dissolution. *Comm'th v. American Life Ins. Co.*, 162 P. S. 586.

279. Where a life insurance company has been adjudged insolvent and has been dissolved, the policy holders have a claim for damages, the measure of which is the net value of the policies without regard to the health of the holder, and calculated as of the date of the dissolution of the corporation according to the tables of mortality, less the outstanding premium notes, if any. *Comm'th v. American Life Ins. Co.*, 162 P. S. 586.

280. Where a life insurance company issued both ordinary life policies and mutual policies, but never kept a separate fund for the payment of mutual policies; it was *held*, upon the insolvency of the company, that auditors appointed to dis-

tribute the estate could not separate mutual policies from the other policies in the distribution. *Comm'th v. American Life Ins. Co.*, 162 P. S. 586.

281. Upon the distribution of the assets of an insolvent corporation, where a fund is created by the action of some of the creditors in taking an appeal to the supreme court, the fund belongs to the whole body of creditors and not merely to those who took the appeal, but the appealing creditors are entitled to the cost of printing their paper-books, together with a reasonable sum for counsel fees. *Schwartz v. Keystone Oil Co.*, 164 P. S. 415. See s. c. 153 P. S. 283.

282. Upon the distribution of the assigned estate of a corporation, taxes due the commonwealth are a preferred claim under the act 1 June 1889, sec. 31 (Brightly's Purdon 1974); and this, though no transcript has been filed in the prothonotary's office as provided by the act 14 April 1827 (Brightly's Purdon 1747). *Goodwin Gas, Stove & Meter Co.'s Estate*, 166 P. S. 296; affirming s. c. 15 C. C. 65; 35 W. N. C. 234.

283. Where members of a beneficial association anticipate the payment of their dues, the officer receiving them should pay them into the treasury, and upon his doing so he incurs no responsibility to the members from whom he received them in case of the insolvency of the association before the time at which the dues mature; any equity for their return must be asserted on the settlement of the account of the assignee. *Garrett v. Guarantee Trust & Safe Deposit Co.*, 29 W. N. C. 33.

(e) Effect of insolvency.

284. An assignment for the benefit of the creditors of a corporation does not necessarily work a dissolution. *Conshohocken Worsted Mills*, 9 Montg. 23.

285. Where the secretary of a corporation is elected for a year the insolvency of a corporation does not end its obliga-

tion to pay his salary; *Hassenfus v. Philadelphia Packing Co.*, 15 C. C. 650.

286. Where the agent of a short term order had paid back money received for dues after he had notice that the order had made an assignment for creditors; it was *held*, that he might be compelled to pay the same amount to the assignee. *Active Workers v. Sanders*, 28 W. N. C. 321.

287. Where the property of a corporation is in the hands of a receiver, it cannot be taken in execution under a judgment against an agent or partner of a corporation, on the ground that the corporation, by permitting the agent or partner to do business in his own name, was thereby estopped from denying that he was a partner; in such a case, the judgment creditor should apply to the court which appointed the receiver, and ask the discharge of the property out of custody so that he may proceed against it. *Thompson v. McCleary*, 159 P. S. 189.

XVI. Amotion.

288. The trial for the disfranchisement of a member of a social club need not be conducted with absolute technical accuracy. It is sufficient if the proceedings are regular and conducted in good faith, the accused has been accorded a full and fair hearing, and a proper finding and judgment has been entered on the facts. *Comm'th v. Union League*, 135 P. S. 301; s. c. 26 W. N. C. 142; reversing s. c. 47 L. I. 4.

289. A member of the Union League of Philadelphia was properly suspended for calling a fellow-member a "black-guard." *Ibid*.

290. Under the by-laws of the Commercial Exchange of Philadelphia, a member of the exchange who fails to meet his contracts may be debarred from all the privileges of membership until satisfactory settlements are made with members of the exchange; and this, although he notifies the president immediately upon his failure. *Sexton v. Commercial Ex-*

change, 10 C. C. 607; s. c. 29 W. N. C. 259.

291. A bill does not lie to restore to membership a member of a ward executive committee, a voluntary organization owning no property, upon the allegation that the plaintiff has been illegally deprived of his membership in such committee. *Smith v. Hollis*, 33 W. N. C. 485.

XVII. By-laws.

292. After a charter has been granted, a majority of the stockholders may adopt by-laws providing for the election of directors during the year named in the certificate, and persons elected under such by-laws are entitled to serve for their term though the year has not expired. *Comm'th v. Helms*, 8 C. C. 410.

293. Upon the incorporation of a mutual aid society the incorporators have no right to adopt a by-law giving to themselves as officers the right to fill all vacancies in the board of directors and other offices and to fix their own salaries, but where it appeared that such action had been rescinded the court refused to remove the officers or to close the business of the corporation. *Comm'th v. United Brethren Mut. Aid Society*, 16 C. C. 145.

294. The by-laws of a corporation upon their adoption become written into the charter and put parties who deal with the corporation upon notice in treating with the officers of the corporation, as to the extent of the power and agency of such officers; and this, whether the specific by-law has been brought home to them or not. *Millward-Cliff Cracker Company's Estate*, 161 P. S. 157.

295. Where a live-stock insurance company, although organized upon the mutual plan, has the power to issue cash policies, the mere fact of membership does not necessarily imply the liability to assessment, and such person is not bound by a by-law of which he has no notice, that every member shall be liable to pay his or her proportion of all losses and expenses at such time or times as

the directors may require in proportion to the amount insured by such members; such a member is not bound to make himself acquainted with the by-laws before he became a member. *Given v. Rettew*, 162 P. S. 638; affirming s. c. 11 Lanc. 114.

296. A by-law giving to the directors the power to suspend for conduct which they might deem disorderly with a provision for a previous notice and subsequent appeal, was authorized by a power to disfranchise conferred by the charter. *Comm'th v. Union League*, 135 P. S. 301; reversing s. c. 47 L. I. 4.

COSTS.

See ARBITRATION: ATTACHMENT: AUDITORS: CERTIORARI: CRIMINAL LAW, XXII.: EQUITY, XLV.: ELECTION LAW: EXECUTION, VIII., XV.: EXECUTORS AND ADMINISTRATORS: JUDGMENT: JUSTICES' COURTS.

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I. When costs are recoverable.

(a) General principles.

1. Costs do not follow a decree under the act of 13 June 1836 (Brightly's Purdon 673) to compel a father to support his daughter. *Salem Township v. Cook*, 6 C. C. 624.

2. Upon an issue to determine "what, if anything, is due upon a judgment," the defendant, if the jury sustain all his allegations, should not pay any part of the costs. *Jenkintown Nat. Bank v. Fulmor*, 5 Montg. 111.

3. Where a judgment against a defendant is reversed by the common pleas on *certiorari*, he is not entitled to execution for costs. *Alexander v. Figley*, 12 C. C. 316.

4. Upon a reversal by the common pleas on *certiorari* of the judgment of a justice, no judgment for costs should be entered; a rule of court providing therefor is invalid. *Metz v. Ebersole*, 3 Dist. Rep. 672.

5. Upon a judgment of the common pleas reversing upon *certiorari* a justice's judgment, an execution will not be allowed for costs. *Leone v. Hammond*, 41 P. L. J. 368.

6. Where the jury in ejectment find for the plaintiff for a part of the land, and for the defendant for the balance, the plaintiff, in the absence of a disclaimer, is entitled to full costs; and, upon an appeal in such case, the court will impose the penalty of twenty dollars under the act 25 May 1874 (Brightly's Purdon 793). *Bachman v. Gross*, 150 P. S. 516.

7. In an action for replevin against two defendants where a verdict is recovered by the plaintiff against one defendant, but as to the other defendant the verdict is for her, the latter is not entitled to costs. *Ramsdell v. Owens*, 12 C. C. 416; s. c. 30 W. N. C. 174.

8. In an action of replevin where a claim property bond is given and a verdict rendered for plaintiff for damages, costs follow by virtue of the statute. *Shoemaker v. Shoemaker*, 7 Kulp 528.

9. Where a mortgagor under the act 3 April 1851, sec. 14 (Brightly's Purdon 656), paid into court the amount paid by the mortgagee with interest and costs, and the question in dispute was the liability for a paving claim which was decided in favor of the petitioner; it was

held, that while the expenses of the audit were imposed upon the mortgagee the prothonotary's fees and percentage must be paid by the mortgagor. *Parker v. Rawle*, 148 P. S. 208.

10. Where the plaintiff's title in replevin depended on his payment of the price on a conditional sale, and before suit brought he made a tender of the price, which he did not duly maintain at the trial, and after a reversal he paid the money into court; it was *held*, that he was liable for the costs accrued to that time. *Summerson v. Hicks*, 142 P. S. 344. See *Hicks v. Summerson*, 134 P. S. 566.

11. Where a rule of court provided that where the defence was to part of the claim, the affidavit should contain an order to confess judgment for the amount not disputed, for which sum judgment should be entered forthwith by the prothonotary, and unless the money be paid into court or bail entered for a stay, the plaintiff might issue execution, and that the plaintiff, if he refuse to accept the judgment in full, should, before he issued execution, file a refusal to accept and could then proceed to trial for the balance of his claim, but if he recovered no part of the balance, he should pay all the costs on the proceedings to recover the same, and the defendants tendered judgment for an amount but did not pay it into court until five days before the trial, when the plaintiff refused to accept, and upon the trial of the case the verdict was for the exact amount tendered; it was *held* not to be error for the court to make an order on the plaintiff to pay all the costs of the proceeding to recover the residue of their claim. *McLane v. Hoffman*, 164 P. S. 491.

12. In a suit before a justice where the defendant tendered a judgment for fifty dollars and interest which the plaintiff refused to accept, and the plaintiff subsequently obtained a verdict for sixty-three dollars, which was a larger sum than the amount of the judgment

tendered with interest, the court refused a motion to enter judgment for the plaintiff without costs. *McGuire v. Morris*, 6 Kulp 485.

13. Where an affidavit of defence alleges a tender of an amount admitted to be due and the plaintiff moves for judgment for that amount, such judgment will be entered without costs. *McNicholl v. Mutual Ins. Co.*, 32 W. N. C. 472.

(b) Amount in controversy.

14. Where the plaintiff appeals from a justice and recovers judgment for a greater amount, he is entitled to full costs; and this, though the judgment is by confession and was tendered for the same amount before the justice. *Vance v. Lee*, 8 C. C. 356.

15. If in trover, on appeal from a justice, the judgment be less than that before the justice, judgment will be entered for plaintiff without costs, and for defendant for the costs accrued on the appeal. *Brinzer v. Shartzer*, 6 C. C. 590.

16. An appellant plaintiff, who recovers in the common pleas less than before the justice, while he is, under the act of 9 April 1833 (Brightly's Purdon 1140), liable for the costs in the common pleas, is, nevertheless, entitled, under the act of 24 June 1885 (Brightly's Purdon 1142), to the repayment of his costs paid by him to the justice to secure his appeal. *Brinzer v. Shartzer*, 7 C. C. 528.

17. One who sues in the common pleas and recovers less than one hundred dollars is not entitled to costs in the absence of a previous affidavit as provided by section 26 of the act of 20 March 1810 (Brightly's Purdon 1127), the affidavit to the statement under the act of 25 May 1887 (Brightly's Purdon 1728), is not sufficient. *Steen v. Smucker*, 24 W. N. C. 304; *Custard v. Krause*, 2 Northam. 251; *McCafferty v. Crew*, 26 W. N. C. 352.

18. If a plaintiff in a suit in the common pleas for five hundred dollars for damages for breach of contract, neglect

to file an affidavit that his damages exceed one hundred dollars and he recovers less, the verdict does not carry costs. *Beaver v. Whitman*, 2 Northam. 24.

19. If a plaintiff in assumpsit in the common pleas files no special affidavit under the act of 20 March 1810 (Brightly's Purdon 1127), and recovers less than one hundred dollars, he is not entitled to costs; and this, though the action be for rent and the claim be reduced by claims for untenantableness, failure to repair, and rent received from reletting. *Grabav v. Hirshfeld*, 9 C. C. 159.

20. Where a plaintiff sues in assumpsit and obtains judgment for less than one hundred dollars, he will not be allowed his costs unless he has filed an affidavit under the act 20 March 1810, sec. 26 (Brightly's Purdon 1127), that he believed the debt or damages sustained exceeded the sum of one hundred dollars. *McCafferty v. Crew*, 153 P. S. 311. See s. c. 124 P. S. 200.

21. The act 9 April 1833 (Brightly's Purdon 1140), that the costs on an appeal from a justice shall abide the result and that the plaintiff shall pay the costs unless he recover a more favorable judgment, applies in torts as well as in contracts. *Knappenberger v. Roth*, 153 P. S. 614.

22. Where the plaintiff brought suit before a justice to recover damages for injuries to crops caused by defendant's cow breaking down a division fence and recovered a verdict for twenty dollars and costs and the defendant appealed and on the trial the jury rendered a verdict for plaintiff for one dollar and seventy-five cents; it was *held*, that under the act 9 April 1833 (Brightly's Purdon 1140) the plaintiff was entitled to full costs. *Knappenberger v. Roth*, 153 P. S. 614.

23. Where a verdict is recovered in the common pleas for unliquidated damages for breach of contract which does not exceed the sum of one hundred dollars, the plaintiff is not entitled to costs where he has not filed an affidavit at the

time of bringing suit that his damages exceed one hundred dollars. *Deffenback v. Carr*, 1 Dist. Rep. 129.

24. In an action of trespass *quare clausum fregit*, where the verdict is under forty shillings, and the court does not certify that the title to land was chiefly in question, the plaintiff is entitled to no more costs than damages. *Miller v. Howard*, 3 Dist. Rep. 70.

25. Where the plaintiff brought suit in the common pleas and made two distinct demands, one based on a real contract and the other on a contract of which a justice would have jurisdiction, and he filed no affidavit that he believed that the debt due or damages sustained exceeded one hundred dollars, and on the trial the first demand was ruled against as invalid under the statute of frauds, and on the other demand the jury rendered a verdict in his favor for ten dollars; it was *held*, that he was not entitled to costs. *Minnich v. Lawall*, 6 Kulp 487.

26. Where the plaintiff in an action for goods sold and delivered claimed over one hundred dollars but recovered less than one hundred dollars and the only defence was that the goods were not as ordered; it was *held*, that he would not be allowed costs where he had failed to file an affidavit under the act 20 March 1810 (Brightly's Purdon 1127), that he believed the amount due to exceed one hundred dollars. *Lane v. Lebzelter*, 12 Lanc. 222.

27. In an action of covenant brought in the common pleas where the verdict was for one dollar; it was *held*, that judgment should be entered without costs. *Jones v. Jones*, 3 Northam. 190.

28. The common pleas has jurisdiction in suits for less than one hundred dollars which are properly cognizable before a magistrate, but in such a case the plaintiff cannot recover costs. *Doherty v. Watson*, 29 W. N. C. 32.

(d) In the orphans' court.

29. The orphans' court has full authority of the question of costs; because a

claim was rejected it does not follow that the decree carries costs. *McCullough's Estate*, 47 L. I. 213.

30. If a husband refuses to take under his wife's will, his share should not contribute to costs not necessarily incurred in an ordinary administration. *McDonald's Estate*, 37 P. L. J. 275.

31. The costs of raising a fund including auctioneer's charges, commissions and counsel fees, fall upon the fund itself. *Teaf's Estate*, 7 C. C. 463; s. c. 26 W. N. C. 310.

32. Costs of litigation between the heirs and the executor were not allowed out of the general funds of the estate. *Thomas's Estate*, 5 Kulp 213.

33. Upon an execution for costs in the orphans' court, the defendant is entitled to his exemption. *Taylor's Estate*, 48 L. I. 25. See contra, *Danner v. Fritz*, 2 Northam. 67.

34. The disposition of the costs of an auditor in the orphans' court will not be reversed except for clear abuse of discretion. *Lusk's Estate*, 150 P. S. 517.

35. The allowance of costs in the orphans' court is in the discretion of the court; the costs of witnesses of an unsuccessful claimant were placed upon the claimant, and the costs of the accountant's witnesses were allowed out of the fund. *Toomey's Estate*, 150 P. S. 535.

36. Where attaching creditors claim shares of certain legatees on the ground that they are vested, and an auditor finds that they are vested, the costs of the audit should be deducted from the shares in dispute. *Evans's Estate*, 155 P. S. 646.

37. Where an examiner in the orphans' court employs a stenographer to take shorthand notes of the testimony, his compensation will be fixed by the court and taxed as costs in the suit; five dollars per meeting is a reasonable compensation for such service; but the expense of copies furnished to counsel will not be taxed as costs. *Drinkhouse's Estate*, 11 C. C. 145; s. c. 30 W. N. C. 306.

38. Costs in the orphans' court will not

be taxed before the review of the decree by the supreme court. *Barber's Estate*, 11 C. C. 242; s. c. 29 W. N. C. 552.

39. Costs will not be reduced because owing to the ambiguity of the order referring the cause to an auditor, the inquiries of the auditor were extended to matters beyond his jurisdiction. *Barber's Estate*, 11 C. C. 242; s. c. 29 W. N. C. 552.

40. Where exceptions to a guardian's account were not pressed, witnesses who were apparently necessary to answer such exceptions were allowed their fees. *Scott's Estate*, 15 C. C. 316.

41. Where a will was set aside on the ground that it was forged and it appeared that the widow was a party to the fraud; it was held, that she had no standing to object to the contestant's counsel and witness fees being paid out of her share of the estate. *Simcox's Estate*, 15 C. C. 386.

42. In proceedings for the sale of real estate for the payment of debts it was held to be error to allow the clerk of the orphans' court in Lancaster county three dollars for each of the eighty purparts; he was entitled to but three dollars for the whole proceeding. The act 22 February 1821, P. L. 57, regulates the fees of the clerk of the orphans' court in Lancaster county. *Griell's Estate*, 37 W. N. C. 85.

43. The estate of a decedent will not be charged with witness fees of a party claimant or with the fees of a witness called in support of a disallowed claim. *Raber's Estate*, 5 York 202.

See EXECUTORS AND ADMINISTRATORS.

(e) Of an interpleader.

44. Upon a sheriff's interpleader, if the goods are found in the possession of the defendant and the execution creditor releases them as soon as the true title is disclosed, the claimant should not recover costs. *Cleaver v. Blaker*, 5 Montg. 179.

45. Upon an interpleader between claimants to a benefit paid into court by a beneficial association, the costs of

the whole litigation will be taken out of the fund and the balance awarded to the rightful claimant. *Northwestern Masonic Aid Ass'n v. Marshall*, 10 C. C. 270.

See EXECUTION, VIII.

(g) Juries of view.

46. The act of 19 May 1887 (Brightly's Purdon 1878) simply authorizes the court in road cases to direct by whom the costs shall be paid; it does not empower the court to order the payment of witness fees. *Lebanon and Dyberry Road*, 8 C. C. 461.

47. Viewers appointed to estimate damages for change of grade are not entitled to mileage. *Reid v. West Conshohocken*, 6 Montg. 205.

48. If upon an alias view in a railroad case a larger amount of damages be awarded, the defendant is liable for the costs of both views. Viewers under the act of 29 March 1848 are entitled to mileage. *McGovern v. Pennsylvania Railroad Co.*, 8 Lanc. 59; s. c. 4 Del. 374.

See HIGHWAYS.

II. Liability for costs.

49. One who intervenes as a defendant in an ejectment is liable for the costs upon a verdict and judgment against him. *Donlin v. Donlin*, 5 Kulp 302.

50. If the garnishee in attachment execution have no funds, the plaintiff alone is liable for the costs. *Warniche v. Seamen*, 5 Kulp 428.

51. To escape liability for costs, a tender before arbitrators should be pleaded, and the record should show it. *Vosburg v. Reynolds*, 5 Kulp 376.

52. Where the plaintiff, on notice to the sheriff, attends the inquisition and examines witnesses and then withdraws the writ, the defendant is liable for the costs to the time of meeting, and the plaintiff to all subsequent costs of the proceeding. *Van Storch's Estate*, 5 Kulp 389.

53. Upon a *scire facias sur judgment*

against several defendants and judgment against all but one defendant, the latter is not entitled to a judgment for costs against the plaintiff. *Freyman v. Bean*, 6 Montg. 163.

54. Where a suit is brought in the name of a legal plaintiff to the use of an equitable plaintiff and the former has no interest in the suit, a judgment for costs against him will be stricken off. *Horlacher v. Gernert*, 11 C. C. 410.

55. Although a waiver of appeal be contained in a promissory note, an appeal will still lie from a justice where the defence is that the note has been paid in part or in full; in such a case where the justice entered judgment for the full amount, a mandamus was allowed against the justice to compel him to grant an appeal and the costs were put upon the justice. *Minich v. Basom*, 12 C. C. 508.

56. Upon a rule to open a judgment and set aside an execution where it appeared that execution had been issued for fifteen hundred dollars, although eight hundred dollars had been paid on the judgment; it was ordered that a credit of eight hundred dollars be entered on the record, and that the plaintiff pay the costs upon the *feri facias* and the rule, and that, when said credit was entered and costs paid, the rule be discharged. *Scott v. Scott*, 8 York 93.

57. Where the plaintiff held a policy of life insurance on the life of his debtor payable to the plaintiff "as his interest may appear," and the defendant made a tender of a certain sum which the plaintiff refused, and upon the money being paid into court the plaintiff was awarded the defendant's tender and no more; it was held, that the plaintiff, though successful, was justly chargeable with the costs of the reference. *Walker v. West*, 16 C. C. 99; s. c. 1 Lack. L. N. 42.

III. What recoverable as costs.

58. The plaintiff in a judgment is entitled to stipulated attorney's commissions, though he himself be an attorney-at-law

and collect the same. *Hook v. Montgomery*, 7 C. C. 268.

59. Counsel fees are not allowable as costs unless expressly stipulated for. They are not payable out of an insurance fund paid into court, although the note for which the policy had been pledged as collateral provided for an application of the proceeds of sale to "expenses and charges." *DeCoursey v. Johnston*, 134 P. S. 328; s. c. 26 W. N. C. 88.

60. An attorney's commissions in a judgment note are not costs, but a part of the plaintiff's claim. *Miller v. Miller*, 147 P. S. 548.

61. The losing party is liable for the cost of struck juries, not ordered or allowed by the court, the case not having been continued by the winning party after the juries were struck. *Spiehlman v. Strasburg*, 8 C. C. 182.

62. A party is entitled to the expense of the jurat to his bill of costs. *De Haven v. Merath*, 7 C. C. 388; s. c. 46 L. I. 496.

63. Where a garnishee in attachment execution denied having anything in his hands and the plaintiff filed a bill of discovery; it was *held*, that in taxing the garnishee's costs, he was entitled to be allowed the sum paid by him for printing his answer to the bill of discovery. *Mills v. McLoughlin*, 27 W. N. C. 573.

64. Where an attachment execution was issued by a justice and the garnishee took an appeal; it was *held*, that the garnishee was not entitled to have a garnishee fee taxed as part of the costs under the act 29 April 1891 (Brightly's Purdon 839); such an attachment is not an attachment execution issued out of a court of record. *Deerwester v. Hook*, 9 Lanc. 247.

65. Where a commission was issued by a non-resident plaintiff to another state where he resided, to take his own testimony, and no reason therefor was given; it was *held*, that he would not be allowed the costs of the commission. *Butler v. Lowe Mfg. Co.*, 7 Montg. 48.

66. As between a party to a cause and an officer, charges for services rendered

are regarded as fees, but as between the parties to the cause, they are comprehended under the term "costs." *Simon v. Johnson*, 7 Kulp 166.

67. The costs of a case so far as they are made up of officers' fees belong to them and not to the party in whose favor judgment is entered; if the latter desires to make the costs available as a set-off, he must first pay them. *Rupp v. Swartz*, 3 Lack. Jur. 125; s. c. 5 Del. 333.

68. Where a party is sued in a representative capacity and judgment is entered against the plaintiff, the costs which the defendant recovers, so far as they belong to him at all, belong to him individually. *Rupp v. Swartz*, 3 Lack. Jur. 125; s. c. 5 Del. 333.

See JUDGMENT.

IV. Taxation of costs.

(a) General principles.

69. A valid judgment, even for costs, cannot be entered by a divided court. *Nolde v. Madlem*, 5 Cent. 728. See *Madlem's Appeal*, 103 P. S. 584.

(b) Costs of witnesses.

(1) Right to tax witness fees.

70. The bill of costs for witness fees and mileage filed by the successful party belongs to him, himself, and not to the witnesses; where the losing party paid the witnesses of his opponent and took an assignment of their fees; it was *held*, that he was not entitled to the costs which had been paid into court on that account, but that they must go to the party in whose favor they were taxed. *Hartly v. Hoppee*, 3 Lack. Jur. 337.

71. Fees of witnesses are taxed as costs, not for their benefit but for that of the party in whose behalf they appear; except in certain rare cases a witness will not be allowed to intervene for the purpose of having his fees taxed for his own benefit. *Leonard v. Smith*, 1 Lack. L. N. 40.

72. Witnesses who reside in the county town of West Chester are entitled to re-

ceive one dollar per day for attendance at court in Chester county. *Bradley v. Vernon*, 166 P. S. 603.

73. The act of 11 March 1873, fixing the fees of witnesses in Philadelphia at \$1.50 per day, is not repealed by the act of 23 February 1889 (Brightly's Purdon 902). The latter act only affects counties which were governed by the act of 22 February 1821 (7 Sm. 377). *De Haven v. Merath*, 7 C. C. 388; s. c. 46 L. I. 496.

74. The act of 23 February 1889 (Brightly's Purdon 902) only affects the fees of witnesses in counties regulated by the act of 22 February 1821 (7 Sm. 377). The act of 27 March 1866 is still in force in Schuylkill county. *McDonald v. Alliance Coal Mining Co.*, 8 C. C. 460.

75. Where a case is ordered on the trial list by the plaintiff and is continued on the defendant's motion because no declaration has been filed, neither party is entitled to tax his witnesses' bill for the term. *Perry v. Williams*, 14 C. C. 423.

76. Where the plaintiff, after the case was at issue, asked leave to file an amended statement, pending which rule the case was called for trial, when the plaintiff answered trial and offered to withdraw the rule, but the defendant asked for a continuance, which was refused and the case was marked by the judge for trial but was not reached; it was *held*, that the plaintiff was entitled to the costs of his witnesses for their three days' attendance at the term. *Ludy v. Philadelphia Traction Co.*, 2 Dist. Rep. 848.

77. Where two cases brought by separate plaintiffs against the same defendant were tried together and a verdict was rendered for the plaintiff in one case and for the defendant in the other, and the same witnesses were used by the defendant in both cases; it was *held*, that the defendant might tax his entire bill against the plaintiff in the case in which the verdict was in his favor. *Showers v. Heidelberg Township*, 3 Dist. Rep. 201.

78. The costs of witnesses in attendance will be taxed though they were not

called to testify, unless it be shown that they were not material. *Comm'th v. Swisher*, 3 Dist. Rep. 662.

79. A witness is entitled to one day's pay and no more for each day's attendance at court; and this, without regard to the number of suits in which he is called. *Keller v. Clinton County*, 4 Dist. Rep. 216; s. c. 1 Mag. & Con. 43.

80. Witnesses attending two suits on the same day must elect against which defendant to have their costs taxed. *Wiggins v. Kelly*, 7 Lanc. 83.

81. The successful party will not be permitted to tax the fees of witnesses who, when called for examination, are unable to testify to anything which is material to the issue. *Williams v. LeBar*, 8 Lanc. 182.

82. Fees will be allowed to witnesses subpoenaed where the party had reason to believe that they would be material; and this, though they were not called. *Neely v. Sensenig*, 9 Lanc. 107.

83. Where a party did not send out an attachment for an absent witness until Wednesday, when the case was called for trial, and the trial was thereby delayed until Friday; it was *held*, that two days' witness fees would not be deducted on the ground that he might have sent out his attachment on Monday. *Neely v. Sensenig*, 9 Lanc. 107.

84. The successful party cannot recover the fees of a witness who knew nothing about the case and subpoenaed himself. *Cole v. Howell*, 1 Northam. 151.

85. Costs of witnesses subpoenaed as to character, and not called, will not be allowed, in the absence of reasonable ground for a belief that it would be attacked. *First National Bank v. Brodhead*, 8 C. C. 536; s. c. 2 Northam. 235.

86. Costs of witnesses subpoenaed in good faith will not be allowed where it appears that they were called for the purpose of establishing a fact which the court decided was incompetent and irrelevant. *Abel v. Fisher*, 3 Northam. 68.

(2) Who entitled to witness fees.

87. A wife who testifies on behalf of her husband and is a material witness is entitled to a witness fee. *Bell v. Dawes*, 9 C. C. 636.

88. Where a married woman is killed by the negligent act of another and she leaves a husband and children, the sole right of action for her death is in the husband; and if the children are summoned as witnesses, they are entitled to witness fees and mileage. *Kauffman v. Manor Township*, 11 C. C. 304.

89. Where a husband testified on behalf of his wife and had been regularly subpoenaed as a witness, he was held to be entitled to witness fees. *Curry v. Phillips*, 14 C. C. 479.

90. The recorder of deeds is not an officer of the court and cannot be compelled to attend as a witness unless legally subpoenaed; he is entitled to full fees and mileage when called as a witness in a criminal case. *Comm'th v. McArdle*, 3 Dist. Rep. 258.

91. A witness committed in default of bail in a case of felony to appear and testify, will not be allowed witness fees for the time of his imprisonment. *Sluchko v. Luzerne County*, 7 Kulp 526.

92. In a proceeding under the act 2 June 1887 (Brightly's Purdon 2049), to free a turnpike from tolls, it was held, that a witness subpoenaed to appear before a master and viewers was not entitled to compensation from the county, his remedy is against the party who subpoenaed him. *Callendar v. Lackawanna County*, 2 Lack. Jur. 35.

93. In an action for the benefit of an assigned estate, the assignor is entitled to fees as a witness. *Leonard v. Smith*, 1 Lack. L. N. 40.

94. A bill of costs for witness fees cannot be allowed to one who is actually, if not nominally, a party in interest; fees will not be allowed a partner in a suit by a receiver of the firm. *Leonard v. Smith*, 1 Lack. L. N. 40.

95. In a suit by a guardian on the

bond of a preceding guardian, the ward and present guardian are not entitled to witness fees and mileage. *Comm'th v. Danner*, 8 Lanc. 226.

96. A defendant is not entitled to costs as a witness, although the action be an appeal from a judgment of a justice against garnishees and not against the defendant. *Deerwester v. Hook*, 9 Lanc. 247.

(3) Mileage.

97. Where there are two well-known railroad routes between the residence of the witness and the county seat, the witnesses' mileage should be taxed by the shortest and most direct route; a witness is entitled to fees only for the day of trial and not for the time necessary in coming and going to the county seat. *Venetian Blind Co. v. Nesbit*, 13 C. C. 330.

98. Where a case was called for trial on Monday but the trial was postponed until Wednesday; it was held, that witnesses who went home on Monday evening and returned on Wednesday morning were entitled to mileage therefor. *Herman v. Shank*, 15 C. C. 406; s. c. 3 Dist. Rep. 813.

99. Where a case is continued from Saturday until Monday, mileage will be taxed for those witnesses who actually went home and returned. *Comm'th v. Swisher*, 3 Dist. Rep. 662.

100. Under the act 19 May 1887 (Brightly's Purdon 901), witnesses are entitled to mileage per a railroad route usually travelled; and this, although such route be fifty-four miles longer than a direct stage route. *Comm'th v. Heiges*, 8 York 134.

(4) Service of subpoena.

101. Where witnesses reside beyond the county line but are subpoenaed in good faith, the party who serves the subpoena is entitled to mileage for making such service. *Venow v. Closser*, 14 C. C. 521.

102. In taxing a bill of costs, compensation will be allowed for serving the subpoena, and this, whether served by a sheriff, constable, party or third person, at the rate fixed by the sheriff's fee bill, to wit, fifteen cents per name. *Youngs v. Harold*, 14 C. C. 525.

103. Where a constable charges for mileage not actually travelled, he makes himself amenable to law; a charge for mileage where the mail is used, is illegal. *Comm'th v. Rice*, 3 Dist. Rep. 259.

104. Where a party serves his own subpoena he is entitled to the compensation allowed by the fee bill for such service. *Elliott v. Mutual Fire Ins. Co.*, 9 Lanc. 294.

105. Where a subpoena is placed in the hands of a constable at his residence, his charge for mileage begins from his residence, and ends with the point where the subpoena is returned. *Elliott v. Mutual Fire Ins. Co.*, 9 Lanc. 294.

See CONSTABLES.

(c) Practice.

106. A rule of court that bills of cost for the attendance of witnesses must be filed and a copy thereof served on the opposite party within four days after a continuance or trial, is neither unlawful nor unreasonable. *Flisher v. Allen*, 141 P. S. 525.

107. Every bill of costs should be endorsed with the names of the parties and should contain a correct statement of the name and mileage of each witness and number of days he attended at each term, giving the dates and the sum charged for serving subpoenas on each witness at each term, with date of service, and the number of miles travelled in making such service. *Simons v. Miller Soap Co.*, 12 Lanc. 59.

108. He who files exceptions to the taxation of costs should see to their being retaxed; the other side may ask the prothonotary to fix a time for the hearing. *Corcoran v. Hetzel*, 9 C. C. 82; s. c. 1 Lack. Jur. 405.

109. Where a party has cause to complain of any of the items of a bill of costs, it is his duty to have them taxed by proceedings in the court below; if any portion of the costs are recoverable the other side is entitled to an execution to collect them; therefore, an appeal from an order refusing to set aside such an execution will be dismissed, when there is nothing on the face of the plaintiff's bill nor on the record itself showing what portions of the costs claimed, if any, were uncollectible. *McGibbeny v. Jefferson Gas Co.*, 139 P. S. 193.

(d) Special cases.

110. If the verdict for the landlord in replevin shows that the value of the goods is in excess of the rent in arrear, the constable is entitled to half commissions. *Harrington v. Hamill*, 5 Montg. 141.

111. The fee of an examiner in divorce, as taxed by the prothonotary, if supported by the evidence, will not be disturbed by the court on appeal. *Uhrich v. Uhrich*, 1 Northam. 128.

112. Where the costs of a remittitur are paid by the defendant in error, they may be recovered by a separate action, but they cannot be taxed as costs in the court below on a return of the record. *Leonard v. Smith*, 1 Lack. L. N. 40.

V. Remedies for costs.

113. The court has no power to issue an attachment against a defendant for the cost of a meeting of a board of arbitrators. *Arnold v. Burr*, 4 Del. 158; s. c. 5 Kulp 407.

114. The right to enforce the payment of costs in a case of divorce *a vinculo matrimonii* by attachment, is more than doubtful. *Uhrich v. Uhrich*, 1 Northam. 59.

115. A decree for the payment of the costs of the committee of an habitual drunkard, entered upon the judgment docket, has all the effect of a lien from

the date of such entry. *Hohman's Appeal*, 127 P. S. 209.

116. A common-law action does not lie to recover costs of an order of removal. Under the act 21 March 1806 (Brightly's Purdon 77), the statutory remedy in the quarter sessions is exclusive. *North Beaver Township v. Big Beaver Township*, 8 C. C. 82.

117. An action on a recognizance for costs on an appeal from a justice is not barred because not brought within six years after final judgment for appellee. Such a recognizance is not a contract within the act of 27 March 1713. *Ehret v. Lewis*, 7 C. C. 108.

118. A defendant in ejectment cannot claim an exemption as against an execution for the costs. *Danner v. Fritz*, 2 Northam. 67. See contra, *Taylor's Estate*, 48 L. I. 25.

119. An executed *fi. fa.* for costs cannot be set aside at the instance of one who has paid the money to the sheriff. *Freyman v. Bean*, 6 Montg. 163.

120. Where a judgment for costs in favor of the defendant was attached by the defendant's creditor, and after the date of the attachment the defendant issued a *feri facias* and subsequently the attachment was set aside; it was held, that the levy on the *feri facias* should also have been set aside. *Hower v. Ulrich*, 156 P. S. 410; *Ulrich v. Hower*, 156 P. S. 414.

121. Where an amicable action of ejectment is grounded solely upon a breach of a lease by a tenant in sub-letting without the consent of the lessor, the costs in the case are merely a species of damages arising from a breach of contract, and a *capias ad satisfaciendum* for such costs will not lie against the tenant. *Lang v. Finch*, 166 P. S. 255.

122. The plaintiff in a judgment cannot by his receipt discharge the defendant from his liability for the office fees; notwithstanding such receipt, the officer may proceed by execution in the name of the plaintiff to collect them. *Dodson v. Born*, 7 Kulp 122.

123. The costs entered on a writ of

feri facias cannot be altered by the prothonotary without the consent of the court or the parties, after the property has been sold and deed acknowledged; where, upon the acknowledgment of sheriff's deeds in open court, it appeared to the judge on examination that the fees taxed and collected by the prothonotary were in excess of the legal rate, and the court ordered him to attach itemized bills to the writs and return them, and upon such a return it appeared that the fees first charged had been erased and altered, the court arraigned the prothonotary and his deputy and ordered them to be indicted for receiving illegal fees and altering and destroying the records and for conspiracy. *Comm'th v. Hartman*, 11 Lanc. 89. See s. c. 10 Lanc. 33.

VI. Security for costs.

124. A non-resident plaintiff must give security for costs, though the defendant admits part of the plaintiff's claim. *Murphy v. Hall*, 1 Lack. Jur. 184.

125. If the legal plaintiff be a resident of this state and the use plaintiff be a non-resident, security for costs will not be ordered upon filing the legal plaintiff's consent to the bringing of the suit. *Black v. Moltby*, 26 W. N. C. 97.

126. A plaintiff will be required to enter security for costs even after issue joined, if the rule will not delay the trial of the cause. *Duparquet v. Brodhead*, 1 Northam. 48.

127. After a case has been on the trial list and been continued, it is too late to ask for security for costs; and this, though the plaintiff has filed an amended statement. *Smart v. Chamberlin*, 26 W. N. C. 272.

128. The garnishee in an attachment execution may require a non-resident plaintiff to give security for costs. *Wallace v. Williams*, 6 Kulp 36.

129. Where non-resident creditors of a joint stock company apply for the discharge of the liquidating trustees of the company, they will be required to give

security for costs. *Clothier & Clark Decorative Co.*, 11 C. C. 201.

130. Where the plaintiffs were ordered to enter security for costs on the ground of non-residence, and one of the plaintiffs being the wife of the other plaintiff filed an affidavit that she was a freeholder in the county and intended changing her residence to the county before the case could be reached for trial; it was *held*, that this did not constitute any reason for permitting her to file her own bond. *Dalton v. Bateson*, 12 C. C. 544.

131. A plaintiff will be compelled to give security for costs as a non-resident, where it appears that after bringing suit he took lodgings within the state and declared it to be his intention to permanently remain here, but it further appears that he owns no property here and his family still resides in another state where he is still registered as a voter. *McCalley v. Moore*, 14 C. C. 37.

132. A non-resident plaintiff will not be required to give security for costs where the petition is filed nearly two years after the case has been at issue and rules have been entered to file a bill of particulars, an amended statement and a more specific bill of particulars, and the case has been on the trial list for several terms. *Voss v. Sensenig*, 14 C. C. 631.

133. Where a non-resident plaintiff has obtained a lien for his claim, he will not be required to give security for costs. *Western Publishing House v. Valentine*, 3 Dist. Rep. 242.

134. A plaintiff will not be required to enter security for costs where it appears that both plaintiff and defendant are non-residents. *Tyler v. Bannon*, 30 W. N. C. 372.

135. A non-resident plaintiff will not be ordered to enter security for costs where the affidavit of defence admits part of the claim to be due. *Heller v. Dreifuss*, 34 W. N. C. 83.

VII. Costs upon amendment.

136. Since the procedure act of 25 May 1887 (Brightly's Purdon 1728) an amendment in the declaration from trespass to case, or *vice versa*, does not change the form of the action and does not require the payment of costs, and a continuance upon the granting of such amendment is now in the discretion of the court. *Armstrong v. Factoryville*, 10 C. C. 274.

VIII. Costs of a former suit.

137. Upon a bill to recover land on the ground of fraud perpetrated by defendants, the court will not stay proceedings until the costs in a previous ejectment in which the defendants were successful are paid. *Rankin v. Thompson*, 8 C. C. 201.

138. A second suit will be stayed until the costs of a former suit for the same cause of action be paid; and this, though the first suit be against the defendant as an individual and the second against him as a surviving partner. *Zimmerman v. Kuebler*, 9 C. C. 128; s. c. 2 Northam. 304.

See ABATEMENT.

IX. Judge's certificate.

139. The statute 22 and 23 Charles II., chap. 9, which provides that in all actions of trespass where the judge shall not find that the title to the land was chiefly in question, the plaintiff, where the jury shall find the damages to be under the value of forty shillings, shall not recover more costs than damages, is in force in Pennsylvania. *Knappenberger v. Roth*, 153 P. S. 614.

140. In an action of trespass where the defendant pleaded a right of way and the jury found for the plaintiff; it was *held*, that the court would grant a certificate entitling the plaintiff to full costs, the title to the land being in question. *Mehring v. Sparver*, 4 York 17.

141. In an action of trespass the court will not certify that the title to the land

came in question so as to carry full costs, when in fact the title did not come in question; and this, although the defendant had ousted the jurisdiction of the justice by filing an affidavit that the title would come in question. *Hoke v. Beckley*, 10 C. C. 306.

X. Treble costs.

142. Where the sheriff under a writ of replevin took out of the possession of a constable two mules, which had been levied upon by the latter under an execution issued by a justice against the plaintiffs in replevin, the court, under the act 3 April 1779 (Brightly's Purdon 1863), quashed the writ of replevin and awarded treble costs to the constable. *Mourner v. Waller*, 8 Lanc. 225.

COUNCILS.

See BOROUGHs: MUNICIPAL CORPORATIONS: PHILADELPHIA: PITTSBURGH.

COUNTY.

See JAILS: MUNICIPAL CORPORATIONS: PUBLIC ACCOUNTS: SUPERVISORS.

1. The population of a county must be determined by the last Federal census in the absence of any legislative provision for otherwise ascertaining the fact. *Guldin v. Schuylkill County*, 149 P. S. 210; reversing s. c. 10 C. C. 601. *Comm'th v. Comrey*, 149 P. S. 216.

2. The constitutional provision that the lines of a new county shall not pass within ten miles of the county seat of any county proposed to be divided has reference to the county town and not to the court-house. *In re County Seat*, 4 Dist. Rep. 319.

3. Upon the division of a county after proceedings to compel a trustee to account, the court of the old county has jurisdiction to enter and enforce a decree to pay over; and this, though the parties resided in the new county. *McDonough v. McDonough*, 5 Kulp 520.

4. Blair county is subject to the general act of 13 April 1843 (Brightly's Purdon 1892), making it the duty of county commissioners to repair all bridges; and this, though it was erected by the act of 26 February 1846 out of two counties to which the act did not apply. *Shadler v. Blair County*, 136 P. S. 488; s. c. 26 W. N. C. 487. See *Berg's Petition*, 139 P. S. 354.

5. Under the act 24 May 1878 (Brightly's Purdon 1975), the board of revenue commissioners, where a county has been divided, has no authority to apportion a credit allowed to the old county and transfer a part of it to the new county; and the board of public accounts, under the act 8 April 1869 (Brightly's Purdon 1745), has authority to reopen such an illegal settlement and charge back to the old county the credit taken from it. *Lackawanna County v. Comm'th*, 156 P. S. 477.

6. The division of a county and change of its name does not affect the special laws applicable to the territory or the people embraced in the new county prior to the change. *Gibbon's Appeal*, 3 Lack. Jur. 241.

7. By the act 15 April 1834, sec. 9 (Brightly's Purdon 436), the titles to all court-houses, jails, prisons, and work-houses are now vested in the respective counties for the use of the people thereof and for no other use. *Stegel v. Lauer*, 148 P. S. 236.

8. The act 1 June 1883 (Brightly's Purdon 438), providing for the purchase of land for court-houses, is constitutional; it supersedes the act 15 April 1834, sec. 10 (Brightly's Purdon 437), and is intended to furnish not only a complete but an exclusive method for the acquisition for the purpose named; under that act the commissioners have no authority to purchase ground without first having obtained the approval of two successive grand juries, and this provision is not complied with by two reports merely recommending the erection of a new court-house, but saying nothing as to the

site or as to the purchase of land. *Ben-nett v. Norton*, 7 Kulp 443.

9. The recommendation to the county commissioners of Mercer county to subscribe for the bonds of the Pittsburgh and Erie Railroad was not sufficient, under the act of 4 May 1852, to authorize such subscription. Such bonds so issued are void except in the hands of *bona fide* purchasers for value without notice. *Frick v. Mercer County*, 138 P. S. 523; s. c. 27 W. N. C. 352.

10. The act of 3 May 1878 (P. L. 43), authorizing the re-indexing of records in the county offices, having a proviso that it shall not apply to counties having a population of over 400,000, is unconstitutional. It is also in conflict with article V., section 26, providing that the jurisdiction and powers of all courts of the same class or grade shall be uniform. *Beaver County Indexes*, 6 C. C. 525. See *Lanius's Petition*, 1 York 221.

11. Under the act 13 April 1854 (P. L. 352), the county of Lancaster may proceed to recover money from the city of Lancaster for opening streets, either by assumpsit or bill in equity, but the remedy by mandamus is inappropriate. That act contemplates yearly statements and the striking of a balance every twelve months, and if the county has not kept the account directed by the act, the court will state an account and will not allow recovery for any items which had accrued six years prior to the date of the suit. *Lancaster County v. Lancaster City*, 160 P. S. 411; affirming s. c. 10 Lanc. 65. See s. c. 12 Lanc. 81.

12. The act of 18 March 1869 imposed upon the county of Lebanon the duty of maintaining only those bridges which, at that date, the townships were required to maintain. *North Lebanon Township v. Lebanon County*, 6 C. C. 538.

13. The county is liable for constable's fees for serving notices of election on school directors, judges and inspectors of election and assessors. The act of 13 June 1840 (Brightly's Purdon 378) is not repealed by the election act of 30 June

1874. *Lehigh County v. Yingling*, 6 C. C. 594.

14. Upon *certiorari* taken by a county to a justice's judgment, the affidavit may be made by the clerk to the county commissioners. *Ibid.*

15. The county is liable for the services of an attorney appointed by the court to sue the sureties of a prothonotary who had misappropriated moneys paid into court. *Northampton County v. Steele*, 1 Mona. 582; affirming *Steele v. Northampton County*, 1 Northam. 407.

16. The act of 25 April 1889 (Brightly's Purdon 452), so far as it requires the county to heat and light the county offices, is constitutional, and applies to officers elected before its passage, but the provision that the county shall furnish the office furniture, books and stationery is, as to officers elected before its passage, an increase of the officers' emoluments and in violation of article III., section 13, of the constitution. *Wren v. Luzerne County*, 6 Kulp 37. See *Young v. Bradford County*, 7 C. C. 428.

17. Where the state personal property tax is embezzled and a settlement is made against the county, and the neglect of the commonwealth's officers to enforce quarterly returns and payments relates only to a single quarter of the year, and the county officers have had ample opportunity for investigation, the attorney-general's commission may be imposed upon the county. *Comm'th v. Philadelphia County*, 157 P. S. 550.

18. Where a county treasurer is required to assess, collect and remit the state tax to the state treasurer, he is not the agent of the commonwealth, but of the county until the tax is paid by him to the state treasurer. Nothing relieves the county from liability to the state for the tax, but actual payment of it to the state treasurer. *Comm'th v. Philadelphia County*, 157 P. S. 531, 550, 558.

19. The right of the commonwealth to a tax cannot be lost by the neglect or unfaithfulness of her agents, but this rule applies only to the tax and not to the

penalties; where a city collected the tax on loans and paid it over to its treasurer, and for sixteen months afterwards not a quarterly return or payment was requested or exacted by the commonwealth's officers; it was *held*, that interest on the tax at twelve per cent should be lowered to six per cent, and that the fees of the attorney-general should be stricken off. *Comm'th v. Philadelphia County*, 157 P. S. 558.

20. Where a county treasurer applies a portion of the state personal property tax to another account with the commonwealth for which the county is in no way responsible, it cannot be claimed that such an appropriation is an embezzlement by the treasurer as trustee of county funds, and that the commonwealth holds the money on the same trust. *Comm'th v. Philadelphia County*, 157 P. S. 531.

21. On an appeal from a tax settlement, the attorney-general's commissions go into the state treasury as a penalty for tardiness in the payment; where a county treasurer embezzled personal property tax and a settlement was made against the county, without the county officers knowing of the settlement, it was *held*, that the attorney-general's commissions should not be charged against the county. *Comm'th v. Philadelphia County*, 157 P. S. 531, 550, 558.

22. Where a county treasurer, through the neglect of the commonwealth's officers, fails to make a prompt return of the state personal property tax, and subsequently embezzles the fund, the county is not liable for interest on that portion of the fund which it is entitled to receive back from the state. *Comm'th v. Philadelphia County*, 157 P. S. 531, 550, 558.

23. In assumpsit by the commonwealth against a county to recover the amount of a tax settlement, the county will be permitted to prove any facts going to show that the commonwealth ought not, in equity and good conscience, recover the whole or any part of the claim; and this,

though no appeal was taken from the settlement. *Comm'th v. Philadelphia County*, 157 P. S. 531.

24. Where a building is added to the county prison without authority from the county commissioners or the court of quarter sessions, a claim for its erection is properly disallowed by the county auditors. *Mogel v. Berks County*, 154 P. S. 14; reversing s. c. 12 C. C. 498.

25. Where prison orders are paid with county funds, neither the orders nor a settlement by the prison auditor will bind the county auditors. *Mogel v. Berks County*, 154 P. S. 14; reversing s. c. 12 C. C. 498.

26. Prison inspectors while at the prison in the discharge of their official duties are entitled to be furnished with meals at the expense of the prison fund; their expenses in travelling to another county to examine the practical workings of the Bertillon system of measuring convicts, under the act 7 May 1889 (Brightly's Purdon 388), is properly chargeable to the prison fund. *Mogel v. Berks County*, 154 P. S. 14; reversing s. c. 12 C. C. 498.

27. A county may indemnify a commissioner who, in good faith, makes a criminal complaint against his defaulting predecessors for the recovery of moneys alleged to have been fraudulently obtained, and who is put to the expense of employing counsel by reason of his own arrest for perjury upon his affidavits filed. *Northampton County v. Schortz*, 5 Northam. 5.

28. Where a judgment has been obtained against a county, ten taxpayers may intervene, under the act 12 June 1878 (Brightly's Purdon 437), and appeal the case to the supreme court; the court has no discretion to grant or withhold the permission to intervene. *Bell v. Allegheny County*, 149 P. S. 381; reversing s. c. 10 C. C. 597.

COUNTY AUDITORS.

See PUBLIC ACCOUNTS.

COUNTY COMMISSIONERS.

1. The act of 1 June 1883 (Brightly's Purdon 438), for the purchase by county commissioners or the condemnation of lands for county buildings, violates article III., sec. 7, of the constitution in excepting counties containing cities coextensive with the county. *Chester County Court House*, 7 C. C. 212.

2. The act of 25 April 1889 (Brightly's Purdon 452), authorizing county commissioners to furnish furniture, books, stationery, light and fuel to county officers, applies to officers elected prior to its passage. *Young v. Bradford County*, 7 C. C. 428.

3. The persons charged with the publication of the mercantile appraiser's lists in the city of Philadelphia are the auditor-general of the state and the city treasurer, and not the city commissioners. *Bartley v. Patton*, 46 L. I. 168.

4. If property be omitted from the tax-book by the assessor, it is his duty to assess it; the county commissioners as a board of revision cannot assess it. *Ridgway v. Bridgeport*, 5 Montg. 73.

5. A grand jury in recommending the erection of a county jail cannot restrict the discretionary power of the commissioners as to the specific location thereof. *Sharp v. Wike*, 9 Atlan. 454.

6. The act 1 April 1852 (P. L. 211), having vested in the county commissioners of Schuylkill county the appointment of the keeper of the county prison subject to the approval of the quarter sessions, it was held, that the court could not review such an appointment in pursuance to the views, preferences and opinions of any section of the community, nor could it inquire into the reasons which prompted the appointment. *Martin's Case*, 11 C. C. 279; *Dunkelberger's Case*, 14 C. C. 641.

7. The act 15 April 1834, sec. 11 (Brightly's Purdon 438), directing the county commissioners to maintain the county buildings in suitable and convenient order and repair, does not give the control of the court officers to the county

commissioners; there is no law authorizing the county commissioners to provide heat for the public offices, nor have the commissioners authority to employ a fireman for the purpose of making fires to supply such heat. The act 25 April 1889 (Brightly's Purdon 452), directing the county commissioners to furnish needed fuel and light, merely requires the county to furnish the material; the county officers must find the means to convert the material into heat and must pay the fireman. *In re Court Officers*, 3 Dist. Rep. 196.

8. The act 14 May 1889 (Brightly's Purdon 1822) does not authorize the construction of a street railway upon a county bridge; upon the purchase of a bridge with the county funds, the same becomes a county bridge, and the title vests in the county commissioners, who have no power to grant street railway companies the right to lay tracks and pass cars over the same. *Venango County Commissioners v. Oil City Street Ry. Co.*, 3 Dist. Rep. 546.

9. If the site of a county bridge be so selected that one of the termini does not connect with any public highway, the county commissioners will not be compelled to construct an approach until by appropriate proceedings a highway has been properly laid out and opened thereto. *Comm'th v. Loomis*, 128 P. S. 174.

10. The court will not interfere by mandamus with the discretion of the county commissioners in the building of an approach to a county bridge. *Ibid.*

11. Blair county is subject to the general act of 13 April 1843 (Brightly's Purdon 1892), making it the duty of county commissioners to repair all bridges; and this, though it was erected by the act of 27 February 1846 out of two counties to which the act did not apply. *Shadler v. Blair County*, 26 W. N. C. 487.

12. County commissioners in office are the proper parties to file a bill to set aside the sale by the county of land bought at a treasurer's sale for taxes, on an averment that a former county commissioner

was interested in the purchase from the county. *Petery's Appeal*, 129 P. S. 121.

13. If land bought at a treasurer's sale be sold to a good faith purchaser, the sale will not be declared void and the deed ordered to be surrendered for cancellation simply because a county commissioner, subsequently purchased a half interest therein. *Ibid*.

14. It is the duty of the county commissioners and not of the township supervisor to repair county bridges. *Dougherty v. Supervisors of Upper Allen*, 12 C. C. 304.

15. Under the local act of 28 March 1873, relating to damages for sheep killed by dogs, the county commissioners cannot review the finding of damages by the appraisers; but, though their duty in signing the warrant is ministerial, if there be indications of fraud, they may inquire into such question and act accordingly. Fraud vitiates everything, "even a sheep certificate." *Vosburg v. Wyoming County Commissioners*, 7 C. C. 646.

16. In Luzerne county the county commissioners constitute a salary board for the purpose of determining the number and salaries of clerks and deputies for the county offices; the county auditors are not members of the salary board. *Comm'th v. Evans*, 6 Kulp 145.

17. Where county re-auditors reported an indebtedness on the part of the county commissioners of a certain amount, and such report was filed in the prothonotary's office and judgment for that amount entered against them, and the defendant, one of the commissioners, appealed from this report, and the appeal was never prosecuted, and a *scire facias* was issued on the judgment, and after the lapse of five years the defendant filed his petition praying the court to quash the *scire facias* and strike off the report of the re-auditors; it was *held*, that the petition must be dismissed; that the defendant having appealed from the report, had himself brought it into court for adjudication. *York County v. Reeser*, 4 York 207.

18. The act 13 May 1889 (Brightly's Purdon 1710), making an allowance to directors of the poor and county commissioners for travelling expenses, does not apply to counties where the officers receive a *per diem* compensation; and this, although such compensation exceeds one hundred and fifty dollars per year. It does not apply to the local act of 22 March 1856 for Mercer county. *Mercer County v. Allen*, 10 C. C. 342.

19. County commissioners for Northampton county are entitled to four dollars a day and mileage at six and one quarter cents per mile, but to no other compensation. *Ritter v. Northampton County*, 2 Northam. 363.

20. A county may indemnify a commissioner who, in good faith, makes a criminal complaint against his defaulting predecessors for the recovery of moneys alleged to have been fraudulently obtained, and who is put to the expense of employing counsel by reason of his own arrest for perjury upon his affidavits filed. *Northampton County v. Schortz*, 5 Northam. 5.

COUNTY CONTROLLER.

1. The act 8 June 1893, entitled "An act creating the office of county controller in counties of this commonwealth containing one hundred and fifty thousand inhabitants and over, prescribing his duties," is in conflict with article III., sec. 3, of the constitution, as there is no indication in the title, of the purpose and effect of the act to abolish the office of county auditor. *Comm'th v. Samuels*, 163 P. S. 283; reversing s. c. 14 C. C. 423; *Comm'th v. Severn*, 164 P. S. 462; affirming s. c. 15 C. C. 249.

COUNTY LINES.

See BOUNDARY: COUNTY.

COUNTY SOLICITOR.

1. It is within the sphere of a county solicitor's duties to prosecute claims by his county to an allowance for overpayment of state taxes. *Lancaster County v. Fulton*, 128 P. S. 48.

2. A contract by county commissioners to give to the county solicitor, whose salary is fixed by law, additional compensation for services within the sphere of his official duties, is *ultra vires*; it is incapable of ratification. *Ibid*.

COUNTY TREASURER.

1. A county treasurer cannot release the sureties on the bond of a tax collector, by the acceptance of a note from the latter and putting the same in judgment. *Templeton v. Comm'th*, 8 Atlan. 167.

2. Under the act of 29 March 1859 (P. L. 294), the county treasurer of Bucks county must pay to the credit of the county, four per cent of the amount of the state taxes collected; not four per cent of the six per cent retained. *Biehn v. Bucks County*, 132 P. S. 561; s. c. 25 W. N. C. 427.

3. Where a county treasurer, through the neglect of the commonwealth's officers, fails to make a prompt return of the state personal property tax, and subsequently embezzles the fund, the county is not liable for interest on that portion of the fund which it is entitled to receive back from the state. *Comm'th v. Philadelphia County*, 157 P. S. 531, 550, 558.

4. Where a county treasurer applies a portion of the state personal property tax to another account with the commonwealth, for which the county is in no way responsible, it cannot be claimed that such an appropriation is an embezzlement by the treasurer as trustee of county funds and that the commonwealth holds the money on the same trust. *Comm'th v. Philadelphia County*, 157 P. S. 531.

5. Where a county treasurer is required to assess, collect and remit the state tax to the state treasurer, he is not the agent of the commonwealth, but of the county until the tax is paid by him to the state treasurer. Nothing relieves the county from liability to the state for the tax but actual payment of it to the state treasurer. *Comm'th v. Philadelphia County*, 157 P. S. 531, 550, 558.

6. The surety of a county treasurer having made good the latter's deficit, is entitled to be subrogated to the rights of the county on his official bond, and, without a formal order of substitution, is entitled to a dividend on the amount of the said deficit out of his assigned estate. *Boltz's Estate*, 133 P. S. 77.

7. A county treasurer cannot be regarded as a county officer in the collection of state taxes; commissions on such taxes are his property and can be retained by him. *Philadelphia v. Martin*, 125 P. S. 583; affirming s. c. 45 L. I. 64.

8. The treasurer of Montgomery county is not entitled to the five per cent allowance to the county in the settlement of state taxes. His compensation is fixed by the act of 17 March 1868. *Cole v. Montgomery County*, 4 Montg. 61.

9. A city treasurer, who by the act of 23 May 1874 is *ex officio* treasurer of the school district, is entitled to compensation for each office. *McCauley v. Easton School District*, 133 P. S. 493; s. c. 25 W. N. C. 520.

10. The city treasurer of Scranton being *ex officio* school treasurer, is entitled to such compensation, not exceeding two per cent, as shall be determined by the school controllers. He is not required to submit his accounts to the city controller, and the latter's disallowance of his claim is not conclusive upon him. *Scranton School District v. Simpson*, 133 P. S. 202; s. c. 25 W. N. C. 517; affirming s. c. 1 Lack. Jur. 165.

11. Under the act 9 June 1891 (Brightly's Purdon 1227), providing for the payment to cities, boroughs and

townships of proportionate parts of all license fees, the whole amount of such fees must first be paid to the county treasurer, and by him disbursed to all who are to share in the division, and for receiving and paying out these moneys, he is entitled to compensation. No particular rate of compensation seems to be fixed for the payment of the sums due to the proper municipalities, but upon the proportion retained for the use of the county the county treasurer is authorized to receive the same per cent as upon moneys collected and returned to the state. *South Bethlehem v. Hemingway*, 4 Northam. 365.

12. A county treasurer is entitled to compensation upon the amount of temporary loans but not upon renewal notes for such loans, as they amount only to an extension of credit. *Hemingway's Appeal*, 4 Northam. 403.

13. To fix the compensation of the county treasurer under the act 15 April 1834, sec. 41 (Brightly's Purdon 464), a majority of both the county commissioners and county auditors must agree; where the county commissioners have fixed the amount the compensation is not settled until a majority of the auditors approve, and in case of disagreement the court upon an appeal under the act 16 April 1875 (Brightly's Purdon 464), may settle the compensation for the treasurer's full term, but neither the court nor commissioners have any power to ascertain or settle the treasurer's compensation for services rendered to the state in the collection of its moneys. *Hemingway's Appeal*, 4 Northam. 403.

COUPONS.

See BOND.

COURTS.

See CONSTITUTIONAL LAW: JURISDICTION: RECORDS.

- I. Court officers and expenses.
- II. Court library.
- III. Special courts.
- IV. Divided court.

I. Court officers and expenses.

1. The appointment of the court crier and tipstaves is in the court and not in the county commissioners or the sheriff, and it is the duty of the court to enforce the performance of their duties. *In re Court Officers*, 3 Dist. Rep. 196.

2. The duties of the court officers involve the opening of court, keeping the court-room, judges' room, law library and jury rooms cleaned, heated, lighted, and in condition for the convenient and comfortable despatch of business. *In re Court Officers*, 3 Dist. Rep. 196.

3. The act 15 April 1834, sec. 11 (Brightly's Purdon 438), directing the county commissioners to maintain the county buildings in suitable and convenient order and repair, does not give the control of the county officers to the county commissioners; there is no law authorizing the county commissioners to provide heat for the public offices, nor have the commissioners authority to employ a fireman for the purpose of making fires to supply such heat. The act 25 April 1889 (Brightly's Purdon 452), directing the county commissioners to furnish needed fuel and light, merely requires the county to furnish the material; the county officers must find the means to convert the material into heat, and must pay the fireman. *In re Court Officers*, 3 Dist. Rep. 196.

4. The crier is entitled by law to receive one dollar for each attorney admitted to practice, and it seems he may demand the right to cry the sheriff's sales and receive the fee allowed by law for that service. *In re Court Officers*, 3 Dist. Rep. 196.

5. A county is liable for the incidental expenses of the courts, such as light and fire for the court-house, and stationery; and this, regardless of the contract or approval of the county commissioners. *In re Court Officers*, 3 Dist. Rep. 196.

II. Court library.

6. The act of 11 April 1866, providing that all fines imposed by the quarter sessions of Luzerne county shall be paid to the library association for the purchase and maintenance of a law library for the use of the courts, is constitutional. It is not repealed by the act of 12 April 1875. *Comm'th v. Ehret*, 1 Northam. 168.

III. Special courts.

7. Where the president judge of a district is under no disability to hold the regular term, but only to try a particular case, he cannot certify that case under the act 1 May 1861 (Brightly's Purdon 329) to any judge in the commonwealth, but he must transmit it to the nearest disinterested president judge under the act 22 April 1856 (Brightly's Purdon 329); under the latter act, the judge called in may try the single case at the regular term, with the regular panel of jurors, and thus dispense with the delay, expense and machinery of a special court. *Comm'th v. White*, 161 P. S. 576.

IV. Divided court.

8. An approval of a bond by one judge, the other dissenting, is not an approval by the court. *Nolde's Appeal*, 15 Atlan. 777; affirming *Nolde v. Madlem*, 4 Lanc. 347.

9. A person detained in a county jail under a commitment cannot, before trial, under the act of 8 May 1883, be committed to an insane hospital by the president judge at chambers; he is not the court within the meaning of that act, there being also associate judges not learned in the law. *Dux's Case*, 7 C. C. 294.

10. Where, upon exceptions to an adjudication in the orphans' court, the judges are equally divided, the judgment of the court is a dismissal of the exceptions and a confirmation of the adjudication. *Strauss's Estate*, 14 C. C. 593; s. c. 34 W. N. C. 478.

11. A court is a tribunal established for the public administration of justice and composed of one or more judges who sit for that purpose at fixed times and places, attended by proper officers; where a court is composed of more than one judge, one of the judges cannot, after the adjournment of the court and without consultation with his associates, enter a valid judgment. *Butts v. Armor*, 164 P. S. 73.

COVENANT.

See CONTRACT: DAMAGES: DEED.

I. Execution of covenants.

III. Dependent and independent covenants.

IV. Implied covenants.

V. Covenants for title.

(a) Covenant of warranty.

(e) Covenant against incumbrances.

VI. Covenants running with the land.

VII. Actions of covenant.

VIII. Performance and breach.

I. Execution of covenants.

1. As to whether a married woman who joins in a conveyance of her husband's real estate is bound by the covenants in the deed. *Trullinger v. Charles*, 129 P. S. 289.

2. Equity will not enforce a covenant to keep open an alley, which found its way into a deed by mistake, where the parties rectified the error among themselves and acquiesced in it for many years. *Corbett v. Bloch*, 1 Lack. Jur. 441.

III. Dependent and independent covenants.

3. Where a lessee of coal covenanted to pay a certain sum each year in the nature of rent, and it was further covenanted that if the lessee could not produce, from causes beyond his control, the quantity of coal required, he should be exonerated from the payment of rent on all coal other than the quantity actually mined, and the instrument also provided for a sale to the lessee of certain buildings and fixtures for a specified sum, and the lessee further covenanted to pay a monthly sum for the use of the miners' houses, and it appeared that for several years the mine was flooded and that defendant was prevented from mining by causes beyond his control; it was *held*, that the covenants to mine and pay rent for houses were not dependent upon each other, and that the defendant was bound to pay the plaintiff the value of the buildings and fixtures and also the rent of the houses during the continuance of the term. *Big Black Creek Improvement Co. v. Kemmerer*, 162 P. S. 422.

4. Upon an exchange of properties where the defendant *inter alia* covenanted to put in the curb and street pavement for the properties conveyed by him, and the plaintiff covenanted to build within one year, and the defendant failed to put in the curb and street pavement which were put in by the city and paid for by the plaintiff; it was *held*, in an action to recover an amount so paid, that the plaintiff was not bound to build before the curbing and paving were done, and that the defendant could not set off damages by reason of the plaintiff's failure to build within one year. *McConaghy v. Pemberton*, 168 P. S. 121.

IV. Implied covenants.

5. The words "grant, bargain, and sell" constitute an implied covenant applicable only to acts of the grantor, and

not of former owners. *Bean v. Steltz*, 4 Montg. 105.

6. The conveyance of a lot of ground "to be used for milling or manufacturing purposes only," does not amount to a covenant by the grantee that he would erect a mill. *Madore's Appeal*, 129 P. S. 15.

7. In an agreement for the sale of the vendor's interest in land, a reference to a deed is not a covenant that the quantity and boundaries shall be as therein set forth. *Holton v. Walter*, 5 Cent. 458.

8. Conditions of sale are merged in the deed and are not admissible in evidence unless they impose conditions not contained in the deed. *Bean v. Steltz*, 4 Montg. 105.

9. In an action against a lessee, who has drilled one paying gas well upon the premises, for not putting down other wells to protect the territory against the effect of operation on adjoining lands; it was *held* to be error to charge that a failure to drill such wells was a breach of an implied covenant imposing a liability in damages in the absence of a reasonable excuse therefor. *McKnight v. Manufacturers' Natural Gas Co.*, 146 P. S. 185.

V. Covenants for title.

(a) Covenant of warranty.

10. In covenant for purchase money, when the vendor has agreed to give a good title, the plaintiff must show a good title; if the defendant shows a doubtful title in plaintiff, by reason of an outstanding trust, the plaintiff cannot recover. *Elliott v. Tyler*, 5 Cent. 543.

11. Upon a contract "to sell and convey by a deed of warranty," the covenant is fulfilled by the delivery of a deed of special warranty. *Payne v. Echols*, 15 Atlan. 895.

12. A covenant of general warranty in a deed conveying real estate and also certain gas wells with their connections and appliances, will be construed to apply only to the title of the real estate conveyed. *Beale v. Jennings*, 129 P. S. 619.

13. In a suit on a covenant of general warranty in a deed, for the value of a coal vein, which the grantor did not own and which was not excepted in the deed, evidence that the grantees knew that the grantor did not own the coal and did not intend to include it, is sufficient to go to the jury on the question of the reformation of the deed on the ground of mutual mistake. *Stafford v. Giles*, 135 P. S. 411.

14. Where money was loaned by a husband upon mortgage and the mortgage placed in the wife's name without her knowledge, and the wife subsequently at the husband's request assigned the mortgage to one who knew that the wife had no interest in the mortgage or in the money loaned; it was held, that there was no warranty of title upon which the wife could be held legally liable upon the failure of the mortgage. *Moore v. Joyce*, 161 P. S. 138.

15. A grantee in a deed of general warranty, who voluntarily surrenders possession of the whole of the land to one who claims only a part interest in it, cannot recover from the warrantor as for an eviction from the whole tract. *McGrew v. Harmon*, 164 P. S. 115.

(e) **Covenant against incumbrances.**

16. The purchaser of land, who has been compelled to pay a collateral inheritance tax charged thereon, may, under the covenant in his deed implied from the words "grant, bargain, and sell," recover the said tax from his vendor. *Large v. McClain*, 7 Atlan. 101.

17. Failure to disclose the existence of a servitude, consisting of a mill-pond and race on lands of an upper owner to supply water to the mill of a lower owner, cannot be assigned as a breach of even a general warranty. *Bean v. Steltz*, 4 Montg. 105.

18. Upon a conveyance subject to a mortgage, the grantor's covenant against incumbrances implied in the words "grant, bargain, and sell" will not be enforced to compel the payment of a mortgage where, under an agreement between the parties,

other land is subsequently conveyed to the grantee as payment of the mortgage. *Johnston v. Markle Paper Co.*, 153 P. S. 189.

19. An incumbrance is any right or interest in land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance; it is not necessarily a lien determinate in amount. *Lafferty v. Milligan*, 165 P. S. 534.

20. Where a municipal assessment for water pipe in the city of Philadelphia was not entered of record so as to preserve its lien, and it appeared that the defendant bought the property at sheriff's sale and sold it to the plaintiff, who paid the claim; it was held, that such claim was not an incumbrance, and that the defendant's covenant implied by the words "grant, bargain, and sell" in his deed did not include such claim. *Stutt v. Building Ass'n*, 12 C. C. 344.

VI. Covenants running with the land.

21. Upon a conveyance of land from a father to his son, a covenant by the son in a collateral agreement to maintain his sister gives her no interest in the land; she cannot maintain an equitable action of ejectment upon it. *Harkins v. Doran*, 15 Atlan. 928.

22. An agreement under seal settling the rights of riparian owners to a water-course, is a covenant running with the land. Trespass is the proper remedy for its infraction. *Horn v. Miller*, 136 P. S. 640; 27 W. N. C. 115. See *Horn v. Miller*, 142 P. S. 557; *Webb v. Bennett's Branch Imp. Co.*, 161 P. S. 623.

23. Covenants to pay rent or royalty run with the land; the assignee of a lease of land for oil and gas production, is liable to the lessor for the payment of all rents or royalties which accrue while he holds an assignment of the lease. *Fennell v. Guffey*, 139 P. S. 341.

24. Where the owner of a large lot of

ground subject to a ground-rent, sold a portion of the land, reserving a ground-rent in himself and covenanting against the paramount ground-rent; it was *held*, that the burden of the covenant ran with the remaining portion of the land, and not with the ownership of the last reserved ground-rent, and that in an action for arrears by a subsequent owner of the latter it was no defence by a successor in the title to the smaller lot that the latter had been obliged to pay a portion of the paramount ground-rent. His remedy for that was against the owner of the remaining portion of the lot. *Provident & Trust Co. v. Fiss*, 147 P. S. 232; affirming s. c. 48 L. I. 44.

25. Where land was conveyed to a married woman, and the deed provided that after her death the land should vest in her two sons subject to the payment by them of eight hundred dollars to the mother's representative, and subsequently the mother divided the land between her two sons and put them in possession; it was *held*, in an action of assumpsit to enforce the charge on the land, that the deed and the writing signed by the mother at the time she divided her property between her sons was properly admitted in evidence, and that the plaintiff was entitled to recover. *Walb v. Snyder*, 155 P. S. 167.

26. Covenants to pay royalty in an oil lease run with the land and are binding upon the assignee who has received the production from the wells. *Williams v. Short*, 155 P. S. 480.

27. Where a husband and wife conveyed land charged with the payment of the legal interest of a certain sum of money, to the grantor and his wife during their joint lives, and to the wife during her life if she survived her husband, and on the same day the land was reconveyed to the husband subject to the same charge; and subsequently the land was sold by the sheriff, and some years afterwards the husband and wife were divorced; it was *held*, that the charge was not divested by the sheriff's sale;

that the wife's interest was not divested by her divorce; and that the lien of the charge extended to every part of the land conveyed, and upon a division of the land, the lien could not be apportioned without the consent of the parties for whose benefit it was created. *Blank v. Kline*, 155 P. S. 613; affirming s. c. 10 Lanc. 76.

28. Where a conveyance was made by a husband and wife to their son under and subject to the payment of an annual sum to the husband during his life, and of a less sum annually to the wife during widowhood, and the payment of the purchase money was provided for without interest one year after the death of the husband and the death or remarriage of the wife, such a conveyance created a fixed lien or charge upon the land which was not divested by a subsequent sheriff's sale. *Rohn v. Odenwelder*, 162 P. S. 346.

29. In an action for purchase money of real estate, it was *held*, that where a deed in a vendor's line of title contains a condition that no mill, factory, brewery or distillery shall be erected on the land, the vendor has not a title which is either good or marketable or clear of all incumbrances; and it was further *held*, that the vendee's agreement to build dwelling-houses did not cure the imperfection in the vendor's title. *Batley v. Foerderer*, 162 P. S. 460; reversing s. c. 34 W. N. C. 37.

30. One who owns land chargeable with an annuity but who has never covenanted to pay it and was not the holder of the title when it became due, is not personally chargeable with its payment, and where he conveys the land to another and agrees to protect his vendee from the charge of the annuity, his obligation to his vendee, is a personal obligation to him only and does not impose any legal duty as to his vendee's successors in the title; where such a vendor and guarantor held a claim against the annuitant for goods sold and delivered, and it appeared that a successor to his vendee

in the title had been obliged to pay arrears of the annuity; it was *held*, that the latter was not entitled to be subrogated to the judgment against the administrator of the annuitant. *Clippinger's Estate*, 162 P. S. 627.

31. Where an owner of three adjoining lots executed three deeds on the same day to three different persons, and the deed for the middle lot contained a covenant that the grantee should not build upon the rear of the lot, but the other two deeds did not refer to such restriction but did recite the fact of the conveyance; it was *held*, that the restriction was in the nature of a covenant running with the land and created an easement of light and air in favor of the adjoining lots. *Muzzarelli v. Hulshizer*, 163 P. S. 643.

32. The court will refuse a liquor license to a building erected on land where there is a covenant in the line of the title that the grantee will not sell liquors on the premises; such a covenant is one which runs with the title. *Snyder's License*, 2 Dist. Rep. 785.

33. Where land is leased with the right to take ore and there is a covenant on the part of the lessor to sell to the lessee at a certain rate, such covenant runs with the land; it is not a mere right of election on the part of the lessee which must be made in the lifetime of the parties. *Strickhouser v. York County Iron Co.*, 1 York 46.

VII. Actions of covenant.

34. If a contract under seal be changed or added to by a subsequent parol agreement, the whole becomes parol, and the remedy for the breach is assumpsit, and not covenant. *Stoddard v. Emery*, 128 P. S. 436.

35. Where the liability of the owner of land exists by virtue of covenants in the line of his title, such covenants cannot be enforced by the orphans' court. *South Mahoning v. Marshall*, 138 P. S. 570; s. c. 27 W. N. C. 225.

36. Where land is conveyed in con-

sideration of covenants to support and maintain the grantor and his wife, and neither the grantor nor his widow complain that the grantee did not perform his covenant, ejectment will not lie by collateral heirs as for condition broken. *McLaughlin v. Collins*, 138 P. S. 198.

37. Where a land-owner sells a number of lots on a certain street to different purchasers, taking from each a covenant not to build beyond a certain line, and one of them violates the covenant, the other purchasers cannot maintain an action at law against him for violation of such covenant. *Churchman v. Cain*, 4 Del. 378.

38. In covenant the *allegata* and *probata* must agree. An agreement under seal to buy certain real and personal property for a fixed sum, is not admissible in covenant for breach of the vendee's contract to buy the personal property. *Cleaver v. Garner*, 133 P. S. 419; s. c. 25 W. N. C. 509.

39. In covenant against the lessors by lessees of a mine, who had been enjoined by the owners of the surface from "robbing back" the breast pillars, the lessees not being authorized to do so by the lease, it was incompetent for them to show what the lessors understood to mean by the words in the lease that the mining was to be done "in the most skilful, workmanlike, and proper manner, according to the most approved manner of mining." *Hecksher v. Sheaffer*, 14 Atlan. 53; s. c. 12 Cent. 444.

40. Upon a covenant by an assignee of a mining lease to indemnify the assignor against claims of a third party and against damages to the neighbors by the operation of washing, the recovery will not be limited to the amount named in the bond which contains the covenant. *Keck v. Bieber*, 148 P. S. 645.

VIII. Performance and breach.

41. Where the defendant employed the plaintiff as his agent to sell proprietary tablets under a written contract

for several years, and the defendant agreed to furnish the plaintiff sufficient samples and printed matter relating thereto, as the same might be called for, and the plaintiff was made the sole agent on the condition that he should use his reasonable endeavors to introduce and sell the tablets, and should devote his entire time and attention to that purpose; it was *held*, in an action for the breach of the contract which was defended on the ground that the plaintiff's demands were unreasonable, and his methods of distribution inefficient, that the plaintiff had a right to demand samples in quantity fairly and reasonably sufficient, and what was a reasonable quantity was a question of fact for the jury. *Jensen v. Perry*, 126 P. S. 495. Upon the questions of reasonableness and efficiency, the opinions of experts were admissible; it was also competent for the defendant to prove by a witness that he had made an investigation but could find no samples, but that the plaintiff was ignorant or unskilful in the business would not entitle the defendant to a verdict. *Perry v. Jensen*, 142 P. S. 125.

42. Where the lessees in an oil lease were an adult and a guardian of certain minors, a declaration by the guardian in relation to the lease that the same was ended and void, and the lessors had no claim thereunder, could not relieve the assignee from liability for the failure to perform the covenants of the lessee. *Springer v. Citizens' Natural Gas Co.*, 145 P. S. 430.

43. Where the assignee of a mining lease has allowed it to become forfeited, and disabled himself from performing his covenants contained in a bond given to his assignor, the assignor may either sue from time to time for royalties due or other damages, or he may treat the contract as rescinded and claim damages in one action for the entire breach. *Keck v. Bieber*, 148 P. S. 645.

44. Where land was subject to a covenant that no manufactory, workshop, steam-engine house, smithshop or other

building for offensive purposes or occupation or building of any kind to be used for any purpose other than as and for a genteel cottage or dwelling-house, stable or coach-house, should ever be built upon the land, and the lessees of defendant in September 1887 built on the land a boat-house, club-house and a carpenter-shop for repairing boats, and notice to remove the same was not given until January 1889, the court refused a mandatory injunction; a mandatory injunction will not be issued where complainants' rights are not clear. *Gatzmer v. St. Vincent School Society*, 147 P. S. 313.

45. A covenant on the part of a lessee of a railroad to use all proper and reasonable means to maintain and increase the business thereof, is not necessarily broken by the building of a parallel line by the lessee; the determination of such a question depends on the use made of the line so built, and the nature and amount of its traffic. *Catawissa R. R. Co. v. Philadelphia & Reading R. R. Co.*, 14 C. C. 280; s. c. 34 W. N. C. 11.

CREDIBILITY.

See EVIDENCE, LI.

CREDITORS' BILLS.

See CORPORATION, XV.: EQUITY, XXIII.

CRIMINAL CONVERSATION.

1. In an action for criminal conversation, the husband is not a competent witness as to the wife's adultery. *Cornelius v. Hambay*, 150 P. S. 359.

2. In an action for criminal conversation, the fact that plaintiff's wife visited a hotel late at night with the defendant and remained there with him several hours, is a circumstance from which the jury may infer illicit intercourse. *Cornelius v. Hambay*, 150 P. S. 359.

3. In an action for criminal conversation, where the plaintiff's interest as a

party to the suit has been commented upon, it is not error to charge that defendant "is interested in swearing, if there is any such thing as honor or moral right that would excuse falsehood, not only to that which would relieve himself but will protect his paramour." *Cornelius v. Hambay*, 150 P. S. 359.

4. It is a well-settled rule in this state, that a husband may recover punitive damages for the debauching of his wife, not only by way of compensation, but by way of punishment, to deter the defendant and others from offending in like cases. *Cornelius v. Hambay*, 150 P. S. 359.

5. In an action for criminal conversation, it is not improper to charge that the jury in assessing damages may take into consideration the social relations of the parties, the apparent affection which existed between husband and wife, and the actual misconduct of the seducer; in such a case the husband is entitled to punitive damages, and evidence is admissible that the seducer is a rich man, and it is not improper for the court to charge that there is a very great difference in a penalty as between a rich man and a poor man. *Matheis v. Mazet*, 164 P. S. 580.

CRIMINAL LAW.

See APPEAL AND ERROR: BASTARDY:
CHURCHES: ELECTION LAW: EVIDENCE,
XXIX.: EXCISE: FISH: GAME: INFANTS:
INSOLVENCY: JUSTICES' COURTS: LIBEL:
LIMITATION: PENAL STATUTES: PRACTICE,
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SURETY OF THE PEACE.

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I. Jurisdiction.

1. In case of a blow in one county, and death following in another, the trial must be held in the county where the blow was inflicted. *Comm'th v. Cioffi*,

5 Montg. 128. But see act of 8 May 1889 (Brightly's Purdon 555).

2. Where an order for goods purported to have been dated in Altoona, Blair county, but proof was that the goods were furnished upon an order in Philadelphia county and there was no proof that the order was made and published in Blair county; it was *held*, that an indictment for a forgery of the order could not be sustained in Blair county. *Comm'th v. Fagan*, 12 C. C. 613.

II. What offences are indictable.

3. The solicitation to commit murder, accompanied by the offer of money as a reward for so doing, is indictable at common law. *Comm'th v. Randolph*, 146 P. S. 83.

4. Concealment of the birth of a bastard child is not a criminal offence. *Comm'th v. Brown*, Vaux's Dec. 24.

5. Where the directors of the poor indenture a pauper of tender years to a person whom they know to be a cruel and dangerous man, they are subject to indictment for permitting the pauper to be so grossly maltreated as to result in his death, and in such a case evidence is admissible, which is descriptive of the results of their misconduct, without proving personal notice to them of each specific act of cruelty which contributed to the death of the child. *Comm'th v. Coyle*, 160 P. S. 36.

6. A tax collector who collects from a taxpayer the amount of a tax, from which the latter has been exonerated, contrary to the act of 27 May 1841 (Brightly's Purdon 1991), may be indicted for the offence in the quarter sessions. *Comm'th v. Snyder*, 5 Kulp 399.

7. A turnpike company subject, by its charter, to the provisions of the general turnpike law of 26 January 1849, cannot be proceeded against by indictment for allowing its road to become out of repair. The statutory remedy must be pursued. *Comm'th v. Roaring Brook Turnpike Co.*, 1 Lack. Jur. 351.

8. The remedy against the Frankford and Bristol Turnpike Company for not keeping its road in repair is not by indictment, but, under its charter of 24 March 1803, by inquisition, etc. *Comm'th v. Frankford & Bristol Turnpike Co.*, 9 C. C. 103.

9. While the commissioners of roads of Pine Grove township, under the act of 9 April 1844 (P. L. 230), have a general charge and supervision, they have also a discretion as to the necessity for a road, and an indictment does not lie against them for their refusal to lay out a road in obedience to a request in writing of citizens of the township. *Comm'th v. Thompson*, 126 P. S. 614.

10. Wife-desertion is not an indictable offence in Pennsylvania. *Extradition Case*, 9 C. C. 27.

11. To wilfully drive upon the sidewalk is an indictable offence. *Comm'th v. Craine*, 12 C. C. 286.

12. The act 6 May 1887 (Brightly's Purdon 479), making it a misdemeanor to mutilate or tear down any show-bill, placard, programme, poster or other advertisement, does not apply to the act of tearing down a constable's notice of sale; it was not decided whether an indictment would lie at common law. *Comm'th v. Johnson*, 13 C. C. 543.

13. No indictment lies under the act of 9 May 1889 (Brightly's Purdon 1665) for hawking and peddling without a license. The remedy is by debt for the penalty. *Comm'th v. Stiles*, 7 C. C. 665; *Comm'th v. Winslow*, Ibid. 667.

14. Since the passage of the act 31 March 1854, P. L. 166, the penalty for peddling in Montgomery county is not enforceable by indictment in the quarter sessions. *Comm'th v. Raffolnitz*, 8 Montg. 210.

15. Under the act 31 March 1860, sec. 69 (Brightly's Purdon 473), it is a misdemeanor to sell to a butcher a live steer suffering with lump jaw. *Comm'th v. Horn*, 13 C. C. 164.

16. One who is guilty of disturbing the peace and good order of a case upon

trial before a justice, or of disturbing or obstructing or interfering with the justice in disposing of a matter before him judicially, may be indicted for a contempt, and if found guilty may be fined or imprisoned. *Comm'th v. Clark*, 13 C. C. 439.

17. It is no offence under the act 31 March 1860, sec. 31 (Brightly's Purdon 491), to prevent a religious meeting from convening; there can be no conviction under that act unless the worshippers have assembled. *Comm'th v. Underkoffer*, 11 C. C. 589.

18. The singing in a church by a church choir in an orderly manner is not an indictable offence, although such singing was contrary to the orders of the pastor. *Comm'th v. McDole*, 10 Lanc. 119.

19. Where authority is given to borough officers to make regulations necessary for the health and cleanliness of the borough, their neglect to do so is a misdemeanor punishable by indictment. *Comm'th v. Bredin*, 165 P. S. 224.

20. The malicious duplication of several complaints for the purpose of collecting costs is an indictable offence. *In re Grand Jury*, 4 Northam. 374.

III. Responsibility for crime.

(a) Defence of insanity.

21. The burden of proving insanity rests upon the defence. A predisposition to insanity cannot be proven by family tradition. *Comm'th v. Moss*, 6 Kulp 31.

22. Upon the trial of an indictment the defendant is presumed to be sane until such presumption is successfully rebutted by fairly preponderating evidence that he was insane at the time of committing the crime; evidence which creates only a mere doubt or a reasonable doubt of his sanity is insufficient to justify an acquittal, but it is error, especially in a capital case, to instruct the jury that the fact of insanity must be clearly proved. *Comm'th v. Gerade*, 145 P. S. 289. See s. c. 40 P. L. J. 117.

23. Upon the trial of an indictment for murder where insanity is set up as a defence, it is proper for the court to charge that mental incapacity is to be established by the weight of the evidence, and that an act is presumed to have been done sanely until the contrary appears by the evidence. *Comm'th v. Woodley*, 166 P. S. 463.

24. Upon the trial of an indictment, where witnesses have testified to facts affording them an opportunity to acquire a knowledge of the mental condition of the defendant at or near the time of the commission of the crime and afterwards; it is error to refuse offers to prove by them their opinion whether the defendant was sane or insane at that time, and so remained. *Comm'th v. Gerade*, 145 P. S. 289. See s. c. 40 P. L. J. 117.

25. Where the commonwealth has proven wilfulness and a fully formed purpose to kill, the law does not call for proof of a motive; in such case the motive is unimportant unless insanity be set up as a defence, when the absence of any motive which would prompt a sane man to the deed adds to the strength of positive evidence of unsoundness of mind. *Comm'th v. Buccieri*, 153 P. S. 535.

26. A physician may express an opinion upon the mental capacity of the prisoner from observations made while the prisoner is testifying in his own behalf on the witness stand. *Comm'th v. Buccieri*, 153 P. S. 535.

27. Where insanity caused by an epileptic fit was alleged as a defence, it is competent for a physician who examined the prisoner an hour after the commission of the crime, to express an opinion as to his mental soundness; and this, although the examination was not for the purpose of ascertaining whether there had been a recent epileptic convulsion. *Comm'th v. Buccieri*, 153 P. S. 535.

28. A non-expert witness will not be permitted to express an opinion as to the prisoner's sanity, where the acts and conversations upon which the opinion is based, as well as the phase of insanity,

sought to be proven have no bearing on the mental condition of the prisoner at the time he committed the crime. *Comm'th v. Buccieri*, 153 P. S. 535.

29. It is not competent on the trial for murder to show that the defendant possessed a nervous temperament and was excitable and eccentric; such an offer is not an offer to show insanity. *Comm'th v. Cleary*, 148 P. S. 26.

30. Where the prisoner alleges insanity from epileptic fits, the commonwealth may show that the falls and stupor which the prisoner attributed to epilepsy were really due to drink. *Comm'th v. Buccieri*, 153 P. S. 535.

31. A plea of insanity on an indictment for murder is not sufficiently supported by evidence which merely shows that the prisoner was an epileptic and that the disease weakened his intellectual powers and in some cases produced total insanity, but fails to show that the prisoner was in any way affected by the disease on the day of the killing. *Comm'th v. Buccieri*, 153 P. S. 535.

32. Where, in a prosecution for larceny, the defence is insanity or kleptomania, a verdict of conviction will not, except in an extreme case, be set aside as against the weight of the evidence. *Comm'th v. Fritch*, 9 C. C. 164.

33. After an order committing to an asylum a defendant acquitted on the ground of insanity, the court may at a subsequent term certify the township of the defendant's legal settlement. *Clearfield County v. Overseers of Cameron*, 135 P. S. 86.

34. The township of the legal settlement of a poor person committed to the Danville Insane Asylum upon an acquittal upon a criminal charge by reason of insanity, is liable to the county for the amount of his maintenance. *Ibid.*

35. A commission will not be allowed to inquire into the sanity of the person convicted of murder in the first degree, where the defence of insanity was set up at the trial. *Comm'th v. Baranski*, 36 P. L. J. 363.

36. A plea of insanity offered at bar when the prisoner is called for sentence, is properly rejected when there is no corroborative affidavit accompanying the plea nor any statement made which might move the court to further inquiries. *Comm'th v. Buccieri*, 153 P. S. 535.

37. As to the test of insanity as a defence to crime, see note of authorities to *Delaware v. Reidell*, 14 Atl. 556.

(b) Intoxication.

38. The intoxication of the defendant cannot be proven by showing the condition of a companion, who had taken the same number of drinks. *Comm'th v. Cleary*, 135 P. S. 64; s. c. 26 W. N. C. 137. See s. c. 148 P. S. 26.

39. The mere intoxication of the prisoner charged with murder will not excuse or palliate his offence unless he was in such a state of intoxication as to be incapable of forming a deliberate and premeditated intent to take the life of the deceased; if he was, the grade of offence is reduced to murder in the second degree. *Comm'th v. Cleary*, 148 P. S. 26.

40. Where the defendant was on trial for the murder of his wife, the defendant's intoxication could not be established by evidence that he brought home a gallon of whiskey a day or two before the commission of the crime, and that the night after the crime was committed there was but little of the whiskey left, to be followed by evidence of all the living members of the family that none of them tasted liquor but the defendant. *Comm'th v. Cloonen*, 151 P. S. 605.

See CRIMINAL LAW, XXVI. (k).

IV. Process.

41. Where a justice has issued a criminal warrant he cannot convert the case into an action for damages and enter judgment in favor of the plaintiff. *Clader v. Shepowich*, 13 C. C. 459.

V. Arrest.

42. A borough officer may arrest without a warrant a property owner who interferes by force to prevent borough workmen from laying pipe in front of his house to connect with a private drain across plaintiff's premises through which to discharge cesspool and other drainage; if injured by the work, he has his lawful remedy. *Crosland v. Shaw*, 12 Atl. 849; s. c. 11 Cent. 665.

43. Peddling fruit in violation of a borough ordinance is not such an offence as will justify the arrest of a citizen without warrant; in such a case, a judgment for the penalty will be reversed on *certiorari*, especially if the record of the magistrate does not show that the arrest was made upon view. *Pittston v. Dimond*, 15 C. C. 543.

44. An officer who makes an arrest for an offence committed in his presence is not bound to inform the prisoner of the charge or of his purpose to arrest him for the act committed. *Comm'th v. Weathers*, 7 Kulp 1. See s. c. 6 Kulp 486.

45. Where an intoxicated person was on a public street of a thickly populated borough and was behaving in a disorderly manner, causing a crowd to congregate; it was the duty of a police officer who saw it, to order the crowd to disperse and the intoxicated person to withdraw, and if such order was ineffectual and was followed by defiant, profane and obscene language, the officer had a right and it was his duty to arrest the offender without a warrant. *Comm'th v. Weathers*, 7 Kulp 1. See s. c. 6 Kulp 486.

46. A police officer has no authority to arrest a man standing on the edge of the curbing in front of his boarding place on a raised area between the sidewalk and the building, where it appears that such person was not an idler or a lounge, that he was neither saying nor doing anything, but was entirely peaceful and orderly; and this, though there were others near him who stood in a crowd blocking the walk, but he was in no way identified with

them. *Comm'th v. Ridgeway*, 2 Lack. Jur. 359.

VI. Preliminary hearings.

47. A general incompetency from want of religious belief or infamy will prevent a person from being a prosecutor and making information to found criminal proceedings; not so, of incompetency from interest or policy. *Comm'th v. Geary*, 9 C. C. 60.

48. Where a defendant is convicted before a justice of an offence against the Sunday laws, the information in addition to the day of the month must state that it was Sunday, and not merely mention a day found to be Sunday by the calendar, otherwise the conviction will be reversed on *certiorari*. *Gelbert v. Comm'th*, 3 Lack. Jur. 374; s. c. 6 Del. 90.

49. A magistrate should bind over the accused unless the doubt of the guilt of the accused is much greater than the probable cause established by the evidence. *Comm'th v. Spain*, Vaux's Dec. 27.

50. A magistrate cannot bind over a defendant to appear at court without probable cause be either proven or conceded on the part of the defendant. *Comm'th v. Biddle*, Vaux's Dec. 12.

51. A magistrate will not be ordered by mandamus to complete his record in the case of the arrest of the relator by adding to the same the names of other persons arrested at the same time upon the same charge, and what was done in reference to such other arrests. *Comm'th v. Pole*, 11 C. C. 226; s. c. 1 Dist. Rep. 125.

52. A magistrate's record is complete if it sets forth the regular and successive steps from the making of the affidavit upon which the warrant was issued to the binding over of the accused for his appearance in court; he will not be compelled by mandamus to set forth what took place in regard to other persons arrested at the same time and on the same charge, or whether such persons were held or discharged. *Comm'th v. Pole*, 11 C. C. 226; s. c. 1 Dist. Rep. 125.

53. Where a defendant is arrested on a warrant, the hearing terminates on the holding to bail, and after such a decision the magistrate has no right without notice to the prosecutor to open the case and render a different judgment. *Hill v. Egan*, 160 P. S. 119.

54. The defendant in a criminal case may waive a preliminary hearing, but by doing so he cannot interfere with the right of the commonwealth to institute such preliminary examination. *Comm'th v. Keck*, 148 P. S. 639.

55. Under the act 23 May 1887 (Brightly's Purdon 816), where a crime is not triable in the oyer and terminer, the defendant cannot be deprived of the privilege of being heard by himself and witnesses at the preliminary hearing. *Comm'th v. Hughes*, 11 C. C. 470.

56. Where the accused has fled the justice of the state, the district attorney may prefer an indictment before the grand jury without a previous binding over. *Comm'th v. Shupp*, 6 Kulp 430.

57. The district attorney by leave of court, may proceed criminally by information against public officers for oppression or misdemeanor in office without any preliminary hearing or previous binding over; so, he may in like manner prefer indictments for such offences as affect the whole community rather than individuals, for such flagrant crimes as tend to debauch public morals in which the purpose is to suppress evils, rather than to punish persons. So, the courts of their own motion may commit to the grand jury the investigation of such offences and direct witnesses to be subpoenaed for that purpose. *In re Grand Jury*, 4 Northam. 374.

58. Where the defendant was committed upon an affidavit charging him with conspiring with persons named to cheat and defraud at a specified election, and in pursuance of said conspiracy making a false and fraudulent return of said election, and conspiring to procure the casting of illegal votes and preventing qualified electors from exercising their

right of suffrage; it was *held*, that such a commitment would not support an indictment which charged a conspiracy with unknown persons to prevent divers persons, whose names were unknown, from voting, they, the said divers persons, being then and there qualified to vote; and the indictment was quashed. Where there is a desire to indict for some other offence, there should be another binding over. *Comm'th v. Hunter*, 13 C. C. 573.

59. An indictment based upon the report of the county auditors, finding that frauds have been committed in erecting the county court-house, was sustained though such indictment was submitted to the grand jury by the district attorney under the direction of the court and without a preliminary hearing. *Comm'th v. Taylor*, 12 C. C. 326.

60. An indictment will not be quashed on the ground that there was no preliminary hearing where it appears that at the time the warrant was issued, the defendant absented himself from the state. *Comm'th v. Delamater*, 13 C. C. 153.

See CRIMINAL LAW, IX.

VII. Bail.

61. After a prisoner has been committed to jail, an alderman has the right to take a recognizance and discharge him from custody; a short entry on the record of "recognizance forfeited May 5, 1889," is conclusive that the defendant and bail were called and did not appear. *Comm'th v. Basendorf*, 153 P. S. 459.

62. An application to admit to bail will be refused where the defendant is indicted for a homicide done in a riot by a body of men who had a common understanding that they should resist all who opposed them even to the extent of taking life, and it appears that the defendant was a party to the combination and that he was present upon the ground giving encouragement to the rioters. *Comm'th v. O'Donnell*, 12 C. C. 142.

63. Where a defendant enters bail to appear at the next term of court, he is

only bound to appear at that term; he cannot be called at a subsequent term and his bail then forfeited. *Comm'th v. Somers*, 14 C. C. 159.

IX. Indictment.

(a) General principles.

64. The words "True Bill" should not be printed on the back of indictments sent to the grand jury; but that is no reason for granting a new trial. *Comm'th v. Usner*, 7 Lanc. 57.

65. An indictment will be quashed where the indorsement of the finding of the grand jury is without date, and where the prosecutor's name and the names of the witnesses are not endorsed on the bill. *Comm'th v. Schall*, 5 York 139; s. c. 9 Lanc. 332.

66. An indictment will be quashed where there are no names of witnesses endorsed thereon. *Comm'th v. Frescoln*, 11 Lanc. 161.

67. A formal defect in an indictment may be amended either in the court below or in the supreme court. *Davis v. Comm'th*, 4 Cent. 711.

68. On a motion to quash an indictment for a misnomer of the defendant, the district attorney may amend by the insertion of the proper name. *Comm'th v. Early*, 1 Lack. Jur. 323.

69. The statute 1 Henry V., chap. 5, providing that the estate, degree or mystery of the defendant must be stated in the indictment, is in force in this state, but a motion to quash for want of such an addition will not be entertained where the defendant fails to state what the proper addition to his name should be. *Comm'th v. Murphy*, 12 C. C. 131; s. c. 4 Del. 71; 1 Lack. Jur. 127.

70. The statute 1 Henry V., chap. 5, requiring that the estate, degree or mystery of a defendant must be stated in the indictment, does not apply to an indictment for selling liquor without a license; in Pennsylvania it is limited to such cases only as treason, felony of death, robbery,

burglary, sodomy and buggery. *Comm'th v. Murphy*, 12 C. C. 131; s. c. 4 Del. 71; 1 Lack. Jur. 127.

71. A formal defect in an indictment may be cured by an amendment, and advantage must be taken of it, if at all, before the jury is sworn; the omission of the defendant's addition of estate, mystery or degree is a defect of an extremely technical and formal kind, clearly amendable. *Comm'th v. Williams*, 149 P. S. 54.

72. Upon a charge of rejecting the vote of a qualified voter, it is error to include the judge and two inspectors in the same indictment, but the misjoinder may be avoided by dropping the name of two by amendment or *nolle pros*. *Comm'th v. Youlls*, 5 Kulp 231.

73. The expediency of jointly indicting prisoners is for the district attorney to determine, and not for the judge. *Franklin's Appeal*, 163 P. S. 1.

74. Where more than one person joined in the commission of an offence, any number of them may be indicted jointly, or each may be indicted severally. *Comm'th v. Casey*, 14 C. C. 389.

75. Where an information is against one defendant only, an indictment cannot be found against two except in cases of public emergency or necessity. *Comm'th v. Schall*, 5 York 139; s. c. 9 Lanc. 332; *Comm'th v. Schall*, 5 York 139; *Comm'th v. Schall*, 5 York 155.

76. An indictment will be quashed where it appears that the information upon which it is based was not signed by any prosecutor. *Comm'th v. Schall*, 5 York 137.

77. A count in an indictment not containing the constitutional conclusion against the peace and dignity of the commonwealth is incurably defective. *Comm'th v. Schall*, 5 York 137; *Comm'th v. Danner*, 5 York 138.

78. Where the first count of a bill of indictment contained the averment that the jurors were inquiring for the county of York, and such count was declared invalid by reason of its defective conclu-

sion; it was held, that the second and third counts, which only by reference to the first count contained such averments, were also defective. *Comm'th v. Schall*, 5 York 137; *Comm'th v. Danner*, 5 York 138.

(b) Finding of the bill.

79. The court may direct an indictment to be laid before the grand jury against supervisors for not keeping their roads in proper repair. *Comm'th v. Fehr*, 2 Northam. 275.

80. A "district attorney's bill" must have special ear-marks by which it is known as his official act, other than his mere signature thereto. *Comm'th v. Wilson*, 36 P. L. J. 332.

81. A constable's return under oath of a sale of liquor without a license is sufficient warrant for the court to send an indictment to the grand jury. *Davidson v. Comm'th*, 5 Cent. 484.

82. An indictment based on the finding of a coroner's jury which either exculpates the defendant or fails to charge a criminal offence cannot be sustained. *Comm'th v. Wilson*, 36 P. L. J. 332.

83. If a grand jury make a presentment of a defendant for keeping a bawdy-house, acting upon the testimony of witnesses examined before them upon an indictment for assault and battery against another defendant, an indictment preferred thereon by the district attorney with leave and returned a true bill will be quashed. *Comm'th v. Green*, 126 P. S. 531; affirming s. c. 5 Lanc. 321.

84. An indictment will be quashed where it appears that it was made upon the testimony of a witness examined before the grand jury in another proceeding, and that it was not based upon the personal knowledge or observation of any member of the grand jury or upon instructions from the court or presentment by the district attorney. *Comm'th v. McComb*, 157 P. S. 611.

85. The court refused to quash indictments for the maltreatment of an

apprentice and for manslaughter, where it appeared that they were founded upon the return of an inquest and that the grand jury were given full instructions as to their duties; and this, though such indictments were not based on a charge made before a committing magistrate or on the personal knowledge and observation of the grand jury. *Comm'th v. Lafferty*, 11 C. C. 513.

86. An indictment based upon the report of the county auditors finding that frauds have been committed in erecting the county court-house, was sustained though such indictment was submitted to the grand jury by the district attorney under the direction of the court and without a preliminary hearing. *Comm'th v. Taylor*, 12 C. C. 326.

87. After a bill has been ignored by the grand jury, it will not be recommitted to a subsequent grand jury in the absence of evidence that it was ignored in consequence of oversight, mistake or fraud, or of an allegation of newly discovered testimony. *Comm'th v. Allen*, 14 C. C. 546.

88. Where a former indictment for the same offence had been quashed with leave to the district attorney to send in a new bill upon proper information, the court refused to quash the new bill because a new information was not made against the defendant, it appearing that a hearing was had on an information charging the defendant and another with the same offence for which, in a second indictment, he is indicted separately. *Comm'th v. Schall*, 6 York 24; *Comm'th v. Danner*, 6 York 25.

See CRIMINAL LAW, VI.

(c) Duplicity.

89. An indictment is not bad for duplicity which charges in the same count burglary with intent to commit larceny and that the larceny was consummated. *Becker v. Comm'th*, 9 Atlan. 510.

90. A count for larceny as bailee may be properly joined with another for robbery,

and the indictment being certified to the oyer and terminer the defendant may be convicted of the larceny and acquitted of the robbery. *Comm'th v. Shuttle*, 130 P. S. 272.

91. A count for assault and battery, a second for assault and battery with intent to ravish, and a third charging felonious rape with an averment of the commission of bastardy, is not a misjoinder, and under the act 19 May 1887 (Brightly's Purdon 535) the defendant may be convicted of fornication and bastardy. *Comm'th v. Lewis*, 140 P. S. 561; *Comm'th v. Parker*, 146 P. S. 343.

92. There is no legal difficulty in joining in one count of an indictment two or more of the four acts specified in the act 31 March 1860, sec. 65 (Brightly's Purdon 500), relating to embezzlement by public officers. *Comm'th v. Mentzer*, 162 P. S. 646; affirming s. c. 10 Lanc. 49, 188.

93. Where a count charged that A, B and C removed their property out of the county to prevent its being levied upon, and that A and B unlawfully secreted, assigned, conveyed and disposed of their property to defraud their creditors and prevent it from being liable for the payment of their debts, and that C received the property and colluded with A and B for its concealment with like intent; it was held, that there was no such joinder of different offences as would make the count demurrable. *Comm'th v. Lutz*, 9 Lanc. 241; s. c. 5 Del. 87.

94. Where an indictment is against more than one defendant and for more than one offence, there should be a separate count for each defendant and each offence. *Comm'th v. Frescoln*, 11 Lanc. 161.

(d) Sufficiency.

95. An indictment is not vitiated by mere surplusage. *Comm'th v. Casey*, 14 C. C. 389.

96. An indictment is sufficient under the act of 2 July 1839 which charges an election officer with rejecting the vote of

a "qualified voter"; this implies that he is a citizen. *Comm'th v. Youlls*, 5 Kulp 231.

97. In an indictment under the act 29 June 1881 (Brightly's Purdon 761) for making a false return, a count will be sustained which charges a conspiracy to commit the act. *Comm'th v. Boyle*, 14 C. C. 561.

98. Under the act 9 May 1889 (Brightly's Purdon 499), it is sufficient that an indictment charge that defendant, being a banker and knowing that he was insolvent, received money from a depositor; it is immaterial that the act describes the offence as embezzlement. *Comm'th v. Rockefeller*, 163 P. S. 139; See *Comm'th v. Smith*, 11 Lanc. 350.

99. An indictment for fortune-telling need not set forth whose fortune the defendant is charged with telling. *Comm'th v. James*, Public Ledger, 30 January 1891.

100. Where an indictment charges that the prisoner did feloniously, wilfully and of his malice aforethought kill and murder, it is not necessary that the weapon used or the manner of killing should be averred, nor has the prisoner a right to demand a bill of particulars. *Comm'th v. Buccieri*, 153 P. S. 535.

101. A demand for a bill of particulars will only be granted to prevent a surprise or injustice and never to specify the evidence to be adduced by the commonwealth. *Comm'th v. Buccieri*, 153 P. S. 535.

102. An indictment for not keeping a turnpike road in good repair will be quashed where it does not set forth where and in what respect the turnpike was defective. *Comm'th v. Columbia & Washington Turnpike Co.*, 16 C. C. 35; s. c. 12 Lanc. 92.

103. Upon a demurrer to an indictment, the sole question is, if the commonwealth can satisfy a jury that the defendant did the acts charged, would he be guilty of a crime. *Comm'th v. Hunter*, 13 C. C. 573.

104. That an indictment must conform to the statute creating the offence, see note to *Maine v. Carville*, 14 Atlan. 942.

105. As to the sufficiency of an indictment charging a statutory offence, see note to *New Jersey v. American Forcible Powder Co.*, 11 Atlan. 127.

(e) Motion to quash.

106. A motion to quash an indictment and the reasons for the motion should be reduced to writing and filed. *Comm'th v. Williams*, 149 P. S. 54.

107. If a witness, whose name is not marked on the bill and who was not sworn before the court, testifies before the grand jury, the indictment will be quashed. *Comm'th v. Wilson*, 6 Kulp 40.

108. On a motion to quash, a grand juror is competent to prove that the grand jury, in making the presentment, did not act upon their own knowledge and observation, but upon the testimony adduced before them upon an indictment against another person. *Comm'th v. Green*, 126 P. S. 531; affirming s. c. 5 Lanc. 321.

109. Where the agent of a life insurance company was indicted for offering a rebate of insurance in violation of the act 7 May 1889 (Brightly's Purdon 514), the indictment should not be quashed for defects in matter of form which are amendable, nor on the ground that the act is unconstitutional. *Comm'th v. Morningstar*, 144 P. S. 103. See s. c. 12 C. C. 34.

110. Where an information charged the defendant with having offered a rebate of premium on a life policy to Jane Orr and the indictment charged him with having offered such rebate on a policy to be issued to Richard Orr; it was held, that the variance was fatal and the indictment would be quashed. *Comm'th v. Morningstar*, 12 C. C. 34. See s. c. 144 P. S. 103.

111. Where a paper containing instructions to the foreman of a grand jury as to whom and on what points different witnesses should be examined, was drawn by private counsel and sent out to the

grand jury by the district attorney, the indictment was quashed. *Comm'th v. Frey*, 11 C. C. 523.

112. An indictment will not be quashed because the justice who returned the case to court was foreman of the grand jury; nor because a brother-in-law of the complainant was one of the grand jury; nor because the bill was first returned "ignored" by mistake, and the next day the words "true bill" were interlined over the foreman's signature and so announced by the court. *Comm'th v. Haag*, 10 Lanc. 265.

113. A formal defect in an indictment must be taken advantage of on a motion to quash; it cannot be questioned on a motion in arrest of judgment. *Comm'th v. Stewart*, 12 C. C. 151.

114. An indictment will not be quashed upon extrinsic facts or evidence *dehors* the record; where the complaint returned by the magistrate contains sufficient information upon which to frame an indictment, an indictment will not be quashed. *Comm'th v. Frescoln*, 11 Lanc. 161.

115. An indictment for murder will not be quashed because the president judge was not actually present, when the names of jurymen were placed in the jury wheel, nor because the jury board occupied two months in the process of selecting jurors and putting their names in the wheel, nor because the jury wheel was not filled before the first term of court, where the defendant is tried after the wheel was actually filled, nor because the deputy sheriff who served the summons on the jurors was related to the murdered man, where the deputy testifies that he was not certain that he was related to the deceased, although he might have been a second cousin. *Comm'th v. Manfredi*, 162 P. S. 144.

116. Under the act 14 April 1834, sec. 87 (Brightly's Purdon 1107 note d), before the sheriff and jury commissioners can make any selection of jurors in any year, they must take the oath prescribed by that section; an indictment will be quashed found in the year 1893 where

the only oath on file was made 17 March, 1892. *Comm'th v. Rush*, 11 Lanc. 164.

117. An indictment will not be quashed because of the fact that the jury commissioners failed to file their oath in writing in the prothonotary's office and failed to provide for the proper custody of the jury wheel and key, nor because the clerk of the court failed to certify at the end of each session the names of the jurors who made default or were regularly excused. *Comm'th v. Yetter*, 1 York 135.

X. Grand juries.

118. An array of the grand jury will be set aside and an indictment quashed where the jury wheel was not sealed by the sheriff and the jury commissioners each with their separate seals, as required by the act 10 April 1867 (Brightly's Purdon 1107); so, the array will be set aside where the wheel is sealed by the sheriff in such a way that it may be opened without breaking the seal. *Comm'th v. Delamater*, 13 C. C. 152.

XI. Nolle prosequi.

119. Where several are indicted jointly a *nolle prosequi* may be entered as to all but one; where there is no misjoinder of defendants, a defendant who is put on trial cannot object to the entering of a *nolle prosequi* as to the other defendants. *Comm'th v. Casey*, 14 C. C. 389.

120. A charge of libel upon an individual in which the public welfare is not concerned may be discontinued by the parties by leave of court; where such a case had been settled without the consent of the district attorney the court remitted the forfeited recognizance. *Comm'th v. Place*, 7 Montg. 164.

XII. Pleading.

(a) Generally.

121. Where the defendant in an indictment refuses to plead, the court may

direct a plea of not guilty to be entered for him. *Comm'th v. Place*, 153 P. S. 314.

122. A municipal corporation is liable to indictment for neglecting to keep its streets in repair. If the defendant refuse to plead to the indictment the court will not direct a plea to be entered until there is an appearance; an appearance may be compelled by summons and distress infinite according to the usage of the common law. *Comm'th v. Lansford Borough*, 14 C. C. 376.

123. Where the jury was sworn before the defendant entered his plea and the error was discovered before the district attorney opened his case, and being asked to plead, the defendant moved to quash the bill, which motion was overruled, it was held not to be error for the defendant to then file his plea and the jury to be then resworn. *Comm'th v. Raffolowitz*, 8 Montg. 210.

124. A defendant can be held on two or more indictments at the same time for the same offence, and a pendency of one will not bar proceedings on the other; he has a right, however, to have the bill first found disposed of before pleading to the second, but if he contents himself with a motion to quash the second bill and is then tried and convicted thereunder, the pendency of the first bill is no ground for a new trial. *Comm'th v. Norris*, 9 Montg. 143.

125. To an indictment for selling liquor without a license a plea of *non volo contendere* is equivalent to a plea of guilty. *Comm'th v. Holstine*, 132 P. S. 357; s. c. 25 W. N. C. 423.

(b) Autrefois acquit.

126. A verdict of not guilty as to the first three counts and guilty on the fourth count, upon a bill containing but two counts, can be pleaded as *autrefois acquit* to a second indictment, a duplicate of the first. *Comm'th v. Weller*, 1 Northam. 271; s. c. Ibid. 270.

127. An acquittal upon an indictment charging the furnishing of liquors on

Sunday, cannot be pleaded as a former acquittal upon the trial of an indictment for furnishing it to men visibly affected with intoxicating drink; but the jury should be instructed that the evidence submitted of sales on Sunday should not be considered by them upon the second trial. *Altenburg v. Comm'th*, 126 P. S. 602.

128. A verdict of not guilty in a criminal prosecution for receiving stolen goods is no bar to a subsequent action by the owner against the defendant for the price of the same. *Rohm v. Borland*, 7 Atlan. 171.

129. The trial and acquittal for an assault and battery before a justice under the act of 1 May 1861 (Brightly's Purdon 1154) may be pleaded in bar of a subsequent indictment for aggravated assault and battery founded upon the same facts. *Comm'th v. Rosenkranz*, 1 Lack. Jur. 455.

130. A plea of twice in jeopardy in an indictment for rape will not be sustained where the record shows that the former indictment was for an act of fornication with the same woman-child under the age of sixteen years, but at a different date than that averred in the indictment for rape. *Comm'th v. Walker*, 15 C. C. 418.

131. For a brief of authorities on the subject of former jeopardy, see note to *Hilands v. Comm'th*, 6 Atlan. 269.

132. An acquittal of a felony is no bar to another indictment for the same act charging it as a misdemeanor; one who has been acquitted of murder may be convicted on an indictment for involuntary manslaughter. *Comm'th v. Skeels*, 13 C. C. 174.

133. After a defendant has been acquitted upon an indictment for a misdemeanor, he cannot be required to answer again. *Comm'th v. Hayward*, 4 Del. 569.

134. After a defendant has been tried and acquitted, upon an indictment charging a felony, the supreme court will not reverse the judgment and award a new venire; and this, though the acquittal be the result of error alleged to have been committed by the judge in

stating the law to the jury. *Comm'th v. Steimling*, 156 P. S. 400. See *Steimling v. Bower*, 156 P. S. 408.

135. Where a person has been discharged on *habeas corpus*, he cannot be again imprisoned for the same offence by any person or court whatsoever; but where such discharge has been secured by reason of the failure of the warrant to charge a criminal offence, he may be again arrested and held under a valid warrant founded on the same transaction. *Comm'th v. Little*, 33 W. N. C. 486.

136. The defendant's acquittal of a criminal charge based on the same transaction, cannot be interposed as a bar to a civil proceeding by a warrant of arrest. *Morch v. Raubitschek*, 159 P. S. 559.

(c) *Autrefois convict*.

137. If seven defendants be indicted for conspiracy, and three plead *autrefois convict*, one of the other four has no standing on appeal to complain that the court sustained a demurrer to such plea. *Comm'th v. Doughty*, 139 P. S. 383; s. c. 38 P. L. J. 261.

138. Where a bastard is begotten in one county and born in another, a conviction of fornication in the county where the child is begotten is a bar to an indictment for bastardy in the county where the child was born. *Comm'th v. Lloyd*, 141 P. S. 28.

139. A conviction and sentence for wife-desertion are a bar to a subsequent prosecution for desertion which took place before the former prosecution. *Comm'th v. Bowman*, 6 Kulp 176.

140. The costs may be imposed upon the prisoner although he be acquitted under a plea of *autrefois convict*. *Comm'th v. Huggins*, 12 C. C. 496.

XIV. Continuance.

141. The continuance of a trial for murder may properly be refused where the senior counsel for the prisoner was assigned more than a month before the trial and the junior counsel five days

before, and communication with their client was easy; an application for a continuance on such a ground is an appeal to the discretion of the court, and its exercise will not be reviewed by the supreme court except in a case of a very gross abuse. *Comm'th v. Buccieri*, 153 P. S. 535.

XV. Separate trials.

142. Where two persons are indicted for the same offence, it is entirely within the discretion of the court below to determine whether they shall be given separate trials; where one defendant is attempting to escape by throwing the blame on the other, there seems to be no reason why separate trials should be granted. *Comm'th v. Place*, 153 P. S. 314.

XVI. Trial.

(a) *Of the prosecution.*

143. A defendant may be tried at the same time for three distinct felonies. *Comm'th v. Dupes*, 14 C. C. 238.

144. After a trial and acquittal of the charge set forth in the information, the supreme court will not, on *certiorari*, at the instance of the commonwealth, inquire whether the court below erred in requiring the prosecution to elect as to which count in the indictment they would proceed on. *Comm'th v. Seeman*, 14 Atlan. 329; s. c. 12 Cent. 571.

145. Where a defendant is indicted for fornication and bastardy and statutory rape and is tried on the former charge, he cannot be called to plead to the indictment for rape even before the jury has rendered a verdict in the first case. The commonwealth having elected to proceed to trial for the minor offence, cannot prosecute an indictment for the felony which included it. See sec. 51 of the act 31 March 1860 (Brightly's Purdon 559). *Comm'th v. Arner*, 149 P. S. 35.

146. Upon an indictment against a prothonotary and his deputy which con-

tained four counts, two charging them with conspiracy to defraud the prosecutor by taking illegal fees, and two against the prothonotary alone for taking illegal fees from the prosecutor; it was held, that the commonwealth would not be compelled to elect on which count to proceed, but all would be tried at once. *Comm'th v. Hartman*, 10 Lanc. 33.

147. Upon a trial for murder, the manner in which the district attorney argued the case is for the consideration of the court below upon a motion for a new trial; it is not reviewable in the supreme court. *Comm'th v. Zappe*, 153 P. S. 498.

148. An order restricting counsel to two hours for argument in a murder case is within the discretion of the court. *Comm'th v. Buccieri*, 153 P. S. 532.

149. Upon the trial of an indictment for murder, where it appears that the prisoner's wife was present at the killing, it is not improper for the district attorney to comment upon the fact that the prisoner failed to call his wife as a witness for the defence. *Comm'th v. Weber*, 167 P. S. 153.

(b) Of the defendant.

150. Upon a trial for murder the record must show the presence of the defendant at every stage of the proceedings, but where he was actually present he is not entitled to a new trial because the clerk neglected to note his presence on the record, but the trial court may direct that the record be so amended as to conform to the actual facts of the case and show the presence of the prisoner. *Comm'th v. Silcox*, 161 P. S. 484.

151. A defendant is entitled to compulsory process to procure the attendance of his witnesses and the court will direct a subpoena to issue for that purpose and compel its service by the proper officer; and this, though the court has no power to direct the county to pay the costs of such service. *Comm'th v. Painton*, 8 Lanc. 376.

(c) Adjournment.

152. An adjournment of the trial from Saturday evening until Monday morning in a case of murder is within the discretion of the court. *Comm'th v. Buccieri*, 153 P. S. 535.

153. The adjournment of the court over Sunday during the progress of a criminal trial is no ground for a new trial. *Comm'th v. Painton*, 5 York 140.

(d) Of the charge.

154. It is error, in a criminal case, for the court to place before the jury the probable result of a verdict of guilty; and this, though the mistake be explicitly rectified. *Comm'th v. Switzer*, 134 P. S. 383; s. c. 26 W. N. C. 46.

155. Upon the trial of a defendant the court may refuse a point upon the question of identity, to the effect that it would be dangerous to convict upon certain facts recited, but not embracing the full evidence. *Comm'th v. McMahon*, 145 P. S. 413.

156. Where the trial judge fails to charge upon some point which counsel regards as essential, the judge's attention should be called to it before the jury leave the bar, in order that he may correct any omission. *Comm'th v. Zappe*, 153 P. S. 498.

157. Where the jury is properly instructed as to the nature of the charge, a verdict of guilty will not be reversed because the court read to the jury the wrong section of the statute under which the indictment was drawn. *Comm'th v. Matz*, 161 P. S. 207.

158. Upon a trial for murder, it is error to refuse to charge that if the jury believe the testimony of certain witnesses "that the deceased made declarations at the time of the shooting and subsequently thereto, that the shooting was accidental and contradictory of his dying declarations," such declarations are to be taken into consideration of the jury, and if true there should be an acquittal. *Comm'th v. Silcox*, 161 P. S. 484.

159. Upon a trial for murder it is not improper to charge that "while justice is to be tempered with mercy you will see to it in your deliberations that your compassion for the accused shall not work wrong and injustice to the commonwealth. The deceased was, and all citizens who survive him are, as much entitled to the protection of the law as the prisoner at the bar." *Comm'th v. Silcox*, 161 P. S. 484.

160. Upon the trial of an indictment for burglary, where it appeared that the defendant, with burglar's tools in his possession, went up the steps of a house where he had no legitimate business in the night-time, and upon his being interrupted by an officer, he left the steps and gave a false account of himself and his purposes; it was *held*, that it was proper to instruct the jury that he might be found guilty of an attempt to commit a burglary under the act 31 March 1860, sec. 50 (Brightly's Purdon 558). *Comm'th v. Clark*, 10 C. C. 444; s. c. 28 W. N. C. 540.

161. Where the facts are undisputed and are insufficient to establish that the offence has been committed by the defendant, it is the duty of the court to direct a verdict of not guilty. *Comm'th v. Ruddle*, 142 P. S. 144.

See APPEAL AND ERROR: PRACTICE.

(e) Verdict.

162. Upon an indictment containing a count charging a conspiracy to unlawfully confine a person in a lunatic asylum, and a second count charging the same offence but setting out the means, a verdict of guilty upon the first count is sufficient; it is not necessary for the jury to pass on the second count. *Comm'th v. Spink*, 137 P. S. 255; s. c. 27 W. N. C. 37.

163. The verdict as it is recorded is the verdict of the jury; the form prepared in the jury-room, though handed to the clerk, is not part of the record. *Comm'th v. Breyessee*, 160 P. S. 451.

164. Where a verdict of murder in the

first degree has been announced in due form and recorded and affirmatively responded to by the entire jury, the separate answers given thereafter, if not in harmony with the previously recorded verdict, may be treated as mere surplusage. *Comm'th v. Schmous*, 162 P. S. 326.
See PRACTICE, XXV.

XVII. Evidence.

(a) Testimony of deceased witness.

165. Upon a trial for murder, evidence is admissible of the testimony of a deceased witness taken before the committing magistrate in the presence of the accused and his counsel, the witness having been cross-examined by the counsel for the accused, although the defendant had waived a hearing. *Comm'th v. Keck*, 148 P. S. 639. See *Comm'th v. Cleary*, 148 P. S. 26.

(b) Examination of defendant.

166. A defendant in a criminal proceeding, who becomes a witness, may be discredited by showing his conviction and sentence in another state for a felony or any species of the *crimen falsi*. The record of such conviction is admissible, though it affect injuriously his case in other respects. *Comm'th v. Barry*, 8 C. C. 216.

167. Upon the question of the credibility of the defendant, it is the duty of the court to call the attention of the jury to his interest. *Comm'th v. Orr*, 138 P. S. 276; s. c. 38 P. L. J. 141.

168. Upon a trial for murder it is improper for the district attorney to attack the character of the prisoner not from the evidence but by inference from the fact that the prisoner had called no witnesses to testify to good character; such an impropriety, however, is no ground for reversal where no objection is made to it at the trial. *Comm'th v. Weber*, 167 P. S. 153.

169. Upon the trial of an indictment for murder where the prisoner on the

stand denied that he had made threats against the deceased; it was *held*, that the person in whose presence the alleged threats had been made could be called in rebuttal to contradict the prisoner. *Comm'th v. Weber*, 167 P. S. 153.

170. Where a defendant offers himself as a witness, and testifies, he waives the protection of the statute against unfavorable comment upon his silence. *Comm'th v. Wolfinger*, 7 Kulp 537.

171. After a defendant in a criminal case has testified in his own behalf, he may be cross-examined upon all questions affecting his interest and credibility; having answered that he believed in a God who would punish him for false swearing, he may be asked if he had not made inconsistent statements to other persons, and such persons may be called to establish the fact that he has made such statements. *Comm'th v. Wright*, 7 York 62.

172. That no inference is to be drawn against a defendant for failing to testify, see a brief of authorities in note to *Maine v. Banks*, 7 Atlan. 270.

173. Upon the subject of the cross-examination of the accused, see note to *Disque v. New Jersey*, 8 Atlan. 823.

(c) Threats.

174. Upon a trial for murder, it is not improper to admit in evidence threats made by the prisoner against the deceased eighteen months before the killing. *Comm'th v. Salyards*, 158 P. S. 501; affirming s. c. 13 C. C. 470.

175. Upon a trial for murder, it may be shown that the prisoner had made threats against the deceased, who was his mother, that he had frequently quarrelled with her, that on one occasion he had made an assault upon her, which had left its marks upon her person, and that a short time before her death he had sought but failed to obtain an insurance on her life without her knowledge. *Comm'th v. Crossmeyer*, 156 P. S. 304. See *Comm'th v. Weber*, 167 P. S. 153.

See CRIMINAL LAW, XXVI (h).

(d) Other offences.

176. Upon the trial of an indictment for incest with defendant's daughter, evidence is admissible for the commonwealth of prior illicit relations between the parties; and this, although such evidence discloses other indictable offences of a like nature which are barred by the statute of limitations. *Comm'th v. Bell*, 166 P. S. 405.

177. Where a defendant was convicted of arson mainly on his own confession; it was *held*, that a new trial would not be granted merely upon proof that defendant was in the habit of boasting that he had committed various crimes when such boasts were utterly false. *Comm'th v. Rose*, 1 York 125.

178. Upon the trial of an indictment where the proof of guilty knowledge or malicious intention constitutes an essential part of the crime, testimony is admissible of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent; and this, although they may constitute in law a distinct crime. Where a defendant was charged with wilfully and maliciously entering a store at night through a transom with the intent to commit a felony, evidence was admissible, that on a previous occasion the defendant took grain from the same store through the same transom. *Comm'th v. Shepherd*, 2 Dist. Rep. 345.

179. As to the admissibility of proof of other crimes by the prisoner, see note to *Clark v. New Jersey*, 4 Atlan. 330.

(e) Character.

180. Evidence of good character is not a mere make-weight thrown in to assist in the production of a reasonable doubt; it is of itself positive evidence which may create the reasonable doubt, and may, in a homicide case, have a bearing on the question of intent to take life. *Comm'th v. Cleary*, 135 P. S. 64; s. c. 26 W. N. C. 137. See s. c. 148 P. S. 26.

181. Evidence of previous good charac-

ter is such positive evidence as may in itself produce such a reasonable doubt as may result in acquittal. *Becker v. Comm'th*, 9 Atl. 510.

182. Upon a trial for murder, it is improper for the district attorney to attack the character of the prisoner not from the evidence but by inference from the fact that the prisoner had called no witnesses to testify to good character; such an impropriety, however, is no ground for reversal where no objection is made to it at the trial. *Comm'th v. Weber*, 167 P. S. 153.

(g) Reasonable doubt.

183. A reasonable doubt must fairly arise out of the evidence; it must be such as fairly strikes a conscientious mind and clouds the judgment. *Comm'th v. Brown*, 7 C. C. 640. See *Comm'th v. Cleary*, 135 P. S. 64.

184. That a "reasonable doubt" entitles a defendant to an acquittal, see note to *Vermont v. Meyer*, 3 Atl. 201. See *Becker v. Comm'th*, 9 Atl. 510; *Rudy v. Comm'th*, 128 P. S. 500.

(h) Alibi.

185. Evidence tending to establish an alibi, though not clear, may with other acts raise a reasonable doubt, to the benefit of which the prisoner is entitled. *Rudy v. Comm'th*, 128 P. S. 500.

186. Upon a trial for murder the burden is on the defendant to prove an alibi to the satisfaction of the jury; otherwise it is valueless as a substantive defence. *Ibid.*

187. Where in a prosecution for rape the defence was an alibi, it was proper for the court to charge that fixing the time of a transaction occurring several days before, within an hour or a half hour, without anything to fix the time, was uncertain. *Comm'th v. Orr*, 138 P. S. 276; s. c. 38 P. L. J. 141.

188. Where the defence of alibi is set up it is not error to instruct the jury that if it was false and manufactured, it should go for nothing and should have

some weight against the defendant. *Comm'th v. McMahon*, 145 P. S. 413.

189. Upon the trial of an indictment for arson where the commonwealth proved a confession by the defendant, that he committed the offence for which he was being tried and that he also set fire to another house; it was held, that the defendant could not contradict the latter portion of his confession by proof of an alibi at the time of the latter fire. *Comm'th v. Rose*, 1 York 125.

(i) Motive.

190. Evidence of defendant's motive to commit the crime is always admissible. *Comm'th v. Spink*, 27 W. N. C. 37.

191. If the defence be insanity or kleptomania, evidence is admissible in rebuttal to show a motive; that defendant had been in the habit of making presents of similar articles. *Comm'th v. Fritch*, 9 C. C. 164.

See CRIMINAL LAW, XXVI. (i).

(k) Flight.

192. Upon the trial of an indictment the flight of the defendant immediately after the commission of the offence, is a circumstance which may always be submitted for the consideration of the jury. *Comm'th v. McMahon*, 145 P. S. 413.

XVIII. New trials.

193. The supreme court will not review the action of the court below in refusing an attachment to compel the taking of certain testimony offered on a motion for a new trial. *Comm'th v. Bucieri*, 153 P. S. 535.

194. The granting of new trial in criminal cases does not depend upon the whim or caprice of the judge, but upon well-established principles of law which are as applicable and controlling in criminal as in civil cases. *Comm'th v. Casey*, 14 C. C. 389.

195. Where the district attorney, upon the trial of an indictment for murder, makes statements as to the defendant's

character which are not warranted by the evidence and which tend to prejudice the jury, the defendant will be granted a new trial. *Comm'th v. Brunner*, 11 C. C. 428.

196. A keeper in an insane asylum who was charged with assault and battery and aggravated assault and battery on a patient and convicted of the lesser offence, was granted a new trial on the ground that the evidence justified either a verdict of guilty of the greater offence or an entire acquittal. *Comm'th v. Williamson*, 46 L. I. 281.

197. Upon a conviction for burglary the court refused a new trial where the facts were submitted to the jury and the court was satisfied with the verdict. *Comm'th v. Davage*, 7 Kulp 524.

198. Where the judge who tried the cause died before the argument of the motion for a new trial, the court granted a new trial upon the expressed opinion of the deceased judge in regard to the matter. *Comm'th v. Herman*, 5 York 43.

199. Upon a conviction of murder in the first degree, the drinking of whiskey by members of the jury pending the trial is a ground for a new trial. *Comm'th v. Dimey*, 36 P. L. J. 335.

200. The sending of a note to his family by a juror, that he will not be home, is not sufficient ground for a new trial, where the defendant has been convicted of murder in the first degree. *Ibid*.

201. Where, upon the trial of an indictment for larceny and while the trial was going on, the prosecutor engaged in conversation during the noon recess with several of the jurors sitting on a panel, the court granted a new trial in the absence of explanation as to what was the subject of the talk. *Comm'th v. Martin*, 16 C. C. 140.

202. A new trial was granted where it appeared that one of the witnesses for the commonwealth had spoken to one of the jurors and remarked that he could have told a good deal more about the defendant's character but was afraid to. *Comm'th v. Stokes*, 3 York 220. See *Comm'th v. Stokes*, 4 York 187.

203. A new trial will not be granted on the ground of an alleged disqualification of a juror, where he testifies under oath that he understood what the witnesses testified to and what the court said in charge. *Comm'th v. Stokes*, 4 York 187.

204. A new trial will not be granted on the ground of alleged disqualification of some of the jurors, where the defendant fails to prove that such disqualifications were unknown to him or his counsel during the trial. *Comm'th v. Stokes*, 4 York 187.

205. The adjournment of the court over Sunday during the progress of a criminal trial is no ground for a new trial. *Comm'th v. Painton*, 5 York 140.

206. Upon a trial for rape where the court charged that the girl's drawers were bloody and soiled and there was evidence that the drawers were soiled but none that they were bloody; it was held not to be a sufficient ground for a new trial. *Comm'th v. Byerts*, 5 York 13.

207. Upon a trial for rape where the woman's testimony is uncorroborated and the defendant denies the offence, the jury must determine between them, and a new trial will not be granted because there was no corroborative testimony; so, a new trial will not be granted for after-discovered evidence which only impeaches the commonwealth's witness and would not probably produce a different result. *Comm'th v. Wire*, 5 York 11; *Comm'th v. Byerts*, 5 York 13.

208. A new trial will not be granted in a criminal case for the purpose of admitting after-discovered evidence which is merely cumulative. *Comm'th v. Rose*, 1 York 125.

209. A new trial will not be granted for after-discovered evidence unless such evidence could not have been produced at the trial by the exercise of reasonable diligence, and it is not merely cumulative but goes to the merits of the case and would probably produce a different result in another trial. *Comm'th v. Miller*, 5 York 171.

210. After-discovered testimony, to be a ground for a new trial, must go to the merits of the case and not merely affect the credibility of one of the witnesses. *Comm'th v. Bellis*, 1 Northam. 46.

211. Where a police officer was convicted of homicide a new trial was granted upon the testimony of intelligent, reputable and disinterested witnesses, tending to show that the defendant acted in self-defence while in the lawful performance of his duty. *Comm'th v. Weathers*, 6 Kulp 486.

212. Upon a conviction for conspiracy, a new trial was refused on the ground of after-discovered testimony, where the latter was cumulative rather than material, and simply tended to contradict and impeach the evidence given by the prosecutor. *Comm'th v. Brown*, 7 Kulp 103.

213. A new trial will not be granted for after-discovered testimony which merely tends to contradict and impeach the principal witness for the commonwealth but not to disprove the essential facts upon which the defendant was convicted. *Comm'th v. Robins*, 7 Kulp 108.

214. After-discovered evidence, to warrant a new trial, must not go merely to the impeachment of a witness nor must it be merely cumulative, but if it prove a distinct and material fact, it may be laid as a ground for a new trial although it have the additional effect of impeaching the testimony of the adverse party. *Comm'th v. Yot Sing*, 7 Kulp 349.

XIX. Arrest of judgment.

215. Upon a verdict of guilty upon a count not contained in the indictment, judgment will be arrested. *Comm'th v. Weller*, 1 Northam 270.

216. Where an indictment charges in one count fornication and bastardy, and in a second count incestuous fornication and bastardy, the judgment will not be arrested because the evidence showed that the prisoner was a married man and should have been indicted for adultery. *Comm'th v. Kammerdiner*, 165 P. S. 222.

217. Where an indictment charged the defendant with the robbery of a promissory note commonly called a bank-note, and the evidence was, that the prisoner robbed the prosecutor of money or of so many dollars; it was *held*, that the variance between the indictment and proof was fatal, and judgment upon a verdict of guilty was arrested. *Comm'th v. McManiman*, 15 C. C. 495.

XX. Sentence.

218. A plea of insanity offered at bar when the prisoner is called for sentence, is properly rejected when there is no corroborative affidavit accompanying the plea, nor any statement made which might move the court to further inquiries. *Comm'th v. Buccieri*, 153 P. S. 535.

219. A defendant who is convicted by a justice for cruelty to animals cannot be sentenced in his absence. *Davis v. Comm'th*, 13 C. C. 545.

220. A sentence to pay must say to whom the fine is payable. *Davis v. Comm'th*, 13 C. C. 545.

221. Upon a conviction before a justice upon a charge of cruelty to animals, a sentence to pay a fine of ten dollars and to be committed to the county jail until paid cannot be pronounced in the absence of the defendant; the sentence in such a case must show to whom the fine was to be paid. *Grim v. Reinbold*, 3 Dist. Rep. 668.

222. Where it is alleged that the defendant has previously been convicted of a similar offence, in order to sentence him to double the time prescribed, under the act 31 March 1860, sec. 182 (*Brightly's Purdon* 560), a suggestion of the former conviction and imprisonment may be made and filed by the district attorney, when, if the defendant admits his identity, double punishment may be imposed. Cases reviewed and different modes of procedure considered by Arnold, J. *Comm'th v. Hagan*, 48 L. I. 196; s. c. 10 C. C. 22.

223. The word "month" employed to

measure time in a sentence of imprisonment, means a lunar month of twenty-eight days. *Comm'th v. Stanley*, 12 C. C. 543.

224. In a sentence of imprisonment the word "month" means a lunar month of twenty-eight days; when used in a statute or transactions between individuals, it means a calendar month. *Comm'th v. Martin*, 2 Dist. Rep. 330.

225. If one count in an indictment will sustain the sentence, it will not be reversed. *Comm'th v. Prickett*, 132 P. S. 371; s. c. 25 W. N. C. 422.

226. The supreme court will not discharge on *habeas corpus* a convict, where the record shows that the ground of his alleged illegal detention arose from the slip or misprision of the clerk in recording his sentence; in such case the petition will be dismissed without prejudice to the petitioner's right to apply to the court in which he was convicted, and the record will be remitted with leave to that court to amend the same as justice may require. *Comm'th v. Wright*, 126 P. S. 464.

XXI. Execution.

227. A person in confinement for costs is entitled to his discharge after thirty days' imprisonment; and this, without any further proceeding. *Comm'th v. Lewis*, 1 Lack. Jur. 213. See *Comm'th v. Ross*, *Ibid.* 217.

See *INSOLVENCY*.

XXII. Costs.

(a) Control of the court.

228. If the grand jury impose the costs upon the prosecutor, the court will not set it aside unless it be clearly shown that the grand jury has erred as to who is the prosecutor, or has imposed the costs on a public officer in the discharge of his duty. *Comm'th v. Sharp*, 7 Lanc. 58.

229. The power of the court to set aside a verdict against the prosecutor for costs was doubted, and the case of *Guffy v. Comm'th*, 2 Grant 66, commented upon in *Comm'th v. Showers*, 7 C. C. 179.

230. The imposition of costs upon the prosecutor by the grand jury will not be set aside where the court is not in possession of all the facts as they appeared before the jury. *Comm'th v. Huddell*, 10 C. C. 548.

231. Where a prosecution appears to have been instituted by an officer in good faith, the court will set aside so much of the verdict as imposes cost upon him. *Comm'th v. Hunter*, 11 C. C. 637.

232. Where, upon the trial of a misdemeanor, the jury designated one of the witnesses as the prosecutor and imposed one-half the costs upon him; it was *held*, that such action was not justified by law, and that the court might set aside so much of the verdict as imposed the costs upon the witness. *Comm'th v. Hayward*, 4 Del. 569.

233. The court has power to supervise the verdict so far as it relates to costs, and, if the facts warrant it, may set aside that part of it which places the costs on the prosecutor. *Comm'th v. Yeager*, 3 Dist. Rep. 237.

234. The court will interfere with the finding of the grand jury imposing the costs upon the prosecutor where such imposition involves outrageous oppression. *Comm'th v. Witmer*, 6 Kulp 304.

235. The court has no power to interfere with a finding of a grand jury ignoring a bill and directing the prosecutor to pay the costs. *Comm'th v. McNair*, 3 York 216.

236. Where complaints have been duplicated by the magistrate or by the clerk of the court, all costs on the unnecessary indictments will be disallowed by the court on inspection of the indictment. *In re Office Costs*, 11 Lanc. 28. See s. c. 11 Lanc. 121; *Comm'th v. Frescoln*, 11 Lanc. 161; *Comm'th v. Sollenberger*, 11 Lanc. 235.

237. A judge of the oyer and terminer and quarter sessions cannot, upon his own motion, and without notice or hearing, make an adjudication of the office costs in certain cases at the previous session of

the court and file it "subject to the exception in writing by the respective officers concerned and hearing upon the same." *Franklin's Appeal*, 163 P. S. 1.

238. The act 31 March 1860, sec. 59 (Brightly's Purdon 796), providing that the supreme court upon error in indictments for murder shall make all proper orders as to paper-books, has been superseded by the act 15 February 1870 (Brightly's Purdon 797); since the passage of that act the supreme court has no longer any duty to perform as to the printing of paper-books, and has no authority to make an order to compel the county to pay for them. *Comm'th v. Buccieri*, 153 P. S. 570.

239. The court will not interfere with an imposition of the costs upon the prosecutor by the grand jury, notwithstanding a prior commitment of the defendant on the same charge. *Comm'th v. Gilgallon*, 1 Lack. L. N. 172.

(b) Liability of the prosecutor and others.

240. If the offence of shooting on Sunday be proved, though not properly charged in the indictment, the jury may, on acquitting, impose the costs on the prosecutor. *Comm'th v. Neely*, 4 Del. 7; s. c. 6 Lanc. 194.

241. If the grand jury do not permit the prosecutor to testify fully, an imposition of costs upon him will be stricken off. *Comm'th v. Stiffel*, 7 Lanc. 193.

242. The costs should not be put upon the prosecutor where the evidence shows that there was a legal offence committed though technically not set forth in the indictment. *Comm'th v. Hunter*, 11 C. C. 637.

243. A verdict imposing the costs on the prosecutor should name the prosecutor; otherwise it will be set aside. *Comm'th v. Lehrsch*, 14 C. C. 496.

244. The jury has no right to put the costs upon the prosecutor where the evidence shows that there was a legal offence committed although technically not set forth in the indictment. *Comm'th v. Bannon*, 9 Lanc. 155.

245. Where the prosecutor is a public officer and has proceeded in the discharge of his duty according to law and the defendant is acquitted, the jury has no right to impose the costs of prosecution upon the prosecutor. *Comm'th v. Reisinger*, 1 York 8.

246. The court will not interfere with the jury putting the costs on a person other than the one whose name is endorsed on the bill as prosecutor, if the evidence supports such a finding. *Comm'th v. Murphy*, 4 Del. 229.

247. A grand jury has no power to place costs on a person who is not marked on the indictment as the prosecutor and who has not appeared before them; before such a person can be condemned to pay costs, he should be notified to appear and be given an opportunity to be heard in his own behalf. *Comm'th v. Madden*, 11 C. C. 459; s. c. 9 Lanc. 141.

248. Upon an indictment for selling liquor without a license, the court refused to disturb a verdict putting the costs upon a person who had given the information to the constable. *Comm'th v. Weber*, 7 Lanc. 172. See *Comm'th v. Stiffel*, *Ibid.* 193.

249. Upon an indictment for selling liquor to minors and on Sundays, the costs should not be put upon the informer where it appears that the information was honestly given to a constable who was induced to return the offender to court, but the latter was afterwards acquitted; but this rule does not apply where false information was given maliciously. *Comm'th v. Hoopman*, 1 York 20.

250. An imposition of costs on the justice by the grand jury was set aside by the court. *Comm'th v. Shaub*, 7 Lanc. 189.

251. Where a defendant was indicted by the grand jury and escaped and the sheriff made an ineffectual attempt to arrest him and he was subsequently arrested by a constable and a *nolle pros.* was entered on condition that he pay the costs; it was held, that he was not

liable for the sheriff's costs, and it was further held, that the costs upon the exceptions to the sheriff's bill should be paid by the sheriff. *Comm'th v. Cane*, 12 C. C. 11.

(c) Liability of the defendant.

252. The costs may be imposed upon the prisoner although he be acquitted under a plea of *autrefois convict*. *Comm'th v. Huggins*, 12 C. C. 496.

253. Upon the trial of an indictment against a banker for receiving money at a time when he knows that he is insolvent, the jury upon acquitting the defendant may impose a part of the costs upon him. *Comm'th v. Schall*, 12 C. C. 554.

254. Where the defendants are acquitted but the costs are imposed upon them by the verdict, such imposition will be sustained where it appears that they are either in some fault or have not sufficiently explained away the charge or are shielding the guilty parties. *Comm'th v. Bishop*, 14 C. C. 404.

255. Where a defendant is acquitted but ordered to pay the costs, a verdict as to costs will not be set aside merely because a third party after the trial testifies that he committed the offence. *Comm'th v. Wagner*, 1 York 24.

256. Where a complaint for surety of the peace is returned and at the same time the same defendant is held for assault and battery, the lesser crime merges into the greater and the surety of peace case will be dismissed and will not carry costs. *Comm'th v. Rice*, 3 Dist. Rep. 259.

257. Where the officers of a borough are convicted of maintaining a nuisance and sentenced to pay the costs and abate the nuisance, such of the defendants as are out of office at the time of sentence are liable for the costs; and this, although they are not in a position to comply with the rest of the sentence. *Comm'th v. Bredin*, 165 P. S. 224.

(d) Liability of the county.

258. If the defendant in an assault and battery dies after a true bill but before trial, the county is not liable for the costs of prosecution. *Comm'th v. Gallagher*, 5 Kulp 532.

259. If the grand jury ignore a bill for a misdemeanor and put the costs on the prosecutor, the county is not liable until the prosecutor has been sentenced. *Donohue v. Luzerne County*, 6 Lanc. 138; s. c. 5 Kulp 220.

260. If the defendant in a misdemeanor be acquitted and three-fourths of the costs be put on the defendant and one-fourth on the prosecutor, and the defendant be sentenced and discharged under the insolvent laws, the imposition upon the prosecutor being set aside, the county is liable to the commonwealth's witnesses for three-fourths of their fees. *Piatt v. Luzerne County*, 5 Kulp 517.

261. A railroad policeman appointed under the act 27 February 1865 (Brightly's Purdon 1696), or a county detective, is not entitled to constable's costs in a criminal prosecution. He may receive, however, compensation from the county for the service of the subpoenas. *Hamlin v. Berks County*, 8 C. C. 462; *Wunch v. Berks County*, Ibid. 465.

262. The county is not liable for the costs of a detective appointed under the act of 23 May 1887 (Brightly's Purdon 677), in cases in which he lodged information and served warrants and the defendants were discharged by the justice. But he may receive compensation from the county for serving the subpoenas. *Kerschner v. Berks County*, 8 C. C. 347.

263. A county is not liable to a justice for fees for taking the recognizance of a prosecutor and defendant for a hearing on a criminal charge at a future day, at which hearing the defendant is discharged. *Young v. Northampton County*, 11 C. C. 508.

264. When an incorrigible child is committed to the house of refuge the county is liable for the fees of the justice

and constable, but not for those of the district attorney or the clerk of the court. *Comm'th v. Patton*, 5 Del. 290.

265. Indictments for receiving stolen goods being triable in the oyer and terminer while indictments for larceny are triable in the quarter sessions, the district attorney may try a single offender upon both indictments in the higher court; and this, although his fees thereby are largely increased. And in such case the clerk is entitled to the fees provided by law for the court in which the record is found. *Comm'th v. Moore*, 4 Del. 617.

266. Upon a prosecution of two or more persons for an indictable offence, there will be allowed but one fee each to the district attorney, clerk and sheriff, one jury fee, one justice's bill, one constable's bill and one fee for taxation of costs. *Comm'th v. McArdle*, 3 Dist. Rep. 258. *Comm'th v. Rice*, 3 Dist. Rep. 259.

267. For the liability of the county for alderman's and constable's costs in cases of commitment for drunken and disorderly conduct, see *Dern v. Lancaster County*, 6 Lanc. 305.

268. A defendant is entitled to compulsory process to procure the attendance of his witnesses, and the court will direct a subpoena to issue for that purpose and compel its service by the proper officer; and this, though the court has no power to direct the county to pay the costs of such service. *Comm'th v. Painton*, 8 Lanc. 376.

269. Although a prisoner is entitled to compulsory process to compel the attendance of his witnesses, there is no liability on the part of the county for either his witness fees or the officer's costs; the witness must attend at his own expense and the officer must execute the process at his own cost. *Comm'th v. Buccieri*, 153 P. S. 570.

270. The county is not liable for the alderman's costs where the defendant is charged with deserting his wife and is discharged; wife-desertion is not an in-

dictable offence. *Sepp v. Lehigh County*, 2 Northam. 337; s. c. 4 Del. 391.

271. Where a prisoner is convicted of aggravated assault and battery and sentenced to fine and imprisonment, and such sentence is vacated and the prisoner discharged on his own recognizance, the county is liable for the costs. *McSweeney v. Allegheny County*, 42 P. L. J. 96.

272. A justice has no jurisdiction of an action against a county to enforce the payment of costs in a criminal prosecution for which the county is claimed to be liable; the proper remedy is by mandamus. *Walton v. Lerch*, 2 Northam. 388.

273. Where, on the removal of a criminal case to the supreme court, an application is made under the act 19 May 1887 (Brightly's Purdon 565), for the payment by the county of the district attorney's expenses and compensation; it is the duty of the court below to fix the amount of the same. *Comm'th v. Morningstar*, 144 P. S. 103. See s. c. 12 C. C. 34.

274. Under the act 19 May 1887 (Brightly's Purdon 564), where the defendant is convicted and a new trial refused but sentence is indefinitely suspended, the county becomes at once liable for the costs. *Wright v. Donaldson*, 158 P. S. 88.

275. Under the act 19 May 1887 (Brightly's Purdon 564), where an indictment for a misdemeanor is ignored and the prosecutor is ordered to pay the costs, the county is immediately liable without any formal sentence being passed upon the prosecutor by the court. The county is primarily liable to pay the costs in the first instance and then reimburse its treasury by the diligence of its officers against the parties ultimately liable. *Allen v. Delaware County*, 161 P. S. 550; affirming s. c. 5 Del. 319.

276. Under the act 19 May 1887 (Brightly's Purdon 564), the county is not liable for the costs when the jury divides the costs of prosecution between the prosecutor and defendant. *Comm'th v. Bishoff*, 13 C. C. 503.

277. Under the act 19 May 1887 (Brightly's Purdon 564), a verdict of guilty alone is not sufficient to fix the liability of a county for witness fees; a county is liable only for the cost of such witnesses as the district attorney shall certify were subpoenaed by his order and were in attendance and necessary to the trial of the case. *Rice v. Schuylkill County*, 12 C. C. 541.

278. Where an indictment for a misdemeanor has been quashed, the county is not liable, under the act 19 May 1887 (Brightly's Purdon 564), for the costs of a witness subpoenaed by the commonwealth. *Ogden v. Greene County*, 3 Dist. Rep. 572.

279. Under the act 19 May 1887 (Brightly's Purdon 901), witnesses are entitled to mileage per a railroad route usually travelled; and this, although such route be fifty-four miles longer than a direct stage route. *Comm'th v. Heiges*, 8 York 134.

280. Where a bill of indictment is quashed and subsequently a new bill is drawn on the same information upon which the defendant is convicted and sentenced, the county is liable for the costs on the first bill. *Richards v. Clearfield County*, 16 C. C. 227.

281. Where a true bill has been found by the grand jury and a *nolle prosequi* has been entered by the district attorney with the leave of court, the county is not liable for the costs. *Williams v. Luzerne County*, 8 Kulp 15.

(e) Witness fees.

282. The recorder of deeds is not an officer of the court and cannot be compelled to attend as a witness unless legally subpoenaed; he is entitled to full fees and mileage when called as a witness in a criminal case. *Comm'th v. McArdle*, 3 Dist. Rep. 258.

283. A witness committed in default of bail in a case of felony to appear and testify, will not be allowed witness fees for

the time of his imprisonment. *Slucko v. Luzerne County*, 7 Kulp 526.

See Costs.

(g) Constables' fees.

284. A constable who serves subpoenas for the commonwealth in a criminal case is entitled to compensation as provided by the sheriff's fee bill 2 April 1868 (Brightly's Purdon 899), to wit, fifteen cents for each service and six cents for each mile circular, and not at the rate of fifty cents for each service and ten cents per mile circular, as fixed by the constable's fee bill 23 May 1893 (Brightly's Purdon 886). *Meagher v. Clearfield County*, 15 C. C. 420.

285. Constables cannot charge for mileage not actually travelled in serving warrants and subpoenas sent to them or returned by mail; if they do so, they make themselves liable to prosecution for extortion. *In re Office Costs*, 11 Lanc. 28. See s. c. 11 Lanc. 121; *Comm'th v. Frescoln*, 11 Lanc. 161; *Comm'th v. Sollenberger*, 11 Lanc. 235.

286. Constables are entitled to a fee of fifty cents for every witness upon whom a subpoena is served; and this, whether the names are upon separate subpoenas or on one. *Comm'th v. Moore*, 4 Del. 617.

See CONSTABLES: Costs.

XXIII. Bills of particulars.

287. Where an indictment charges that the prisoner did feloniously, wilfully, and of his malice aforethought, kill and murder, it is not necessary that the weapon used or the manner of killing should be averred, nor has the prisoner a right to demand a bill of particulars. *Comm'th v. Buccieri*, 153 P. S. 535.

288. A demand for a bill of particulars will only be granted to prevent a surprise or injustice and never to specify the evidence to be adduced by the commonwealth. *Comm'th v. Buccieri*, 153 P. S. 535.

289. A bill of particulars in support of an indictment is not a matter of right;

the commonwealth will not be compelled to disclose the residences of her witnesses. *Comm'th v. Applegate*, 1 Dist. Rep. 127.

XXIV. Pardon.

290. Upon a pardon, on condition that the defendant leave the commonwealth and forever remain away therefrom, the condition is void. *Comm'th v. Flavell*, Vaux's Dec. 157; overruled in *Flavell's Case*, 8 W. & S. 197.

XXV. Treason.

291. Aliens domiciled within the state owe temporary allegiance to it and are amenable for treason. *Comm'th v. O'Donnell*, 12 C. C. 97.

292. The members of a mere mob collected upon the impulse of the moment without any definite object beyond the gratification of sudden passion do not commit treason; and this, although the mob destroy property and take life. But when a large number of men armed and organized engage in the common purpose to defy the law, it is levying of war against the state and the offence is treason, especially if the functions of government are usurped in the locality and the process of the commonwealth and the lawful acts of its officers resisted and unlawful arrests made. *Comm'th v. O'Donnell*, 12 C. C. 97. See s. c. 10 Lanc. 25.

XXVI. Homicide.

(a) Solicitation to commit murder.

293. The solicitation to commit murder, accompanied by the offer of money as a reward for so doing, is indictable at common law. *Comm'th v. Randolph*, 146 P. S. 83.

(b) Murder in the first degree.

294. If the character of the wounds indicate a purpose to take life, they indicate the commission of a premeditated

murder, which is murder in the first degree. *McCabe v. Comm'th*, 8 Atlan. 45.

295. One who takes life with a deadly weapon (a sashweight) with such a manifest design, and with sufficient time to deliberate and form a conscious purpose, without sufficient extenuation, is guilty of murder in the first degree. *Killer v. Comm'th*, 124 P. S. 92; affirming *Comm'th v. Killer*, 45 L. I. 216.

296. Upon an indictment for murder committed during a riot, where the evidence showed a violent attack made by all the defendants, that one blow was first struck by the defendant, Toth, which blow was intended to kill, and afterwards the deceased being disabled was held, by one of the other defendants, while the third one beat him, and after this, while he was on his knees, he was then beaten by the second defendant; it was *held*, that the evidence justified the jury in believing that there was a deadly intent in the minds of all the defendants. *Comm'th v. Toth*, 145 P. S. 308.

297. In defining murder in the first degree, it is not erroneous to charge "when not committed in the perpetration of or attempt to perpetrate any one of the felonies named in the statute, the intention to kill is the essence of murder in the first degree." *Comm'th v. Cleary*, 148 P. S. 26.

298. Where it was claimed that the killing was done in sudden passion and the evidence showed that the wounds inflicted on the deceased were six in number, one six or eight inches deep through the abdominal cavity to the backbone, one upon the head, one on the arm, one on the hand and two on the buttocks; it was *held*, that the number and character of the wounds were sufficient to sustain a verdict of murder in the first degree. *Comm'th v. Straesser*, 153 P. S. 451.

299. Where the whole time that elapsed between the first indication of the prisoner's purpose and the giving of the fatal wound was probably not longer

than from ten to twenty seconds; it was *held* not to be error to charge that if for any period of time, no matter how short, there was, on the part of the accused, a conscious design and determination to kill, the killing was murder in the first degree. *Comm'th v. Buccieri*, 153 P. S. 535.

300. Where it appeared that the deceased, who was a policeman, was killed by a shot from a pistol, and that the prisoner had made threats that he would shoot the deceased if he followed him, and on the night of the shooting the deceased was seen to follow the prisoner into an alley and almost immediately afterwards a shot was fired, and the prisoner was seen running away, and it further appeared that the prisoner disguised himself and immediately left the town and was subsequently captured in a neighboring state; it was *held*, that the evidence was sufficient to sustain a verdict of murder in the first degree. *Comm'th v. Salyards*, 158 P. S. 501; affirming s. c. 13 C. C. 470.

301. Where a deliberate purpose is formed to kill one person and the defendant fires a pistol at him for that purpose, the fact that the ball misses the intended victim and kills another person does not relieve the murderer. *Comm'th v. Breysee*, 160 P. S. 451.

302. Where it appeared that the prisoner had been at the house of the murdered man in the evening, that he stayed late and until told he must go, and that he then left unwillingly, if not angry, that he went home and got a revolver and returned about two o'clock in the morning, entered by a window, went upstairs, put out a light that was burning there and was grappled by decedent, who was undressed and unarmed, and that after a short struggle he shot the deceased, holding the pistol so close to his breast that the powder blackened the skin; it was *held*, that the verdict of murder in the first degree would be sustained, and that it was not improper for the court to call the attention of the jury to the fact

that if the prisoner entered the house for the purpose of committing a felony, and if the killing was done in perpetration of, or attempt to, perpetrate a felony, the crime was murder in the first degree. *Comm'th v. Manferdi*, 162 P. S. 144.

303. Where it appeared that the prisoner, who was the proprietor of a drinking saloon, became engaged in a quarrel with the deceased, and after ordering him to leave the saloon threatened to strike him with a club, and that the deceased with his friend left the saloon, but the latter returned and asked for their hats; that the prisoner crossed the room, picked up a heavy iron bar four feet long, and opening the door and stepping into the alley, raised the bar with both hands and struck a blow which fractured the deceased's skull and caused his death; it was *held*, that a conviction of voluntary manslaughter would be sustained, and that under the testimony there might well have been a conviction of murder in the first degree. *Comm'th v. McLaughlin*, 163 P. S. 651.

304. Where the evidence tended to show that the prisoner lived with the deceased, who was not his wife, that he made frequent threats to kill her, that he had previously struck and beaten her, that on the evening of the killing he had bought and given her liquor, but later in the evening he left his house and went into another state, where he remained until he was arrested, and there were plainly visible thumb and finger marks on the neck of the deceased which warranted experts in expressing an opinion that her death was due to strangulation; it was *held*, that the evidence was sufficient to sustain a verdict of murder in the first degree. *Comm'th v. Bell*, 164 P. S. 517.

305. Where it appeared that the prisoner procured a revolver and bought cartridges, and having loaded the weapon, went to a market house where his wife was at a stall, where he shot her three times and killed her, and there was evidence of previous threats to kill, and that he said immediately after the shooting,

that he knew he shot his wife and that he intended to do it long ago, and when informed that she was dead, he said he was glad of it; it was *held*, that the evidence was sufficient to sustain a verdict of murder in the first degree. *Comm'th v. Werling*, 164 P. S. 559.

306. Upon a trial for murder, where it appeared that the prisoner threatened the deceased and shot over her head, and that she then swore a warrant out for his arrest, that he then lay in wait for her and shot her in the back at short range, and when she cried out "I am shot" he again shot her in the back and afterwards fled to another state, where he was arrested; it was *held*, that a finding of murder in the first degree would be sustained. *Comm'th v. Cook*, 166 P. S. 193.

307. Where it appeared from the evidence that the prisoner had made threats against the deceased, his father-in-law, that subsequently he met his wife, from whom he had been separated, and his father-in-law for the purpose of dividing some household furniture, that prior to the meeting he bought a revolver and cartridges and loaded the revolver, that at the meeting, which was in a cellar, the deceased after some words started to leave the cellar, when the prisoner drew his revolver and aimed it at the deceased and snapped it and again pulled the trigger and shot the deceased in the arm, and then fired two other shots, one piercing the brain and the other his arm, and the prisoner then snapped the revolver at his wife and ran away; it was *held*, that a judgment on a verdict of murder in the first degree would be sustained. *Comm'th v. Weber*, 167 P. S. 153.

(c) **Murder in the second degree.**

308. It is not erroneous to charge that murder in the second degree is where a felonious and malicious homicide is committed, but without any specific attempt to take life. *Comm'th v. Cleary*, 148 P. S. 26.

309. Where the evidence proves beyond

a reasonable doubt that the defendant in cool blood, not in the heat of passion and not demented by gross intoxication, shot the deceased and thereby inflicted upon his leg a wound, which wound accelerated or caused blood poison to set in and caused the death of the deceased five days after the shooting, the defendant may be found guilty of murder in the second degree. *Comm'th v. Silcox*, 161 P. S. 484.

310. The degrees of murder and manslaughter are defined and distinguished in *Comm'th v. Brown*, 7 C. C. 640.

311. The killing being established, the burden is on the commonwealth to raise the crime above, and on the defendant to lower it below, murder in the second degree. *Ibid*.

(d) **Manslaughter.**

312. A count in an indictment for manslaughter charging the killing of two persons is bad. *Comm'th v. Starr*, 36 P. L. J. 334.

313. Sufficiency of an indictment under the act of 22 March 1865 (Brightly's Purdon 534), against persons in the employ of a railroad company whose refusal or neglect to obey the rules of the company has resulted in death. *Ibid*.

314. A railroad employee is, under the act of 22 March 1865 (Brightly's Purdon 533), guilty of criminal negligence, if his negligence, concurring with the negligence of any other employee, contributed in any measurable degree to the accident. *Comm'th v. Cook*, 8 C. C. 486.

315. Where the evidence establishes beyond a reasonable doubt, that the defendant upon a sudden quarrel or provocation, and without malice, shot and wounded the deceased, and that such wounding caused blood poisoning to set in, from which the deceased died the fifth day after the shooting, the defendant may be convicted of manslaughter. *Comm'th v. Silcox*, 161 P. S. 484. See *Comm'th v. McLaughlin*, 163 P. S. 651.

(e) Indictment.

316. Where an indictment charges that the prisoner did feloniously, wilfully and of his malice aforethought, kill and murder, it is not necessary that the weapon used or the manner of killing should be averred, nor has the prisoner a right to demand a bill of particulars; the latter will only be granted to prevent a surprise or injustice, and never to specify the evidence to be adduced by the commonwealth. *Comm'th v. Buccieri*, 153 P. S. 535.

(g) Trial.

317. Upon a trial for murder the record must show the presence of the defendant at every stage of the proceedings, but where he was actually present he is not entitled to a new trial because the clerk neglected to note his presence on the record, but the trial court may direct that the record be so amended as to conform to the actual facts of the case and show the presence of the prisoner. *Comm'th v. Silcox*, 161 P. S. 484.

318. A verdict of guilty of murder in the first degree will not be set aside because the prisoner was brought handcuffed into the court-room in the presence of the grand jury. *Comm'th v. Weber*, 167 P. S. 153.

319. A conviction of murder will not be reversed for an obscure remark by the district attorney as to the defendant's competency as a witness, evidently not intended to prejudice the defendant. *Comm'th v. Taylor*, 129 P. S. 534.

320. Upon a trial for murder, the manner in which the district attorney argues the case is for the consideration of the court below upon a motion for a new trial, it is not reviewable in the supreme court. *Comm'th v. Zappe*, 153 P. S. 498.

321. Upon the trial of an indictment for murder, where it appears that the prisoner's wife was present at the killing, it is not improper for the district attorney to comment upon the fact that the prisoner failed to call his wife as a witness

for the defence. *Comm'th v. Weber*, 167 P. S. 153.

322. Where the district attorney, upon the trial of an indictment for murder, makes statements as to the defendant's character which are not warranted by the evidence and which tend to prejudice the jury, the defendant will be granted a new trial. *Comm'th v. Brunner*, 11 C. C. 428.

323. A defendant charged with murder may waive the right to have a juror sworn on his *voir dire* and examine him as to his qualifications without being sworn. *Comm'th v. Ware*, 137 P. S. 465; s. c. 26 W. N. C. 462.

324. Upon a trial for murder, it is not improper for the court to send the jury to view the ground where the murder was committed, without sending the prisoner and his counsel with them. *Comm'th v. Salyards*, 158 P. S. 501; affirming s. c. 13 C. C. 470.

325. A verdict of murder in the first degree will not be set aside because the jury were furnished with liquor during the course of the trial, where it does not appear that there was a resulting misconduct or separation. *Comm'th v. Salyards*, 158 P. S. 501; affirming s. c. 13 C. C. 470.

326. Judgment will not be arrested upon a verdict of murder in the first degree because the jury was allowed to separate during the trial, where the alleged separation consisted in the jury sleeping in two adjoining rooms in a hotel which did not communicate, six in each room, with the court officers in charge, sleeping in an adjoining room which communicated with one of the jury-rooms, and it appeared that the doors were locked by the officers and that there was no tampering or interference with the jury. *Comm'th v. Manfredi*, 162 P. S. 144.

327. Upon an indictment for murder, an examination by experts for the defence of the heart and clothes of the murdered man will not be ordered before trial unless it be shown that such examination

is necessary to bring the facts properly before the jury. *Comm'th v. Haley*, 2 Dist. Rep. 533.

(h) Evidence.

328. Where the deceased was shot from a window of a house in Kensington during the riots of 1844, it was *held*, that the defendant, though he did not fire the shot, might be convicted by showing connection and concert of action or agreement between the prisoner and those persons who slayed the deceased. *Comm'th v. Campbell*, 2 L. L., May 7, 1845.

329. Voluntary declarations made by a person indicted for murder, to ordinary witnesses after his arrest, which are shown to be falsehoods, are proper evidence for the commonwealth as tending to establish guilt. *Comm'th v. Johnson*, 162 P. S. 63.

330. The declarations of a person charged with murder, while under the influence of liquor, supplied by his custodian, are not admissible in evidence. *McCabe v. Comm'th*, 8 Atlan. 45.

331. Circumstantial evidence on the question of the time of the death of the murdered man, of the possession of money, and finding of the deceased's pocket-book. *Ibid*.

332. Murder may be established by circumstantial evidence where all the proven circumstances are irreconcilable with any other theory than that of deliberate murder, and are also irreconcilable with any reasonable theory consistent with defendant's innocence. *Comm'th v. Johnson*, 162 P. S. 63.

333. A verdict of guilty of murder in the first degree will not be reversed because the court refused to strike from the record an offer of the commonwealth to place the wife of the prisoner on the stand as a witness for the prosecution when it appears that the offer was objected to by the defendant and overruled by the court. *Comm'th v. Weber*, 167 P. S. 153.

334. Upon a trial for murder, where the commonwealth's witnesses testified to the

effect that the prisoner was the only person in the room who had a knife; it was *held* to be error to exclude an offer by the defendant to show that another person received a stab in the room at that time, but while the defendant was not there. *Comm'th v. Wertz*, 161 P. S. 591.

335. Evidence of the dangerous character of the deceased is not admissible where self-defence is not alleged as a justification and there is no offer to show that the prisoner had any knowledge of the character of the deceased; the prisoner's knowledge of the general character of the deceased as a quarrelsome and dangerous man is not established by the evidence of the prisoner himself, that upon one occasion the deceased pointed a revolver at a man with whom he had some difficulty, and threatened to shoot him. *Comm'th v. Straesser*, 153 P. S. 451.

336. Upon a trial for murder, after a physician has testified as to the injuries found on the body, he is competent to state his opinion as to what caused the death and how the injuries were inflicted. *Comm'th v. Crossmyer*, 156 P. S. 304.

337. Upon a trial for murder, where the evidence showed that the deceased was strangled, it may be shown that the prisoner showed certain witnesses a peculiar grip by which he claimed he could easily "shut anybody's wind off." *Comm'th v. Crossmyer*, 156 P. S. 304.

338. Upon a trial for murder, it may be shown that the prisoner had made threats against the deceased, who was his mother, that he had frequently quarrelled with her, that on one occasion he had made an assault upon her which had left its marks upon her person, and that a short time before her death he had sought, but failed, to obtain an insurance on her life without her knowledge. *Comm'th v. Crossmyer*, 156 P. S. 304.

339. Upon a trial for murder, in determining the credit to which the defendant's testimony is entitled, the jury may consider the extent to which he was contradicted, the character of his testimony,

and its reasonableness and its consistency with the established facts of the case. *Comm'th v. Breyessee*, 160 P. S. 451.

(i) Motive.

340. Where the prisoner was charged with murder by shooting with a pistol at a street corner, it was proper to refuse a point as misleading, that before the jury could convict in the first degree, they must find that the prisoner acted upon as clear and premeditated a motive, as he who kills by poison or lying in wait. *Comm'th v. McManes*, 143 P. S. 64.

341. Where the testimony was undisputed that the prisoner, his mistress and the deceased were together immediately before the killing, and there was other testimony tending to show the prisoner's jealousy as to the mistress; it was held, that his conduct an hour previous, in threatening her with a pistol, was admissible upon the question of motive. *Comm'th v. McManes*, 143 P. S. 64.

342. Where the commonwealth has proven wilfulness and a fully formed purpose to kill, the law does not call for proof of a motive; in such case the motive is unimportant unless insanity be set up as a defence, when the absence of any motive which would prompt a sane man to the deed adds to the strength of positive evidence of unsoundness of mind. *Comm'th v. Bucieri*, 153 P. S. 535.

See CRIMINAL LAW, XVII. (i).

(k) Defence of intoxication.

343. The mere intoxication of the prisoner charged with murder will not excuse or palliate his offence unless he was in such a state of intoxication as to be incapable of forming a deliberate and premeditated intent to take the life of the deceased; if he was, the grade of offence is reduced to murder in the second degree. *Comm'th v. Cleary*, 148 P. S. 26.

See CRIMINAL LAW, III.

(l) Self-defence.

344. To establish the plea of self-defence, the burden is on the defendant to prove an actual necessity to take life, or a seeming one, so reasonably apparent, as to lead him to believe he could only defend himself by taking the life of the deceased; and this, though the deceased was originally the aggressor. *Comm'th v. Brown*, 7 C. C. 640.

345. A man may slay his assailant to save his own life, but not if he has probable means of escape. *Comm'th v. Ware*, 26 W. N. C. 462.

346. Life may be lawfully taken in self-defence, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him. *Comm'th v. Breyessee*, 160 P. S. 451.

347. Where an assault is made upon another with the manifest intention to take life or do great bodily harm, and the party assaulted has no reasonable means of escape, he may take the life of his assailant to save his own life or to prevent the infliction of great bodily harm. *Comm'th v. Weathers*, 7 Kulp 1. See s. c. 6 Kulp 486.

348. Where the defence is self-defence, evidence is admissible that the deceased was a man of brutal and ferocious disposition, and that this was known to the defendant. *Comm'th v. Weathers*, 7 Kulp 1. See s. c. 6 Kulp 486.

349. Where a party assailed has reasonable grounds for believing that he is in danger of loss of life or great bodily harm and does so believe, he is justified in acting on appearances; and this, though it should turn out afterwards that he was mistaken. *Comm'th v. Weathers*, 7 Kulp 1. See s. c. 6 Kulp 496.

350. Where a police officer has made a lawful arrest and is violently assaulted by his prisoner, he is not bound to retreat or attempt to escape, but it is his duty to stand and defend himself; if, however, he has brought the peril on himself

either by making an unlawful arrest or in the treatment of the prisoner while under arrest, he will not be justified in taking the life of his prisoner on the ground of self-defence. But although the arrest be illegal, yet if the officer declines any further struggle and retreats as far as possible, and his adversary pursues him and again attacks him, the officer's right of self-defence revives, and he may repel the attack by force, even to the taking of life, if it be necessary to save his own. *Comm'th v. Weathers*, 7 Kulp. 1. See s. c. 6 Kulp 486.

351. Under the act 22 April 1863 (Brightly's Purdon 482) the entry of a stable with intent to commit a felony is itself a felony, and upon a trial for murder, where the killing was done in an alley near the prisoner's stable and the prisoner claimed that he shot the deceased in self-defence while he was escaping from the stable; it was held, that the right of the prisoner to pursue and arrest the deceased must be determined as in cases of felony actually committed; and this, although the actual larceny was not completed. In such a case evidence was admissible that part of a harness belonging to the prisoner has been stolen, and that it had been in the possession of the deceased, and that the latter had traded it to another person with a promise to supply the missing part. *Comm'th v. Pipes*, 158 P. S. 25.

(m) Charge of the court.

352. Counsel for a defendant charged with murder should ask instructions by points properly drawn. If they fail to do so, the supreme court will not consider them, unless the omissions are of such a serious nature as to substantially prejudice the rights of the accused. *McCabe v. Comm'th*, 8 Atlan. 45.

353. Upon a trial for murder or manslaughter, it is the duty of the judge to answer points fully, and if the law of the case is plainly, fully and accurately

presented, this duty is discharged though he has chosen to state it in his own words. *Comm'th v. McManes*, 143 P. S. 64.

354. Upon a trial for murder a request for instructions, that the jury are judges of the law as well as the fact, was properly answered as follows: "The statement of the law by the court is the best evidence within your reach; and therefore, in view of that evidence and viewing it as evidence only, you are to be guided by what the court has said with reference to the law." *Comm'th v. McManes*, 143 P. S. 64. See *Comm'th v. Costello*, 1 Dist. Rep. 745.

355. Where the evidence disclosed that the prisoner, after a quarrel with his wife, both being intoxicated, had taken time to heat a poker and with it inflicted upon her person fatal wounds, indicating a well-defined and definite purpose to destroy life, it was not error to charge that there was little room for doubt as to the deliberate and premeditated nature of the killing. *Comm'th v. McMillan*, 144 P. S. 610; affirming s. c. 6 Kulp 281.

356. Where the court has fully and accurately defined murder in the first degree, it is no ground for reversal, that at the close of the charge the court in recapitulating what had been said omitted the word "wilful." *Comm'th v. Buccieri*, 153 P. S. 535.

357. Upon an indictment for murder, where there is no evidence which points in the remotest degree to the offence as manslaughter, it is not error for the court to fail to define manslaughter. *Comm'th v. Buccieri*, 153 P. S. 535.

358. Upon a trial for murder, it is entirely proper to call the jury's attention to the prisoner's interest as affecting his credibility, but a charge is improper, the general effect of which is to discredit the prisoner as a witness, and to lead the jury to throw out his testimony except where it was corroborated. *Comm'th v. Pipes*, 153 P. S. 25.

359. Upon a trial for murder, a judgment of guilty will be reversed where the trial judge gives due prominence to

the evidence on the part of the commonwealth, but fails to bring to the attention of the jury evidence which tended to show the existence of intimate relations between the deceased and the accused, and their declarations and conduct immediately after the shooting which tended to negative an inference of ill-will or a quarrel. *Comm'th v. Silcox*, 161 P. S. 484.

360. Upon a trial for murder, it is not improper to charge that "while justice is to be tempered with mercy you will see to it in your deliberations that your compassion for the accused shall not work wrong and injustice to the commonwealth. The deceased was, and all citizens who survive him are, as much entitled to the protection of the law as the prisoner at the bar." *Comm'th v. Silcox*, 161 P. S. 484.

361. Upon a trial for murder, it is error to refuse to charge that if the jury believe the testimony of certain witnesses "that the deceased made declarations at the time of the shooting and subsequently thereto, that the shooting was accidental and contradictory of his dying declarations," such declarations are to be taken into consideration of the jury and if true there should be an acquittal. *Comm'th v. Silcox*, 161 P. S. 484.

362. It is improper for the court to say, in refusing to discharge the jury in a murder trial, that to do so "would do a wrong and defeat the ends of justice"; such an instruction is likely to be taken by the jury as a strong, if not a binding direction that it is their duty to convict the prisoner. *Comm'th v. Wernitz*, 161 P. S. 591.

(*) Verdict.

363. Upon a trial for murder, if the jury render a verdict of guilty without specifying the degree, the court may send them back to amend their verdict. *Comm'th v. Nicely*, 130 P. S. 261.

364. Where a verdict of murder in the first degree has been announced in due form and recorded and affirmatively re-

sponded to by the entire jury, the separate answers given thereafter, if not in harmony with the previously recorded verdict, may be treated as mere surplusage. *Comm'th v. Schmous*, 162 P. S. 326.

XXVII. Abortion.

365. A wife is a competent witness against her husband and others charged with a conspiracy to produce an abortion, upon her, and producing the same. *Comm'th v. McEwen*, Vaux's Dec. 16. See *Comm'th v. McEwen*, 1 Clark 140.

366. Upon the trial of an indictment for conspiracy to produce an abortion, where it appeared that the female died from the effects of the abortion, but such death was not referred to in the indictment; the court refused to give binding instructions to acquit on the ground, that while the indictment was for a misdemeanor, the offence was a felony into which the conspiracy merged. *Comm'th v. Sterling*, 10 Lanc. 41.

367. Upon the trial of an indictment for conspiracy to produce an abortion, it is not necessary, in order to convict the defendants, that they should have urged the victim to commit the deed; they are guilty if they were privy to it and consented and in any way assisted her in furthering her designs; and this, although the design may have been hers. *Comm'th v. Sterling*, 10 Lanc. 41.

XXVIII. Obstruction of justice.

368. A justice who is disturbed in the performance of his official duties by loud whistling by a passer-by, may arrest the latter without a warrant for the obstruction of public justice. *Comm'th v. Zant-zinger*, Vaux's Dec. 132.

369. The refusal of a physician sworn as a witness, to give his opinion as to the effect of the medicines administered, and to describe the deceased's condition and symptoms, is a contempt, for which the coroner can hold him to bail to answer. Such contempt is indictable as an obstruc-

tion of justice. But the coroner cannot compel him to enter bail before a justice. *Comm'th v. Higgins*, 5 Kulp 269.

370. A landlord's distress warrant is not a legal process within the act 31 March 1860, sec. 8 (Brightly's Purdon 526), and an indictment will not lie under that section for resisting the execution of such a warrant. *Comm'th v. Nichols*, 6 Del. 78.

XXIX. Assault and battery.

371. The chief burgess, upon witnessing a disturbance of the peace, has a right to issue a warrant for the arrest of those engaged in it, and the constable holding such warrant may call upon another to assist him. If such other makes the arrest, he cannot be convicted of assault and battery because not physically in possession of the warrant. *Comm'th v. Black*, 12 C. C. 31.

372. Where a person was arrested on charge of aggravated assault and battery which was not triable by a justice under the act 1 May 1861 (Brightly's Purdon 1154); it was held, that by discharging him from the charge of aggravated assault and battery and holding him for assault and battery, the justice did not acquire jurisdiction to try the defendant of the latter charge before a jury of six; the jurisdiction of justices under that act depends upon the character of the offence charged in the information. *Comm'th v. Catterson*, 3 Lack. Jur. 1.

373. A defendant may be convicted of assault and battery upon evidence that he struck the prosecutrix recklessly while striking at a dog. *Comm'th v. Wright*, 7 York 62.

374. Upon an indictment for an assault and battery upon a member of a firm by whom the defendant was employed, it was error to refuse the defendant's offer to show that by a special contract with his employer, he was entitled to the exclusive possession of the room where the assault took place, and particularly that the partner assaulted

was not to enter it. *Comm'th v. Ribert*, 144 P. S. 413.

375. Upon an indictment for felonious wounding under sec. 81 of the act 31 March 1860 (Brightly's Purdon 477), the intent to commit murder is the felonious element, and the overt act in execution of that intent completes the offence; it is not error for the court to refuse to charge that it is incumbent upon the commonwealth to show that the wound was dangerous to life. *Comm'th v. Matz*, 161 P. S. 207.

XXX. Sodomy.

376. To convict of sodomy there should be corroboration of the word of an accomplice. Circumstances that amount to corroboration. *Comm'th v. King*, Public Ledger, 19 April 1890. See *Comm'th v. Smith*, 3 Kulp 414.

377. To sustain a charge of sodomy against a reputable citizen, the proof must be indisputable. *Comm'th v. Dunn*, Vaux's Dec. 4.

XXXI. Obscene literature.

378. The act of 6 May 1887 (Brightly's Purdon 525), against the making and dissemination of obscene literature, is not unconstitutional by reason of its title. *Comm'th v. Havens*, 6 C. C. 545.

379. It is not necessary that an indictment under the act of 6 May 1887 (Brightly's Purdon 525), for disseminating obscene literature, should set forth the paper alleged to be indecent. *Ibid.*

380. It is not necessary that the indictment should set forth that the defendant had knowledge that the acts complained of were prohibited. *Ibid.*

381. Under the act of 6 May 1887 (Brightly's Purdon 525), against disseminating obscene literature, the test of obscenity is whether the articles or pictures would suggest impure thoughts in the young and inexperienced. Parol evidence is not admissible to explain the language used. *Ibid.*

382. A newspaper containing but one indecent item is an obscene paper within the act of 6 May 1887 (Brightly's Purdon 525). *Ibid.*

383. The "Kreutzer Sonata" is not an obscene publication by reason of its containing ideas and doctrines upon religious subjects contrary to orthodox teaching. *Comm'th v. Arentzen*, 8 C. C. 359.

384. Under the act 6 May 1887, sec. 2 (Brightly's Purdon 525), the fact of selling is for the jury, while the character of the publication is a question for the court; where the defendant was a news-dealer, and sold copies of the "National Police Gazette" and "New York Illustrated News" and the "Illustrated Police News" at his news stand, the court sustained a verdict of guilty, under sec. 2 of that act, of selling to a minor. *Comm'th v. Dowling*, 14 C. C. 607.

XXXII. Rape.

385. Under the act of 19 May 1887 (Brightly's Purdon 535), a defendant charged with rape on a child under sixteen, to escape conviction must prove that the child was not of good repute. The commonwealth may prove a medical examination made almost a year afterwards. *Comm'th v. Allen*, 135 P. S. 483; s. c. 26 W. N. C. 285.

386. Where, in a prosecution for rape, the defence was an alibi, it was proper for the court to charge that fixing the time of a transaction occurring several days before, within an hour, or a half hour, without anything to fix the time, was uncertain. *Comm'th v. Orr*, 138 P. S. 276; s. c. 38 P. L. J. 141.

387. A count for assault and battery, a second for assault and battery with intent to ravish, and a third charging felonious rape with an averment of the commission of bastardy, is not a misjoinder, and under the act 19 May 1887 (Brightly's Purdon 535), the defendant may be convicted of fornication and bastardy. *Comm'th v. Lewis*, 140 P. S. 561; *Comm'th v. Parker*, 146 P. S. 343.

388. Where a defendant is indicted for fornication and bastardy and statutory rape and is tried on the former charge, he cannot be called to plead to the indictment for rape, even before the jury has rendered a verdict in the first case. The commonwealth having elected to proceed to trial for the minor offence, cannot prosecute an indictment for the felony which included it. See sec. 51 of the act 31 March 1860 (Brightly's Purdon 559). *Comm'th v. Arner*, 149 P. S. 35.

389. A defendant charged with rape and bastardy and surrendered by another state "to be tried for the offence of rape and that only," may be convicted of fornication and bastardy upon the trial of the original indictment. *Comm'th v. Johnston*, 12 C. C. 263.

390. A plea of twice in jeopardy, to an indictment for rape, will not be sustained where the record shows that the former indictment was for an act of fornication with the same woman-child under the age of sixteen years but at a different date than that averred in the indictment for rape. *Comm'th v. Walker*, 15 C. C. 418.

391. Upon the trial of an indictment for rape, evidence is admissible of the real character of the prosecutrix as distinguished from supposed qualities or reputation for the purpose of determining whether she was or was not of good repute. *Comm'th v. Davis*, 3 Lack. Jur. 239.

392. Upon a trial for rape, where the woman's testimony is uncorroborated and the defendant denies the offence, the jury must determine between them and a new trial will not be granted because there was no corroborative testimony; so, a new trial will not be granted for after-discovered evidence which only impeaches the commonwealth's witness and would not probably produce a different result. *Comm'th v. Wire*, 5 York 11; *Comm'th v. Byerts*, 5 York 13.

393. Upon a trial for rape, where the court charged that the girl's drawers were

bloody and soiled and there was evidence that the drawers were soiled but none that they were bloody; it was *held* not to be a sufficient ground for a new trial. *Comm'th v. Byerts*, 5 York 13.

XXXIII. Adultery.

394. An indictment for adultery need not set out the name of the defendant's wife. *Davis v. Comm'th*, 4 Cent. 711.

395. An indictment for adultery will not be quashed because the wife was examined before the grand jury; it will be presumed that she was simply examined on the question of marriage. *Comm'th v. Mosier*, 135 P. S. 221; s. c. 26 W. N. C. 182.

396. Adultery may be inferred from the fact of a man and woman, not husband and wife, occupying the same bed, and room, undressed, in the night-time. *Ibid.*

397. A defendant having denied adultery with the woman mentioned in the indictment, may, for the purpose of discrediting him, be asked on cross-examination why he pleaded guilty to an indictment for adultery with the same woman in another state. *Ibid.*

398. The marriage of a minor without the consent of his parents or guardian being void in England, where it was celebrated (under the act of 26 George II., chap. 11), the husband cannot be prosecuted for adultery in subsequently living with another woman in this state. *Comm'th v. Burton*, Vaux's Dec. 83.

399. To convict a defendant of adultery, the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion that the offence had been committed; a deliberate and voluntary confession of guilt is among the most weighty and effectual proofs in the law. *Comm'th v. Manock*, 1 York 169.

400. An indictment for adultery will not be quashed because it does not allege that the *particeps criminis* is not the law-

ful wife of the defendant, that the defendant has a lawful wife living, or with whom the defendant committed adultery, where the nature of the offence is set forth with sufficient clearness to be understood by the defendant and the jury. *Comm'th v. Hogentogler*, 11 Lanc. 395; s. c. 6 Del. 49.

XXXIV. Incest.

401. Upon the trial of an indictment for incest with defendant's daughter, evidence is admissible for the commonwealth, of prior illicit relations between the parties; and this, although such evidence discloses other indictable offences of a like nature, which are barred by the statute of limitations. *Comm'th v. Bell*, 166 P. S. 405.

402. Upon the trial of an indictment for incestuous fornication with defendant's daughter; it was *held*, that evidence was admissible that the prisoner forbade his daughter to go to church or to have social intercourse with the young people in the neighborhood, where it appeared that the motive of such action was either to have greater freedom for sexual intercourse with her or to punish her for not yielding to every one of his demands. *Comm'th v. Bell*, 166 P. S. 405.

403. Upon the trial of an indictment for incestuous fornication, where the prosecutrix was asked under objection if she had told her brothers and sisters of the offence, about the time of its occurrence, and answered that she did not then, but did about four or six weeks afterwards, and being about to tell what she said, the court instructed her not to state it; it was *held*, that as no motion was made by the prisoner's counsel to strike out her answer or so much thereof as was not responsive to the question, the prisoner was not prejudiced, and judgment on a verdict of guilty would not be reversed. *Comm'th v. Bell*, 166 P. S. 405.

XXXVI. Fornication and bastardy.

404. A husband cannot be a witness for the commonwealth upon the trial of a charge against a third person for fornication with his wife; but he may be informant and prosecutor. *Comm'th v. Geary*, 9 C. C. 60.

405. Though a married woman will not be permitted to prove the non-access of her husband, yet if the jury be satisfied of such non-access by other evidence, they may then consider her story as to the paternity of the child. *Easley v. Comm'th*, 11 Atlan. 220.

406. In a bastardy case the attending physician was permitted to testify as to the mother's declarations of paternity made while in labor, though he was not certain she was *in extremis*, the jury being instructed not to regard them unless they were satisfied that she believed herself to be at the time in peril and not likely to survive. *Ibid*.

407. If in a bastardy case it be attempted by the defence to show that the prosecutrix gave false testimony that she was not married, she may show in rebuttal that she was married in Ohio, while under age, and that such marriage was invalid. *Easley v. Comm'th*, 11 Atlan. 221.

408. As to the admissibility of the bastard child in evidence, see note to *Clark v. Bradstreet*, 15 Atlan. 56.

409. A defendant may be sentenced to pay a fine and costs and to give bond for future maintenance. Payment of lying-in expenses and an order of maintenance are not required to be imposed, and the court may refuse to impose them after a discharge. *Comm'th v. Cook*, 4 Cent. 710.

410. After three months' imprisonment a defendant convicted of fornication and bastardy may obtain his discharge under the insolvent laws, without complying with any part of the sentence. *Ibid*.

411. A criminal confined for fine and costs and allowance to prosecutrix in fornication and bastardy is entitled to

his discharge after an actual confinement for three months, and filing his petition and bond to take the benefit of the insolvent laws under section 6 of the act of 24 January 1849 (Brightly's Purdon 1034). But that act as to Schuylkill county was repealed by the act of 22 March 1850. *Fahey's Case*, 8 C. C. 457. But he must satisfy the court that he has brought himself within the provisions of the insolvent laws, and that there is no fraud. *Owen's Case*, 140 P. S. 565; affirming s. c. 8 C. C. 458.

412. A judgment note given in settlement of a prosecution for fornication and bastardy is valid; that is not an illegal consideration. *Romig v. Hinkle*, 7 C. C. 145.

413. A judgment on a bond given in settlement of a prosecution for fornication and bastardy will not be opened on an averment that it was executed while the defendant was in prison, and that he was innocent, that no living child had been born of the obligee, who had died unmarried and without issue. The duress was one of law. *Pfau v. McClin-tock*, 130 P. S. 369.

414. A count for assault and battery, a second for assault and battery with intent to ravish, and a third charging felonious rape with an averment of the commission of bastardy, is not a misjoinder, and under the act 19 May 1887 (Brightly's Purdon 535), the defendant may be convicted of fornication and bastardy. *Comm'th v. Lewis*, 140 P. S. 561; *Comm'th v. Parker*, 146 P. S. 343.

415. Where a bastard is begotten in one county and born in another, a conviction of fornication in the county where the child was begotten, is a bar to an indictment for bastardy in the county where the child was born. *Comm'th v. Lloyd*, 141 P. S. 28.

416. Where a defendant is indicted for fornication and bastardy and statutory rape and is tried on the former charge, he cannot be called to plead to the indictment for rape even before the jury has rendered a verdict in the first

case. The commonwealth having elected to proceed to trial for the minor offence, cannot prosecute an indictment for the felony which included it. See sec. 51 of the act 31 March 1860 (Brightly's Purdon 569). *Comm'th v. Arner*, 149 P. S. 35.

417. Where an indictment charges in one count fornication and bastardy, and in a second count, incestuous fornication and bastardy, the judgment will not be arrested because the evidence showed that the prisoner was a married man and should have been indicted for adultery. *Comm'th v. Kammerdiner*, 165 P. S. 222.

418. A defendant charged with rape and bastardy and surrendered by another state "to be tried for the offence of rape and that only," may be convicted of fornication and bastardy upon the trial of the original indictment. *Comm'th v. Johnston*, 12 C. C. 263.

419. The settlement of a case of fornication and bastardy by the prosecutrix and defendant is no bar to the prosecution. The district attorney may disregard the settlement if he thinks the public interests require that course. *Comm'th v. Wicks*, 2 Dist. Rep. 17.

420. Upon a conviction of fornication and bastardy, where the child was begotten in this state but was born in another state, a fine may be imposed for fornication but no order for lying-in expenses or maintenance can be imposed. *Comm'th v. Walker*, 2 Dist. Rep. 727.

421. Upon the trial of an indictment for fornication and bastardy, the evidence of the prosecutrix cannot be discredited by proof that about the time the child was begotten she walked and rode with certain young men, in the absence of any offer to prove any other facts tending to show criminal intercourse with them. *Comm'th v. Phillips*, 2 Lack. Jur. 146.

422. Upon a trial for fornication and bastardy, the testimony of the defendant as to a common-law marriage denied by the prosecutrix, is no defence. *Comm'th v. Toogood*, 10 Lanc. 13.

See BASTARDY.

XXXVII. Kidnapping.

423. A father who takes and withholds his child from its mother, who, with or without cause, has abandoned his home, is not liable to an indictment for kidnapping under section 94 of the act of 31 March 1860 (Brightly's Purdon 1014); neither are those who aid him therein. *Burns v. Comm'th*, 129 P. S. 138. See *Comm'th v. Myers*, 146 P. S. 24.

424. An indictment for a conspiracy to abduct a child is defective which does not aver the name or sex of the child and that it was under the age of ten years, and an intent to deprive its parents or other person having lawful charge of it, of its possession, or to steal any article of apparel, etc. *Comm'th v. Myers*, 146 P. S. 24.

XXXVIII. Arson.

425. Upon the trial of an indictment for arson, where the commonwealth proved a confession by the defendant, that he committed the offence for which he was being tried, and that he also set fire to another house; it was held, that the defendant could not contradict the latter portion of his confession by proof of an alibi at the time of the latter fire. *Comm'th v. Rose*, 1 York 125.

426. As to the sufficiency of evidence to sustain a conviction of arson, see *Comm'th v. Miller*, 5 York 171.

XXXIX. Burglary—Breaking and entering.

427. The room of a boarder is his dwelling, upon which a burglary may be committed by the owner of the boarding-house. *Comm'th v. Hummel*, 1 Dist. Rep. 479.

428. Upon a conviction for burglary, the court refused a new trial where the facts were submitted to the jury and the court was satisfied with the verdict. *Comm'th v. Davage*, 7 Kulp 524.

429. Upon the trial of an indictment for burglary, where it appeared that the

defendant, with burglar's tools in his possession, went up the steps of the house where he had no legitimate business in the night-time, and upon his being interrupted by an officer he left the steps and gave a false account of himself and his purposes; it was *held*, that it was proper to instruct the jury that he might be found guilty of an attempt to commit a burglary under the act 31 March 1860 sec. 50 (Brightly's Purdon 558). *Comm'th v. Clark*, 10 C. C. 444; s. c. 28 W. N. C. 540.

430. Under the act 22 April 1863 (Brightly's Purdon 482), the entry of a stable with intent to commit a felony is itself a felony, and upon a trial for murder, where the killing was done in an alley near the prisoner's stable and the prisoner claimed that he shot the deceased in self-defence while he was escaping from the stable; it was *held*, that the right of the prisoner to pursue and arrest the deceased must be determined as in cases of felony actually committed; and this, although the actual larceny was not completed. In such a case evidence was admissible that part of a harness belonging to the prisoner had been stolen, that it had been in the possession of the deceased, and that the latter had traded it to another person with a promise to supply the missing part. *Comm'th v. Pipes*, 158 P. S. 25.

431. An indictment under the act 22 April 1863 (Brightly's Purdon 482), for breaking and entering a dwelling-house with felonious intent, need not state whether the offence was committed in the night-time or the daytime; such an indictment is not vitiated by the statement that the felony intended was committed, nor by the fact that the word "feloniously" was used instead of "maliciously." *Comm'th v. Carson*, 166 P. S. 179.

XL. Robbery.

432. To constitute robbery there must be a *felonious* as well as a forcible taking. A practical joke is not robbery. Where

the defendant was charged with taking some tobacco from the person of the prosecutor, the jury might consider its value on the question of intent. *Comm'th v. White*, 133 P. S. 183; s. c. 25 W. N. C. 439.

433. Where an indictment charged the defendant with the robbery of a promissory note commonly called a bank-note, and the evidence was that the prisoner robbed the prosecutor of money or of so many dollars; it was *held*, that the variance between the indictment and proof was fatal, and judgment upon a verdict of guilty was arrested. *Comm'th v. McManiman*, 15 C. C. 495.

434. Upon the trial of an indictment, where the proof of guilty knowledge or malicious intention constitutes an essential part of the crime, testimony is admissible of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent; and this, although they may constitute in law a distinct crime. Where a defendant was charged with wilfully and maliciously entering a store at night through a transom with the intent to commit a felony, evidence was admissible that on a previous occasion the defendant took grain from the same store through the same transom. *Comm'th v. Shepherd*, 2 Dist. Rep. 345.

435. One who enters a store in the daytime, when the owner is absent and it is in charge of a boy ten years of age, and by falsehood, threats and intimidation obtains money and goods from the store, may be convicted of a felony under the act 31 March 1860, sec. 102 (Brightly's Purdon 537), and act 22 April 1863, sec. 2 (Brightly's Purdon 482). *Comm'th v. Cruikshank*, 138 P. S. 194.

XLI. Larceny.

436. A taking of notes under a belief that the taker has an interest or property in them is not larceny. *Comm'th v. Jackson*, Vaux's Dec. 64.

437. A general verdict in larceny and receiving stolen goods will be sustained,

though there be a defective description of an article in a divisible count. The court may strike out the articles defectively described or enter a *nolle prosequi* as to them. *Comm'th v. Johnson*, 133 P. S. 293; s. c. 26 W. N. C. 3.

438. Where in a prosecution for larceny the defence is insanity or kleptomania, a verdict of conviction will not, except in an extreme case, be set aside as against the weight of evidence. *Comm'th v. Fritch*, 9 C. C. 164.

439. It is not necessary that an indictment for larceny should aver an intent to deprive the owner permanently of his property and to convert it to the taker's own use against the will of the owner; neither is it necessary that a verdict of guilty should find also the value of the property taken. *Comm'th v. Butler*, 144 P. S. 568.

440. The provisions of the sixth section of the act 15 May 1889, entitled "an act for the taxation of dogs and the protection of sheep," that all dogs shall hereafter be personal property and subject of larceny, was *held* not to be unconstitutional; the provision was germane to the object of the act. *Comm'th v. Depuy*, 148 P. S. 201. See act 25 May 1893, sec. 7 (*Brightly's Purdon* 692).

441. Upon the trial of one of several defendants for the larceny of money from a bank, the photograph of one of the other defendants is admissible to prove the fact, in connection with other testimony, that the defendant stole the money while the original of the photograph occupied the attention of the bank officer. *Comm'th v. Connors*, 156 P. S. 147.

442. Where the prosecutor was the owner of a farm which was crossed by a creek, and particles of coal had been carried down from mines further up the stream, and deposited in the bed of the creek, and the defendant descended the stream in a flat boat, and scooped up the coal and carried it away; it was *held*, that he was not merely a trespasser, but was guilty of carrying away and an actual conversion, and the question of the existence of an *aminus furandi* was

for the jury. *Comm'th v. Steimling*, 156 P. S. 400. Where the prosecutor was afterwards sued for malicious prosecution; it was *held*, that the defendant had shown probable cause, and plaintiff could not recover. *Steimling v. Bower*, 156 P. S. 408.

443. A person who plans a robbery, the execution of which is entrusted to others, may, if the robbery has been successfully accomplished, be convicted of larceny. *Comm'th v. Hollister*, 157 P. S. 13.

444. Where a person is entitled to receive a share of the crops for his services, he does not stand in the position of a joint owner, and he may commit larceny by stealing part of the crops. *Mitchell v. Hendrix*, 3 York 5.

445. An indictment for larceny as bailee should be charged as a felony; such an indictment is bad which charges the defendant with appropriating the property of the prosecutor to his own use or the use of some other persons unknown; it should be in the conjunctive instead of the disjunctive. A charge of the crime in the language of the act is sufficient, it is not necessary that the character of the bailment be set out. *Comm'th v. Schall*, 5 York 153; *Comm'th v. Schall*, 5 York 155.

446. Where several articles are embraced in a count for larceny, and one of them is sufficiently described and the others are not, the indictment will not be quashed. *Comm'th v. Schall*, 6 York 25.

447. An indictment for larceny as bailee will not be quashed because it appears that the defendants are charged in another bill with embezzlement of the same securities at the same time and place. *Comm'th v. Schall*, 6 York 27.

448. An indictment for larceny as bailee will not be quashed because it is not averred that the bonds and securities alleged to have been converted are still due and unpaid; nor because the bill fails to aver how the defendants became bailees of the prosecutor's

property. *Comm'th v. Schall*, 6 York 27.

449. An indictment for larceny as bailee is fatally defective if it fails to charge a fraudulent taking; such an omission is of substance and not of form and cannot be amended. *Comm'th v. Schall*, 6 York 27.

450. Where possession of property is obtained by an artifice accompanied with a felonious intent to convert it, and the property is converted to the taker's own use, the offence is larceny. *Comm'th v. Diffenderfer*, 8 Lanc. 209.

451. Where a defendant found stolen property and converted it to his own use and sold it for an unreasonable price; it was *held*, that he could be convicted of larceny; and this, although he did not know to whom it belonged or the fact that it was stolen. *Comm'th v. Dearolf*, 9 Lanc. 336.

XLII. Receiving stolen goods.

452. A charge of receiving stolen goods is triable exclusively in the oyer and terminer; where such an indictment is found in the quarter sessions and contains also a count for larceny, the court will not quash the indictment, but will certify it to the oyer and terminer for trial. *Comm'th v. Keyes*, 4 Dist. Rep. 152.

XLIII. False pretences.

453. An indictment for false pretence is bad which merely charges that defendant unlawfully obtained "a credit for the amount of ninety-nine dollars on the book account, etc., held against the said defendant." *Comm'th v. Usner*, 6 Lanc. 121.

454. An indictment is bad which alleges that the defendant falsely pretended that a horse which was vicious and unsound was a safe and sound family horse. *Comm'th v. Hoover*, 6 Lanc. 129.

455. A false statement about a collateral matter, though intended to induce the purchase, is not a false pretence. *Comm'th v. Springer*, 8 C. C. 115.

456. In false pretence the defendant's knowledge that his statements were false need not be proven, if he must necessarily have been conscious of that fact. *Comm'th v. Usner*, 7 Lanc. 57.

457. Obtaining money on a forged draft constitutes the crime of obtaining money by false pretences. *Comm'th v. Clarkson*, Vaux's Dec. 152.

458. To constitute the crime of false pretence in passing a forged check, something must be obtained on its credit at the time it is passed. *Comm'th v. Smith*, Vaux's Dec. 74.

459. Upon the sale of a refreshment privilege at a coming concert for the sum of fifty dollars in cash, it is a false pretence to falsely state that a third party had offered seventy-five dollars for the same privilege, to be paid after the concert. *Comm'th v. Jones*, Vaux's Dec. 96.

460. A note given in settlement of a prosecution for obtaining money by false pretences is not invalid. *Rothermal v. Hughes*, 134 P. S. 510.

461. Where the defendant, on purchasing goods from an agent, made false representations, upon the faith of which the principal filled the order in another county; it was *held*, that the purchaser could be indicted for false pretences in the county where the principal received the representations from his agent and where the sale was consummated. *Comm'th v. Karpowski*, 167 P. S. 225; affirming s. c. 15 C. C. 280.

462. Where an indictment for false pretences charged that the defendant represented that he had money in the Merchants' National Bank of Shenandoah, and the proof was that he stated that he had it in the Merchants' Bank of Shenandoah; it was *held*, that there was no such variance between the indictment and the proof as would defeat a verdict of guilty; and where the indictment charged that the defendant stated that

he had more than \$300 in bank, while the proof was that he stated that he had more than enough money to pay the bill, which was about \$300; it was held, that such variance was also immaterial. *Comm'th v. Karpowski*, 167 P. S. 225; affirming s. c. 15 C. C. 280.

463. Where, on the sale of a horse, the defendant signed a written contract to refund the money if the horse was not as represented, and the prosecutor was further induced to part with his money by representations made at the time with intent to cheat and defraud and known to be false, a conviction for obtaining money by false pretences was sustained. *Comm'th v. Sebring*, 1 Dist. Rep. 163.

464. Upon a trial for false pretences, the prosecutor may be asked whether he parted with his property upon the defendant's representations, and whether the credit was given on that ground alone. *Comm'th v. Boyer*, 11 Lanc. 7; s. c. 2 Dist. Rep. 843.

465. A defendant indicted for false pretences has the power to waive his constitutional right to a trial by a jury of twelve. *Comm'th v. Sweet*, 4 Dist. Rep. 136.

466. A false statement made before a justice to induce a certificate of damage for compensation from a sheep fund is sufficient to sustain a prosecution for false pretences. *Comm'th v. Sweet*, 4 Dist. Rep. 136.

467. It is an indictable offence to obtain the possession of goods by the presentation of an envelope falsely represented as containing money. *Comm'th v. Warner*, 1 York 35.

XLIV. Embezzlement.

468. There is no legal difficulty in joining in one count of an indictment two or more of the four acts specified in the act 31 March 1860, sec. 65 (Brightly's Purdon 500), relating to embezzlement by public officers. *Comm'th v. Mentzer*, 162 P. S. 646; affirming s. c. 10 Lanc. 49, 188.

469. Under the act 9 May 1889 (Brightly's Purdon 499), it is sufficient that an indictment charge that defendant, being a banker and knowing that he was insolvent, received money from a depositor; it is immaterial that the act describes the offence as embezzlement. *Comm'th v. Rockafellow*, 163 P. S. 139. See *Comm'th v. Smith*, 11 Lanc. 350.

470. An indictment against a broker for converting money entrusted to him to his own use, under the act 31 March 1860, sec. 114 (Brightly's Purdon 499), should set forth specifically the nature of the offence and of the transaction between the defendant and prosecutor and the purpose of the trust; it is not sufficient for the indictment to merely set forth that the defendant being a broker and entrusted for safe custody with the money of the prosecutor, unlawfully, with intent to defraud, did convert and appropriate said money. *Comm'th v. Fahnestock*, 15 C. C. 598.

471. An indictment under the act 9 May 1889 (Brightly's Purdon 499), must charge the unlawful conversion or appropriation of the moneys deposited or that the same were embezzled; a charge that defendants were engaged in carrying on the business of a private bank does not sufficiently allege that the defendants are bankers; in the case of a general partnership, the insolvency both of the partnership and of the individuals composing it must be averred in the indictment. *Comm'th v. Delamater*, 2 Dist. Rep. 118.

472. An indictment for embezzlement will be quashed if it does not aver ownership. *Comm'th v. Haggel*, 7 Kulp 10.

473. An indictment under the act 9 May 1889 (Brightly's Purdon 499), against a banker for receiving money from a depositor with the knowledge that the bank is insolvent at the time, must charge that the money was received as a deposit, naming him and stating the amount of the money; it is not sufficient to charge the defendant's partner in the bank was insolvent and that the defend-

ant knew it. *Comm'th v. Schall*, 5 York 137.

474. An indictment for the conversion of securities must designate and enumerate the securities, and must charge the conversion of them to the use of some person other than the prosecutor. *Comm'th v. Schall*, 5 York 139; s. c. 9 Lanc. 332.

475. An indictment charging the embezzlement of a large number of bonds and certificates should give the denominations of the several bonds alleged to have been embezzled. *Comm'th v. Schall*, 6 York 25.

476. An indictment for embezzlement in receiving money as a deposit when defendants knew that their private banking-house was insolvent, was *held* to be sufficient where it charged simply the embezzlement of "money." *Comm'th v. Schall*, 6 York 24; *Comm'th v. Schall*, 6 York 25.

477. An indictment against a factor for embezzlement is sufficient where the sale is charged distinctly enough to afford full notice to the defendant of the offence for which he is to be tried. *Comm'th v. Kelly*, 8 York 9.

478. Horses are merchandise within the act 31 March 1860, sec. 25 (Brightly's Purdon 499), against embezzlement of proceeds of merchandise by consignees and factors. *Comm'th v. Keller*, 9 C. C. 253; s. c. 5 York 61; 4 Del. 514; 9 Lanc. 51; *Comm'th v. Kelly*, 8 York 9.

479. A mechanic authorized by the owner to sell machinery left in his possession for that purpose, and who sells it at a price fixed by the owner, cannot be convicted of embezzlement although he fails to turn over the proceeds of the sale. *Comm'th v. Biggam*, 1 Dist. Rep. 438.

480. The act 9 May 1889 (Brightly's Purdon 499), providing for the punishment of bankers receiving a deposit with knowledge that the bank is insolvent, is not in violation of article I., sec. 15, of the constitution that the person of a debtor shall not be continued in prison after delivering up his estate for the benefit

of his creditors; where attorneys-at-law are the proprietors of a banking institution they are amenable as bankers under that act; it is no defence that the defendant intended to return the money. *Comm'th v. Sponsler*, 16 C. C. 116; s. c. 1 Lack. L. N. 61.

481. Upon the trial of an indictment against a banker for receiving money at a time when he knows that he is insolvent, the burden of proof is upon the commonwealth to show that the defendant was a banker, that he knew himself to be insolvent, and that he received the money as a deposit. *Comm'th v. Schall*, 12 C. C. 209.

482. Where the prosecutor and the defendant had been partners, and upon a dissolution of the partnership the prosecutor took a carriage by consent as payment for balance due him of one hundred dollars, and he subsequently left it with the defendant to sell for him, the defendant to keep for his trouble the amount realized over and above the one hundred dollars, and the defendant sold the carriage and appropriated the proceeds to his own use; it was *held*, that the act of the defendant was only a breach of trust and was not an embezzlement under sections 114 and 115 of the act 31 March 1860 (Brightly's Purdon 499). *Comm'th v. Kauffman*, 11 Lanc. 247.

483. An agreement not to arrest an embezzler will constitute a defence to a mortgage, but the burden is on the mortgagor to establish it by competent evidence. *Saalfeld v. Manrow*, 165 P. S. 114; reversing S. C. 13 C. C. 497. As to compromise under act 31 March 1860, sec. 9 (Brightly's Purdon 547), see case in lower court.

484. Upon the trial of an indictment against a consignee or factor for embezzlement, under the act 31 March 1860 sec. 125 (Brightly's Purdon 499), if the commonwealth fails to prove a fraudulent misappropriation by the defendant, the court should direct a verdict of not guilty; looseness of method is not fraud. *Comm'th v. Harris*, 168 P. S. 619; s. c. 36 W. N. C. 343.

XLV. Fraudulent secretion and removal.

485. The act 31 March 1860, sec. 130 (amended by the act 23 June 1885, Brightly's Purdon 538), punishing the fraudulent secretion and removal of property by a debtor with intent to defraud his creditors, does not apply to the fraudulent conveyance of real estate for that purpose. *Comm'th v. Markle*, 1 York 39.

XLVI. Forcible entry and detainer.

486. To establish a forcible entry it is sufficient to prove a quiet and peaceable possession by the prosecutor; the commonwealth is not required to show that his possession was lawful. *Comm'th v. Jeter*, 1 Northam. 164.

487. If at the time of the entry the prosecutor be present either in person or by representative, any kind of violence amounting to a "circumstance of terror" is sufficient; but if no one be present, then the entry must be by such breaking with violence and a strong hand as amounts to a disturbance of the public peace. *Ibid.*

488. A tenant who is allowed to remain peaceably in possession after the termination of his lease is not guilty of forcible entry and detainer, having received no notice of a subsequent letting and not being called upon to leave. *Comm'th v. Knarr*, 135 P. S. 35; s. c. 26 W. N. C. 345.

489. No matter what the circumstances are, a man who goes to another man's home with a band of others and breaks down his doors and terrifies his wife and family and thereby takes possession, is guilty of forcible entry and detainer. *Comm'th v. Trimble*, Public Ledger, 20 November 1890.

490. An indictment for forcible detainer must aver a prior possession by the prosecutor and an unlawful detention by the defendant by force and with a strong hand, or by menaces or threats;

the words "with a strong hand" should never be omitted, greater force must be averred than is expressed by the phrase "with force and arms." *Comm'th v. Brown*, 138 P. S. 447.

491. Where an indictment for forcible entry and detainer does not aver that the prosecutor had an estate either of freehold or of leasehold, the court cannot award restitution in sentencing the defendant. *Comm'th v. Brown*, 138 P. S. 447.

492. Where a writ of restitution was awarded after a collusive plea of guilty of forcible entry and detainer, the said writ was set aside upon petition of the owner of an undivided interest in the premises whose tenant the defendant was, and who resumed possession by other tenants when the defendant left the premises. *Comm'th v. Griffin*, 149 P. S. 176.

XLVII. Blasphemy.

493. Public swearing is a nuisance at common law, but to be indictable it must be in a public place and an annoyance to the public, and the indictment must charge that the profane language was uttered in the presence and within the hearing of the citizens present. *Comm'th v. Linn*, 158 P. S. 22.

XLVIII. Perjury.

494. An indictment for perjury need not aver that the proceeding in which the false oath is alleged to have been taken has been finally determined, but a trial upon the indictment will be postponed until there has been such a final determination. *Comm'th v. Moore*, 9 C. C. 501.

495. Where it appears upon the face of an indictment for perjury that the alleged false matter was immaterial, the indictment will be quashed; and this, notwithstanding a formal averment in the indictment that the matter was material. *Comm'th v. Wood*, 13 C. C. 477.

496. Where the defendant has made a qualified affidavit as to his belief, an indictment for perjury will be quashed which does not aver that he did not believe or that he knew well to the contrary. *Comm'th v. Ryder*, 12 Lanc. 97.

497. As to the requirements of an indictment for perjury, see note to *Vermont v. McCone*, 7 Atlan. 407.

498. A witness arrested for perjury in a civil suit will, pending the trial, be discharged on *habeas corpus*. *Comm'th v. Somers*, 1 Northam. 289.

499. One who makes a false affidavit before a justice and presents it to the examining board to be registered as a miner, may be indicted for perjury under the act of 9 May 1889 (Brightly's Purdon 1340). *Comm'th v. Wallick*, 6 Kulp 11.

500. At a primary election the officers have no authority to swear witnesses as to qualification of a challenged voter. Swearing falsely by such a witness is not perjury. *Comm'th v. Lawrence*, 4 Del. 27.

501. A defendant charged with perjury in swearing or going bail for another, that he was worth \$300, was discharged on proof that he had that amount of money in his possession. *Comm'th v. Griffin*, Vaux's Dec. 41.

502. Where the defendant was indicted for falsely swearing to a bill of costs, and the bill of costs was filed with the affidavit upon which the indictment was founded; it was *held*, that the court upon a motion to quash would examine the bill, and where the same showed that there was no intention wilfully to swear falsely, the indictment was quashed. *Comm'th v. Ryder*, 12 Lanc. 97.

503. Upon an indictment for making a false affidavit to support an application for a land warrant, that the lands were unimproved; it was *held*, that the affiant could not be convicted of perjury where it appeared that the affidavit was made upon the advice of counsel, that under the act 23 April 1889, P. L. 46, the land was unimproved. *Comm'th v. Clark*, 157 P. S. 257.

504. Where a person is charged with

perjury which is alleged to have been committed in a civil suit not yet determined, he is entitled to a continuance of his trial until the civil suit is determined, and also to a discharge on *habeas corpus* until that time. *Comm'th v. Davis*, 10 C. C. 596; s. c. 29 W. N. C. 500.

L. Forgery.

505. Making false entries by a clerk in the books of his employer, which enables him to embezzle the moneys of his employers, is forgery at common law. *Comm'th v. McDowell*, Vaux's Dec. 167.

506. The making, altering, and uttering any writing, which gives thereto a false character and whereby another's rights are prejudiced, is forgery at common law. *Comm'th v. Hutchinson*, Vaux's Dec. 47.

507. If a defendant be charged with forgery by which he obtained a sum of money, the magistrate will retain a sum of money, found upon his person when arrested, pending the trial of the cause. *Comm'th v. Edwards*, Vaux's Dec. 1.

508. The act of signing another person's name, though a dangerous indiscretion, is not a forgery under the law, if it lacks the element of intent to defraud. *Comm'th v. Connolly*, 11 C. C. 414.

509. Where an order for goods purported to have been dated in Altoona, Blair county, but the proof was that the goods were furnished upon an order in Philadelphia county and there was no proof that the order was made and published in Blair county; it was *held*, that an indictment for a forgery of the order could not be sustained in Blair county. *Comm'th v. Fagan*, 12 C. C. 613.

510. A pilot who issues a false receipt for pilot fees which were not in fact received by the pilot who signed it, may be indicted for forgery under the act 31 March 1860, sec. 169 (Brightly's Purdon 506). *Comm'th v. Fitzpatrick*, 15 C. C. 154; s. c. 35 W. N. C. 258.

511. Upon the trial of an indictment for uttering a forged note, it was *held*,

that where the defendant, at the time of negotiating the note, represented that J. B. Miller, the drawer of the note, lived at or near a certain place, it was competent for the commonwealth to prove that no such person lived at or near that place. *Comm'th v. Norris*, 9 Montg. 143.

512. Upon the hearing of a writ of *habeas corpus* the relator will be held to bail for forgery, where it is shown that a check proved to be false was found in his possession. *Comm'th v. Sheriff*, 10 C. C. 341.

513. Upon the trial of an indictment for forgery, the duty of comparing the genuine signatures with the alleged forgery is exclusively for the jury. *Comm'th v. Stokes*, 4 York 187.

LI. Conspiracy.

514. An indictment charging conspiracy with persons unknown is good. *Comm'th v. Edwards*, 26 W. N. C. 242. See s. c. 5 Kulp 192.

515. Where two are joined in one indictment for conspiracy and one is acquitted and the other convicted, either by his own plea or by the jury, the costs cannot be put either upon the county or the prosecutor. *Ibid.*

516. An indictment for a conspiracy to abduct a child is defective, which does not aver the name or sex of the child, and that it was under the age of ten years, and an intent to deprive its parents or other person having lawful charge of it, of its possession, or to steal any article of apparel, etc. *Comm'th v. Myers*, 146 P. S. 24.

517. It is not necessary that an indictment for an unexecuted conspiracy to cheat and defraud should state any overt act or the means to be employed or the act done in furtherance of the unlawful purpose. *Comm'th v. Hadley*, 13 C. C. 188.

518. Where the defendant was committed upon an affidavit charging him with conspiring with persons named to cheat and defraud at a specified election,

and in pursuance of said conspiracy making a false and fraudulent return of said election and conspiring to procure the casting of illegal votes and preventing qualified electors from exercising their right of suffrage; it was held, that such a commitment would not support an indictment which charged a conspiracy with unknown persons to prevent divers persons whose names were unknown from voting, they, the said divers persons, being then and there qualified to vote; and the indictment was quashed. Where there is a desire to indict for some other offence there should be another binding over. *Comm'th v. Hunter*, 13 C. C. 573.

519. An indictment for conspiracy to commit an unlawful act need not set forth the means by which the object was to be effected; it is sufficient to charge that the defendants unlawfully, falsely and maliciously did conspire and agree to cheat and defraud a certain person out of a certain sum of money. *Comm'th v. Lutz*, 9 Lanc. 241; s. c. 5 Del. 87.

520. Upon an indictment for conspiracy, the *venire* may be laid in any county in which it can be proven that an overt act was done by any of the conspirators in pursuance of their common design; and this, although they entered into the design in another county. *Comm'th v. Sterling*, 10 Lanc. 41.

521. If one communicates a libel to another, with a view to its publication, both are guilty of a conspiracy to publish a libel. *Comm'th v. Murphy*, 8 C. C. 399.

522. In an indictment under the act 29 June 1881 (Brightly's Purdon 761), for making a false return, a count will be sustained which charges a conspiracy to commit the act. *Comm'th v. Boyle*, 14 C. C. 561.

523. Upon the trial of an indictment for conspiracy, concurrence of sentiment may be presumed from a concurrence of action on a material point, and from this the actual fact of conspiracy may be inferred; it is not necessary to prove that the defendants came together and actually agreed to have a common design and

pursued it by common means. *Comm'th v. Sterling*, 10 Lanc. 41.

524. Upon the trial of an indictment for conspiracy to produce an abortion, where it appeared that the female died from the effects of the abortion but such death was not referred to in the indictment; the court refused to give binding instruction to acquit on the ground, that while the indictment was for a misdemeanor, the offence was a felony into which the conspiracy merged. *Comm'th v. Sterling*, 10 Lanc. 41.

525. Upon the trial of an indictment for conspiracy to produce an abortion, it is not necessary in order to convict the defendants that they should have urged the victim to commit the deed; they are guilty if they were privy to it and consented and in any way assisted her in furthering her designs; and this, although the design may have been hers. *Comm'th v. Sterling*, 10 Lanc. 41.

526. Where an indictment for conspiracy to take illegal fees contained allegations that the same were taken from the prosecutor, but no allegations that they were taken from the prosecutor and others; it was *held*, that evidence would not be admitted of illegal fees taken from other parties, in order to show a conspiracy. *Comm'th v. Hartman*, 10 Lanc. 33.

527. Where a prothonotary and his deputy were on trial for conspiracy to defraud by taking illegal fees and for taking illegal fees, and the evidence showed that such fees were charged by the deputy and there was no evidence of any agreement between the defendants or that the prothonotary knew of the illegal charge until it was pointed out to him, when he offered to refund it; it was *held*, that a verdict of not guilty should be directed for the defendants. *Comm'th v. Hartman*, 10 Lanc. 33.

528. Upon the trial of an indictment for conspiracy the commonwealth is bound to prove the alleged corrupt combination; although it is not essential to produce witnesses who were present when the combination was entered into, it is at

least necessary for the commonwealth to prove such circumstances as necessarily tend to its establishment. *Comm'th v. Lutz*, 9 Lanc. 241; s. c. 5 Del. 87.

529. A conveyancer employed by the prosecutor to make searches, and who falsely states the amount of incumbrances on the mortgagor's property, will be held with the mortgagor for conspiracy to cheat and defraud. *Comm'th v. Pryor*, Vaux's Dec. 54.

530. The mere fact that two of the defendants received large sums of money from the third defendant, a partner of the prosecutor, will not sustain a prosecution for conspiracy to cheat and defraud. *Comm'th v. Burr*, Vaux's Dec. 106.

531. In a criminal prosecution for conspiracy to confine the prosecutor in an insane asylum, the finding of insanity by a duly appointed commission *de lunatico* is not conclusive on the question of such insanity as to the propriety of such confinement, but the commonwealth may inquire into the question of such insanity and as to the alleged conspiracy. *Comm'th v. Spink*, 137 P. S. 255; s. c. 27 W. N. C. 37.

532. Under the act of 23 May 1887 (Brightly's Purdon 816) a married woman is competent to testify on the trial of an indictment against her husband and another, for conspiracy to put her in an insane asylum. *Ibid*.

533. Upon a trial for conspiracy, testimony under oath of the defendants in a former trial may be read as their admissions and declarations. *Comm'th v. Doughty*, 38 P. L. J. 261.

534. A judgment will not be arrested where the judge interrupted the trial and called a person for sentence and took testimony implicating one of the defendants in another similar transaction. *Ibid*.

535. If seven defendants be indicted for conspiracy and three plead *autrefois convict*, one of the other four has no standing on appeal to complain that the court sustained a demurrer to such plea. *Ibid*.

536. Upon a trial for conspiracy after evidence has been given tending to establish collusion, it is not error to admit in evidence a relevant act of one defendant with which, in itself, the other defendant has not been connected. *Comm'th v. O'Brien*, 140 P. S. 555.

537. Upon the trial of an indictment for conspiracy the admissions or declarations made by one conspirator after the conspiracy has come to an end as to acts previously done by the other, are not admissible in evidence against the other. *Comm'th v. Sterling*, 10 Lanc. 41.

538. Upon a conviction for conspiracy, a new trial was refused on the ground of after discovered testimony, where the latter was cumulative rather than material, and simply tended to contradict and impeach the evidence given by the prosecutor. *Comm'th v. Brown*, 7 Kulp 103.

LIII. Extortion.

539. Extortion at common law is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or more than is due, or before it is due; and any person who acts as an officer cannot avoid his liability for extortion by pleading the irregularity of his appointment. *Comm'th v. Saulsbury*, 152 P. S. 554.

540. A deputy constable appointed as a township policeman under the act 9 May 1889 (Brightly's Purdon 374), is not an officer of the commonwealth within the provisions of the act 31 March 1860, sec. 12 (Brightly's Purdon 503), providing a penalty for the crime of extortion; but such an officer may be convicted of extortion at common law if the evidence justifies it. *Comm'th v. Saulsbury*, 152 P. S. 554.

541. The penal provisions of the act 28 March 1814 (Brightly's Purdon 879), for taking illegal fees were designedly omitted from the act 2 April 1868 (P. L. 3); since the passage of that act, the offence of extortion in taking illegal fees is punishable only by indictment under

the act 31 March 1860, sec. 12 (Brightly's Purdon 503). *Irons v. Allen*, 169 P. S. 633. contra, *Heinrich v. Venter*, 33 P. L. J. 147.

542. Where an indictment for conspiracy to take illegal fees contained allegations that the same were taken from the prosecutor, but no allegations that they were taken from the prosecutor and others; it was held, that evidence would not be admitted of illegal fees taken from other parties, in order to show a conspiracy. *Comm'th v. Hartman*, 10 Lanc. 33.

543. Where a prothonotary and his deputy were on trial for conspiracy to defraud by taking illegal fees and for taking illegal fees, and the evidence showed that such fees were charged by the deputy and there was no evidence of any agreement between the defendants, or that the prothonotary knew of the illegal charge until it was pointed out to him, when he offered to refund it; it was held, that a verdict of not guilty should be directed for the defendants. *Comm'th v. Hartman*, 10 Lanc. 33.

544. Upon an indictment for taking illegal fees, the commonwealth must show that the illegal charge was taken wilfully, fraudulently and corruptly; an officer is not liable for the misconduct of his deputy where it is not shown that he authorized or sanctioned it. *Comm'th v. Hartman*, 10 Lanc. 33.

545. Where the accounts for a term were confirmed *nisi* and came up for final confirmation, and it appeared to the court that illegal fees were allowed therein to the register of wills, clerk of the orphans' court and prothonotary, the court refused to confirm the accounts and appointed a committee of the bar to file exceptions thereto. *In re Accounts*, 10 Lanc. 139. See *Mumma's Estate*, 10 Lanc. 193; *Reeser's Petition*, 12 Lanc. 33.

546. Constables cannot charge for mileage not actually travelled in serving warrants and subpoenas sent to them or returned by mail; if they do so, they make themselves liable to prosecution for extor-

tion. *In re Office Costs*, 11 Lanc. 28. See s. c. 11 Lanc. 121; *Comm'th v. Frescoln*, 11 Lanc. 161; *Comm'th v. Sollenberger*, 11 Lanc. 235.

547. The costs entered on a writ of *feri facias* cannot be altered by the prothonotary without the consent of the court or the parties after the property has been sold and deed acknowledged; where, upon the acknowledgment of sheriff's deeds in open court, it appeared to the judge on examination that the fees taxed and collected by the prothonotary were in excess of the legal rate, and the court ordered him to attach itemized bills to the writs and return them, and upon such a return it appeared that the fees first charged had been erased and altered, the court arraigned the prothonotary and his deputy and ordered them to be indicted for receiving illegal fees and altering and destroying the records and for conspiracy. *Comm'th v. Hartman*, 11 Lanc. 89. See s. c. 10 Lanc. 33.

548. Upon an indictment for extortion under the act 31 March 1860, sec. 12 (Brightly's Purdon 503), in receiving illegal fees, the commonwealth must show that the fee was received for a service which should have been performed gratuitously; a public officer may lawfully receive compensation for services performed by request, which are not part of the duties of his office but could as well have been performed by any other person. *Comm'th v. Ache*, 2 Northam. 370.

549. Upon a report of the grand jury that they had taken consideration of the subject of demanding illegal fees by county officers and suggesting to the court that the whole subject be intrusted for an investigation to a committee of persons learned in the law; it was held, that the court could take no action in the matter as it had no power to appoint such a commission nor to compel its members to serve if appointed, nor to provide compensation for their services if willing to serve. *In re Grand Jury Report*, 6 York 200; s. c. 5 Del. 271.

LIV. Nuisance.

550. A corporation may be indicted for maintaining a nuisance. If it fails to appear and plead, it can be compelled to answer by *distress infinite*. *Comm'th v. North & West Branch Railway Co.*, 5 Kulp 293.

551. Where a corporation has been summoned by a writ of *venire facias* to answer an indictment for nuisance, and fails to enter an appearance, a judgment may be entered against it by default. *Comm'th v. Lehigh Valley R. R. Co.*, 165 P. S. 162; reversing s. c. 14 C. C. 341.

552. An indictment charging the defendants with "maintaining and keeping a certain brick kiln and by means of the burning of brick in the same, great heat is occasioned and sulphurous, noxious and destructive smoke, vapors, exhalations and smells are emitted and occasioned, and the air vitiated and corrupted, to the common nuisance of the neighborhood and all the good citizens of the commonwealth in said neighborhood residing and passing," was held not to be so defective that the court would quash it; and this, although it might have been drawn with greater accuracy. *Comm'th v. Weitzel*, 1 York 59.

553. A landlord is not criminally liable for the act of his tenant in obstructing a highway, even though he knew it and did not dissent. *Comm'th v. Switzer*, 134 P. S. 383; s. c. 25 W. N. C. 46.

554. Upon an indictment against a street railway company for a nuisance in maintaining its track with a slight deflection from the centre line of the street, contrary to the provisions of the borough ordinance granting its consent to the construction, if such location did not in point of fact interfere with public travel, the mere location did not itself constitute a nuisance. *Comm'th v. Wilkes-Barre & Kingston Street Railway Co.*, 127 P. S. 278.

555. Where a road is opened by the supervisors, and maintained as such by the public, any one obstructing it is

guilty of a public nuisance and so indictable. *Glenn v. Comm'th*, 5 Cent. 492.

556. If a street be declared by statute a common highway, any private occupation of the same is indictable as a nuisance; and this, though the street has never been passable otherwise than on foot, and though there be no evidence that the travel of foot passengers thereon has been actually incommoded. *Comm'th v. McNaugher*, 131 P. S. 55.

557. The mere plotting of a city street does not give the public any rights, of travel. In the absence of a definite, uniform and adverse user by the public under a claim of right for twenty-one years, a defendant will not be punished for, or restrained from, building a fence across the so-called streets. *Comm'th v. Philadelphia & Reading Railroad Co.*, 135 P. S. 256; s. c. 26 W. N. C. 154.

558. Upon an indictment for obstructing a highway by the erection of a stone wall within its limits, the only question is whether the wall is upon any part of the highway as laid out and used. *Comm'th v. Marshall*, 137 P. S. 170; s. c. 27 W. N. C. 67.

559. It is an indictable offence to haul stone on a public highway with a traction engine, making a train fifty feet long, weighing, when loaded, from thirteen to fourteen tons; and this, though there be no evidence that the train interfered with travel by frightening the horses or that it obstructed travel. *Comm'th v. Allen*, 148 P. S. 358. See act 30 June 1885 (Brightly's Purdon 1885).

560. Upon an indictment for a public nuisance in maintaining a fence upon a public highway, it is inadmissible as a defence that the highway, as actually opened and travelled, was not upon the location made by the report of the viewers confirmed by the court, and that by such report the fence was upon defendant's own land. *Comm'th v. Dicken*, 145 P. S. 453.

561. An indictment for obstructing a street by a fence cannot be sustained where

the fence is not upon the opened and travelled part of the street, nor in that portion which has been actually accepted by the public authorities. *Comm'th v. Royce*, 152 P. S. 88.

562. A person cannot be convicted for obstructing an alley way in the city of Altoona, where it appears that although the alley was on the plan annexed to the report made by the commissioners, under the act incorporating the city, the alley was never actually opened. *Comm'th v. Kline*, 162 P. S. 499.

563. Any unauthorized permanent structure which materially encroaches upon a public street of a city and impedes travel, is a nuisance notwithstanding spaces left for the passage of the public. An ordinance declaring every obstruction of a street, except by authority of an ordinance or permit, to be a common nuisance and imposing a fine for its violation, will sustain a conviction for erecting any permanent structure in the highway. *Wilkes-Barre v. Burgunder*, 7 Kulp 63; s. c. 5 Del. 265.

564. Where the defendants cut ice in the river so as to obstruct and interfere with a winter way across the river, which had been used by the public for more than twenty years; it was held, that such unlawful interference with the right of passage was an indictable offence. *Comm'th v. Christie*, 13 C. C. 149.

565. Playing base-ball on Sunday at an unfrequented place is not indictable as a common nuisance. *Comm'th v. Parks*, 6 Montg. 141.

566. Base-ball playing on Sunday at an unfrequented place is not such a breach of the peace as to make the parties indictable for a common nuisance, in the absence of evidence that any one in the immediate neighborhood was disturbed. *Comm'th v. Meyers*, 8 C. C. 435; s. c. 2 Northam. 213.

567. Public swearing is a nuisance at common law, but to be indictable it must be in a public place and an annoyance to the public, and the indictment must charge that the profane language was uttered in

the presence and within the hearing of the citizens present. *Comm'th v. Linn*, 158 P. S. 22.

568. Where authority is given to borough officers to make regulations necessary for the health and cleanliness of the borough, their neglect to do so is a misdemeanor punishable by indictment. *Comm'th v. Bredin*, 165 P. S. 224.

569. Where the officers of a borough are convicted of maintaining a nuisance and sentenced to pay the costs and abate the nuisance, such of the defendants as are out of office at the time of sentence are liable for the costs; and this, although they are not in a position to comply with the rest of the sentence. *Comm'th v. Bredin*, 165 P. S. 224.

570. A borough cannot be indicted for a nuisance for altering and straightening a street or for authorizing a citizen to lay a new curb and to place a hitching-post along the edge of the foot-walk; the burgess and members of council cannot be indicted as individuals for nuisance, for acts done in pursuance of a borough ordinance. *Comm'th v. Kinports*, 12 C. C. 463.

571. Upon an indictment for a nuisance in erecting and maintaining a chemical factory in which bones were boiled and burned and otherwise prepared, thereby causing noisome, disagreeable and unhealthy odors to be disseminated; it was *held*, that the jury might take into consideration evidence of odors produced at the factory otherwise than by boiling, burning and preparing bones. *Comm'th v. Rush*, 11 Lanc. 97.

572. Upon the trial of the operators of a refinery of petroleum, for maintaining a nuisance, the facts that the business has been in operation for several years, and the size of the establishment, may be considered by the jury in the determination of the question whether the refinery was a common nuisance at the place where it was located. *Comm'th v. Miller*, 38 P. L. J. 226.

573. Upon the trial of an indictment for maintaining a nuisance, it is error to

charge that "a reasonable doubt is such a doubt as would influence or control you in your actions in any of the important transactions of life." *Comm'th v. Miller*, 139 P. S. 77; s. c. 38 P. L. J. 226.

574. Upon the trial of an indictment for maintaining a nuisance, leave to the jury to view the premises is within the discretion of the court. *Ibid*.

LV. Lotteries.

575. The act of 3 June 1885 for the suppression of lottery gifts by store-keepers is in conflict with article III., sec. 3, of the constitution, the title is misleading. *Comm'th v. Moorhead*, 7 C. C. 513.

576. A proposal by the owners of suburban lots to pay a sum of money to the person who would suggest the best name for a village, the choice to be determined by a committee, was *held* to be not within the act 31 March 1860 (Brightly's Purdon 517), prohibiting lotteries; and it seems that under such a contract each person who sent in the selected name was entitled to a prize of the amount advertised. *Holt v. Wood*, 14 C. C. 499.

LVIII. Malicious mischief.

577. The act 23 March 1865 (Brightly's Purdon 519), against maliciously breaking down fences, does not apply to the tearing down of a fence in the honest exercise of a supposed legal right. *Comm'th v. Drass*, 146 P. S. 55.

578. The act 6 May 1887 (Brightly's Purdon 479), making it a misdemeanor to mutilate or tear down any show bill, placard, programme, poster or other advertisement, does not apply to the act of tearing down a constable's notice of sale; it was not decided whether an indictment would lie at common law. *Comm'th v. Johnson*, 13 C. C. 543.

579. In an indictment for malicious mischief, failure to charge the act as maliciously done, is not fatal; it is sufficient to aver some act of damage from which

malice can be inferred. *Comm'th v. Cunningham*, 1 Dist. Rep. 573.

580. The act 31 March 1860, sec. 421 (Brightly's Purdon 534), punishing malicious injury to railroads, includes street railways. *Comm'th v. McCaully*, 2 Dist. Rep. 63.

581. An indictment will not lie in the quarter sessions for malicious trespass under the act 8 June 1881 (Brightly's Purdon 520), unless the record of the magistrate shows not only a hearing, conviction, sentence and recognizance entered but also a refusal by the defendant to comply with the sentence imposed; under that act the magistrate has no authority to grant an appeal. *Comm'th v. Groff*, 8 Lanc. 267.

582. A defendant may be indicted and convicted for wilfully, maliciously and mischievously cutting another's hair with intent to disfigure him. *Comm'th v. Nusky*, 9 Lanc. 317.

583. Upon an indictment for malicious mischief in tearing down a party wall previous to official condemnation; it was held, that malice might be inferred from the wilful disregard of the defendant of the rights of the prosecutor, or from the fact of the act having been done secretly or in the night-time. *Comm'th v. Strobe*, 27 W. N. C. 437.

584. Upon an indictment under the act 31 March 1860, sec. 153 (Brightly's Purdon 523), for maliciously cutting and destroying a certain bounded tree or other allowed landmark, it must be shown that the tree was on the line and was an undisputed and allowed landmark, and that the cutting was done maliciously. *Comm'th v. Rauhauser*, 2 York 189.

LIX. Cruelty to animals.

585. An indictment for cruelty to animals should describe the particular animals by name, color or other marks of individuality; it is not sufficient to describe them as "horses and other domestic animals." *Comm'th v. Frescoln*, 11 Lanc. 161.

586. Shooting pigeons from a trap to test skill of marksmanship is not cruelty to animals, within the act of 29 March 1869 (Brightly's Purdon 489). *Comm'th v. Lewis*, 140 P. S. 561; s. c. 27 W. N. C. 359; reversing s. c. 7 C. C. 558.

587. Upon a conviction before a justice on a charge of cruelty to animals, a sentence to pay a fine of ten dollars and to be committed to the county jail until paid, cannot be pronounced in the absence of the defendant; the sentence in such case must show to whom the fine was to be paid. *Grim v. Reinbold*, 3 Dist. Rep. 668.

588. A defendant, who is convicted by a justice for cruelty to animals, cannot be sentenced in his absence. *Davis v. Comm'th*, 13 C. C. 545.

589. Where a defendant was convicted before a justice of cruelty to animals and was allowed an appeal by the judge of the quarter sessions two days after his conviction, on condition of entering into a recognizance for his appearance at the next term; it was held to be no ground to quash the appeal because no application was made to the justice to grant it and the judge failed to fix a time within which the bail should be entered. *Comm'th v. Deardorff*, 5 York 63.

LX. Bribery.

590. Section 32, of article III., of the constitution (Brightly's Purdon 35), that a witness shall not be permitted to withhold his testimony against persons charged with bribery, but that such testimony shall not afterwards be used against him, includes bribery at nominating conventions or delegate elections; where a witness claims the privilege of refusing to testify and the court decides that the case is within the constitutional provision, such decision, whether right or wrong, will shield the witness from having testimony, given under such circumstances, afterwards used against him. *Comm'th v. Bell*, 145 P. S. 374.

591. Upon the trial of an indictment for bribery, where a witness for the commonwealth was asked whether the defendant had at a certain time offered a bribe to the witness; it was *held*, that a responsive answer would not tend to criminate the witness in such a sense as to justify a refusal on his part to answer. *Comm'th v. Bell*, 145 P. S. 374.

LXI. Accessories.

592. Where a person joins others in the commission of a crime for the purpose of exposing it, he is not an accessory before the fact, although he may have encouraged and counselled the parties who were about to commit the crime, and such a person is not to be treated as an infamous witness. *Comm'th v. Hollister*, 157 P. S. 13.

CROSS-EXAMINATION.

See EVIDENCE, L.

CRUELTY TO ANIMALS.

See CRIMINAL LAW, LIX.

CRUELTY TO CHILDREN.

See INFANTS.

CURTESY.

See HUSBAND AND WIFE.

CURTILAGE.

See MECHANICS' LIEN, VI: RAILROAD COMPANIES.

CUSTOM.

1. In the construction of a written contract, a usage of trade known to the parties not unreasonable or in conflict with positive law, is admissible to explain the intention and give effect thereto. *First National Bank v. Fiske*, 133 P. S. 241; s. c. 25 W. N. C. 454.

2. A contract to do mason work at a certain price per cubic yard is not affected by evidence of a usage for "mason's measurement," a mere usage of trade, recent in date and not general in its application. *Corcoran v. Chess*, 131 P. S. 356.

3. A rule of the Bricklayers' Association as to "constructive measurement," variable from time to time, cannot be read into a written contract without evidence of actual knowledge and recognition by the parties. *Ambler v. Phillips*, 132 P. S. 167.

4. In a suit for rent reserved in a lease of a theatre, it is a good defence that the defendant gave three months' notice of a desire to cancel, and that by a custom of the theatrical profession one month's notice is sufficient to determine a lease. *Academy of Music v. Bert*, 8 C. C. 223.

5. An employee in a quarry is bound by an established custom as to the manner in which notice was to be given of a blast, and if such customary notice be given, the defendant cannot be held to be guilty of negligence. *Martins v. Stevens*, 1 Northam. 191; affirmed in *Stevens v. Martins*, 23 W. N. C. 475.

6. If a farm hand be injured in his employment under circumstances which prevent a recovery of damages, he cannot recover his wages for the period during which he was incapacitated; nor can such liability on the part of the master be established by evidence of local custom. *Shaw v. Deal*, 7 C. C. 379; s. c. 25 W. N. C. 39.

7. Under the act of 13 April 1834, fixing a ton at 2000 pounds, it was *held* to be incompetent to show that by a custom of a particular trade a ton consists of

2240 pounds. A party will, however, be held to his stipulated agreement to deliver that number of pounds to the ton. *Harrison v. Mora*, 8 C. C. 224.

8. If an oil lease provide by express terms how many wells shall be put down, no implication can be raised that a greater number are to be drilled in accordance with a custom for the most effective operations. *Stoddard v. Emery*, 128 P. S. 436.

9. In an action for rent, where the only question was as to the terms of the contract, it was incompetent for the defendants to prove the custom of the lessor in renting the building, his declarations as to his custom, or the usages of his assignee as to renting in like cases. *Arrott Steam Power Mills Co. v. Way Mfg. Co.*, 143 P. S. 435.

10. Where a literal breach of a contract is averred, such an averment is sufficient to prevent a summary judgment; and this, though a trade custom might affect the determination of the defendant's rights to strict performance. *Martinez v. Earnshaw*, 143 P. S. 479.

11. An affidavit of defence setting up a custom, when made by a person with presumable knowledge of the custom, should not be made on information and belief without an averment of expectation of ability to prove it; where the custom was said to be one "known to dealers in bonds and stocks," the affidavit should allege that the plaintiff was such a dealer. A custom among dealers in bonds and stocks, that an option to sell at the end of any given period expires on the last day of said period, was *held* not to apply to an option to demand a rescission of a sale after a year of obligatory retention by the purchaser of the article sold. *Weld v. Barker*, 153 P. S. 465.

12. Where an owner invites proposals to erect a building, he is not thereby obliged to award the contract to the lowest bidder; where, upon the opening of the bids, the owner said to the lowest bidder, "you are the lucky man"; it was *held*, that this did not amount to an award of

the contract; in such a case, proof of a custom that the lowest bidder is entitled to the contract, is inadmissible. *Leskie v. Haseltine*, 155 P. S. 98.

13. In an action to recover the price of building stone piers at so much per perch, mason's measure, evidence was admissible of a custom among masons to measure piers by finding their actual surface contents and dividing the result by sixteen and one-half. *McCullough v. Ashbridge*, 155 P. S. 166.

14. In an action for dredging, where a certain sum per day was to be paid for the use of a dredge, it is not improper for the court to charge that the time which constitutes a day's work for a dredge must be determined from the evidence as to the custom of the business on the subject. *National Dredging Co. v. Mundy*, 155 P. S. 233.

15. Upon a contract to deliver pelts, where no terms of payment have been agreed on, such terms may be fixed by evidence of previous dealings between the parties, and of the custom of the trade. *Peirson v. Duncan*, 162 P. S. 187.

16. In an action to recover the price of a car load of cabbage, an affidavit of defence was held to be sufficient which averred that by a custom of the trade, when vegetables are ordered by telegram or letter to be shipped to a distant point, the consignor impliedly warrants the goods to be sound, wholesome and merchantable, and that he will employ a certain specified means of packing to aid in the preservation of the goods and that the plaintiff failed to so pack the car whereby the cabbage became unmerchantable. *Davis v. Koenig*, 165 P. S. 347.

CY PRES.

See CHARITY.

DAMAGES.

See ACTION: APPEAL AND ERROR: CONSTITUTIONAL LAW: HIGHWAYS: INTEREST: MONEY: NEGLIGENCE: NUISANCE: PRACTICE, XX., XXI.: RAILROAD COMPANIES: REPLEVIN: TRESPASS: TROVER.

- I. Liability for damages.
- II. What recoverable as damages.
- III. Vindictive damages.
- IV. Mitigation of damages.
- V. Measure of damages.
 - (b) Actions *ex contractu*.
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 - (1) Criminal conversation.
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 - (5) Replevin.
 - (6) Riparian owners.
 - (7) Trespass.
 - (8) Trover.
- VI. Liquidated damages.
- VII. Double and treble damages.

I. Liability for damages.

1. A bank which without cause refuses to honor a depositor's check, is liable for substantial damages, though no special loss be shown. *Patterson v. Marine Nat. Bank*, 130 P. S. 419.

2. The owner of an unimproved lot is not liable in damages for the natural flow of surface water from his lot into the cellar of the house on the adjoining lot, both properties being below the grade of the street. *Sentner v. Tees*, 132 P. S. 216.

3. The owner of ground through which a channel for surface water has flown for a long time, is liable in damages for diverting the same upon the land of his neighbor. *Rhoads v. Davidheiser*, 133 P. S. 226; s. c. 25 W. N. C. 513.

4. A person boring for oil or gas having knowledge that neighboring water wells are supplied from a stratum of clear water, and that a deeper stratum of salt water when penetrated by such boring is likely to rise and mingle with the fresh, is liable for a failure to use means to prevent such mingling which he might do, by a reasonable outlay. *Collins v. Chartiers Gas Co.*, 131 P. S. 143; s. c. 139 P. S. 111. See *Pennsylvania Coal Co. v. Sanderson*, 113 Ibid. 126; *Lyle's Appeal*, 106 P. S. 634.

5. Persons having no interest in a water-course as riparian owners, cannot sue for damages the alienee of the party who obstructed it, and thereby caused injury to their property. Such damages are properly chargeable to him by whom the trespass was committed. *Schlag v. Jones*, 131 P. S. 62.

6. Upon a contract between three parties that each shall sink oil wells on their respective premises, jointly purchase the implements, each to be at the expense of the well on his premises, and each to receive one-twentieth of the product of the wells of the others; if but one party put down a well he cannot recover from the others one-third of the expense thereof, he can recover only such loss as he can show he sustained by reason of defendant's failure to put down their wells. *Hutchinson v. Snider*, 137 P. S. 1; s. c. 26 W. N. C. 531.

II. What recoverable as damages.

7. The recovery of damages for the pollution of a stream cannot extend to the pollution caused by water pumped from a mine in its natural character, with impurities arising from natural causes. *Long v. Trexler*, 8 Atlan. 620.

8. In estimating damages to a leasehold, interest may be allowed on the loss for each year of the term. *Jones v. Pittsburgh & Lake Erie Railroad Co.*, 10 Cent. 413.

9. In an action for the negligent destruction of property, it is error to charge

that the jury might include in their verdict interest on the damages. But the supreme court instead of reversing, will, with the plaintiff's assent, reduce the judgment by striking off the interest. *Richards v. Citizens' Natural Gas Co.*, 130 P. S. 37.

10. Interest should not be included in damages in an action *ex delicto*; but the supreme court will allow the judgment to be amended by remitting the interest. *Emerson v. Schoonmaker*, 135 P. S. 437.

III. Vindictive damages.

11. For trespass committed by defendant's employee exemplary damages should not be allowed unless it was shown to be the result of defendant's wantonness, or else of his culpable inattention and neglect. *Keil v. Chartiers Valley Gas Co.*, 131 P. S. 466.

12. If the verdict clearly shows that only actual damages were given, the supreme court will not consider an assignment of error that it was error to direct the jury that punitive damages might be given. *Lord v. Meadville Water Co.*, 135 P. S. 122; s. c. 26 W. N. C. 110.

13. A judgment against the defendant, an upper riparian owner, for diverting the water of a stream, is conclusive in a subsequent action by the same plaintiff of his right to recover. Punitive damages may be given in the second suit for such continued diversion. *Long v. Trexler*, 8 Atlan. 620.

14. For cutting a pipe line supplying water to plaintiff, the latter is entitled to the reasonable cost for obtaining a supply of water, and of the deprivation thereof. The court could not say it was not a case for punitive damages. *Reynolds v. Braithwaite*, 131 P. S. 416.

15. As to the liability of a natural gas company for exemplary damages for injuries resulting from their making a connection from the mains in a crowded city without turning off the gas, see *Millbury v. People's Natural Gas Co.*, 2 Mona. 145.

16. In an action for maintaining a

nuisance in the neighborhood, it may be shown, on the question of exemplary damages, that the defendant continued the negligent practice after the suit was brought; but it was *held* to be error to instruct the jury whether or not a preliminary injunction had been violated by the defendant. *Keiser v. Mahanoy City Gas Co.*, 143 P. S. 276.

17. In an action for the obstruction of an alley, where the plaintiff had made no serious objection to the obstruction, but instituted the suit at the instigation of his landlord, it was improper to charge that if the defendant had wilfully used the plaintiff's land for a purpose not authorized, after being remonstrated with and the jury believed he had done so in wilful disregard of the plaintiff's right, they would have a right to find a verdict for the plaintiff for vindictive damages as a punishment to defendant. *Stephenson v. Brown*, 147 P. S. 300.

18. It is a well-settled rule in this state, that a husband may recover punitive damages for the debauching of his wife, not only by way of compensation, but by way of punishment, to deter the defendant and others from offending in like cases. *Cornelius v. Hamby*, 150 P. S. 359.

19. A statement in trespass which avers that the defendant tore down, demolished and carried away plaintiff's fence and trampled down and destroyed growing crops, will support a verdict for punitive damages; wantonness, malice or ill-will need not be specifically averred. *Kennedy v. Erdman*, 150 P. S. 427.

20. In trespass for assault and battery punitive damages may be allowed, although the defendant has already been convicted and fined for the same act in the quarter sessions. *Rhodes v. Rodgers*, 151 P. S. 634.

21. In an action of trespass for wantonly destroying shade trees; it was *held*, that exemplary damages might be given if the defendant wilfully and intentionally killed the trees. *Huling v. Henderson*, 161 P. S. 553.

22. Where the verdict established express malice, the plaintiff's good character and his persistent persecution for twelve years; it was *held*, in an action for libel, that a verdict for \$45,000 was not excessive, and that even if so considered by the court, it would not be proper to set it aside; in such cases punitive damages have always been encouraged. *Smith v. Times Publishing Co.*, 4 Dist. Rep. 399.

IV. Mitigation of damages.

23. In trespass for assault and battery evidence is admissible, in mitigation of damages, of the defendant's conviction of the same act in the quarter sessions; defendant may also prove the conduct of the plaintiff if it was calculated to provoke the assault. *Rhodes v. Rodgers*, 151 P. S. 634.

V. Measure of damages.

(b) Actions ex contractu.

24. In covenant for breach of contract not to engage in the omnibus business evidence was admissible that the defendant had carried a certain number of passengers which at regular rates amounted to a certain sum. *Moore v. Colt*, 127 P. S. 289.

25. The evidence to establish a parol contract of a decedent to devise his estate in consideration of services rendered must be clear and satisfactory. The measure of damages for the breach of such a contract is the value of the services, not the value of the estate. *McEvilla's Estate*, 5 Montg. 191.

26. An executor is liable on an express contract to pay funeral expenses; in such case it is no defence that they were unreasonable. In the absence of an express contract, however, the plaintiff can recover only their reasonable worth, in ascertaining which the jury may consider the estate of the decedent and his station in life. *Smith v. Teacle*, 8 C. C. 150.

27. In a suit for the contract price for digging an oil well, evidence as to the average cost of digging oil wells is irrelevant. *Holmes v. Chartiers Oil Co.*, 138 P. S. 546; s. c. 27 W. N. C. 156.

28. In an action for the price of a machine, where the defendant claims that the machine was imperfect, he is entitled to deduct from the plaintiff's claim such an amount as he would be required to expend in repairs in putting the machine in the condition which was arranged for in the plans designed, and also the necessary expenses he had been put to which were the result of the defects. *Johnson v. Freemann*, 160 P. S. 317.

29. Where changes were made in the plans for the iron work and appliances for the curves of a traction street railway company, whereby three curves were practically made into one at a certain point, by lengthening the radii in placing lighter castings between the boxes; it was *held*, that the plaintiff could recover for the filling pieces only their actual value, unless, when the change was made, there was an agreement that it was part of the curved work to be paid for at the contract price. *Marshall F. & C. Co. v. Pittsburgh Traction Co.*, 138 P. S. 266.

30. In an action for a share of profits upon the erection of a monument, the testimony of the persons who made the monument and shipped it, the opinions of expert witnesses and the original freight bills, were competent evidence as to the cost to defendants of the making, shipping and setting. *Canfield v. Johnson*, 144 P. S. 61.

31. In assumpsit by a son against his father's estate upon an express contract to compensate the plaintiff for his services either in money or land, and in any event, to give him one-half the farm at his death; it was *held*, that the plaintiff could not recover unless he had established the existence of the contract by clear, direct, positive, express and unambiguous evidence; and it was further *held*, that the

measure of damages was not the value of the land, but only the value of the services rendered, and in no event to exceed the value of the land at the death of the father, with interest from that date. *McLaughlin v. McLaughlin*, 145 P. S. 582.

32. Under an agreement to aid a daughter in contesting her father's will for twenty-five per cent of the net proceeds of all that might be recovered; it was *held*, that the claimant was entitled to twenty-five per cent of the balance after deducting costs, on the basis of the valuation of the property recovered, at the end of the litigation. *Douglass's Estate*, 39 P. L. J. 123.

(c) Contracts of sale.

33. Upon an executory contract for the sale of goods not specific, the measure of damages for a refusal to receive is the difference in the contract price and the market value on the day appointed for delivery. *Unexcelled Fire Works Co. v. Polites*, 130 P. S. 536.

34. Upon a refusal by defendant to purchase carbons under a contract to buy all its carbons of plaintiff at list-price, the damage for non-compliance should be assessed according to the profits which the plaintiff would have made on the carbons which defendant actually purchased from other parties. *Brush Electric Co.'s Appeal*, 11 Atl. 654.

35. In a suit by a seller against buyer for refusal to accept defective curtain-rollers, where the defendant had agreed that the plaintiff should replace them, the measure of damages was the contract price less what it would cost the plaintiff to supply the parts which were defective. *Muskegon Curtain-Roll Co. v. Keystone Manufacturing Co.*, 135 P. S. 132.

36. Where plaintiffs agreed to supply the defendants with what coal they would require for their mill for three years, and the defendants subsequently introduced natural gas and thereafter used a less quantity of coal and purchased such coal from another firm; it was *held*, that the defendants were liable for the coal neces-

sary for consumption after the introduction of the natural gas, but were not liable for the coal they would have required had they not introduced gas. *McKeever v. Cannonsburg Iron Co.*, 138 P. S. 184.

37. In a suit for damages for refusal to accept goods ordered, the measure of damages is the difference between the price at which the goods were to have been taken and the expense to the plaintiff of making them, or any other damage or expense caused to the plaintiffs by reason of their refusal to take. *Gallagher v. Whitney*, 147 P. S. 184.

(d) Contracts to deliver.

38. Upon the breach of a contract to supply iron of a certain character, the measure of damages is compensation for everything which has been the natural and probable consequence of the breach. *Philadelphia & Reading Coal and Iron Co. v. Hoffman*, 4 Atl. 848.

39. In a suit for damages for a breach of contract to supply patented articles at prices to be agreed upon, if no price was ever agreed upon, the plaintiff is entitled to but nominal damages. *Smith v. Loag*, 132 P. S. 301.

40. In an action for the breach of a contract to supply the plaintiff with coal sufficient to keep its coke plant in full operation for a definite period, such coal to be converted into coke for the defendant company at a fixed price per ton; it was *held*, that the plaintiff might recover the net profits which it certainly would have made had the contract been performed. *Imperial Coal Co. v. Port Royal Coal Co.*, 138 P. S. 45.

41. Where a vendor agrees to supply raw material to a factory for a year, and after partially completing the contract announces that he will deliver no more goods, the measure of damages is the difference between the price agreed upon in the contract and the market price at the date of the breach. *Arnold v. Blabon*, 147 P. S. 372.

42. In an action for a failure to deliver goods, the measure of damages is the dif-

ference between the contract price and the real price at which the plaintiff obtained the goods to fill the orders intended to have been filled by the goods, which the defendant agreed to deliver; where the plaintiff admits that he obtained most of the goods from his own firm, he may be asked what such goods cost him and whether he made or lost money on them. *Theiss v. Weiss*, 166 P. S. 9.

(g) Stock contracts.

43. The measure of damages in an action for deceit in the sale of stock is the difference between the real value of the stock at the time of the sale and the fictitious value at which the plaintiff was induced to purchase. *High v. Berret*, 148 P. S. 261.

44. In an action for breach of contract to purchase stock, where there is no formal tender of the stock, the measure of damages is the difference between the contract price and the market value of the stock at the time and place of delivery, with interest; but the value of the stock cannot be proven by testimony that a certain person had dealt in the stock and had stated its value to the witness. *Corser v. Hale*, 149 P. S. 274.

45. Where a person induces others to subscribe for stock and guarantees that if they do not want it and cannot pay their subscription, he will take it off their hands, he is responsible to them for whatever loss they sustain by reason of his subsequent failure to comply with his agreement, and the measure of damages is the difference between what they were obliged to pay for the stock and what they subsequently sold it for. *Herd v. Thompson*, 149 P. S. 434.

46. Where stock is wrongfully transferred under a forged power of attorney, the measure of damages, in an action against the company, is the market price of the stock at the time of the transfer. *Pennsylvania Company for Insurance on Lives & Granting Annuities v. Philadelphia, Germantown & Norristown R. R. Co.*, 153 P. S. 160: affirming s. c. 11 C. C. 482.

47. Where the stock is deposited with a broker as collateral for purchases, and it is pledged by the broker and sold by the pledgees, the measure of damages for the conversion of the stock is its market value at the date of the conversion. *Jamison's Estate*, 163 P. S. 143; reversing s. c. 3 Dist. Rep. 217.

(h) Breach of warranty.

48. In an action for a breach of warranty of a steam engine, the measure of damages is the difference between the actual value of the engine as it was, at the time of the sale, and its value if it had been as warranted. *Himes v. Kiehl*, 154 P. S. 190.

49. In an action for a breach of warranty, it is error for the court to fail to make a distinct statement as to what would be the true measure of damages. *Himes v. Kiehl*, 154 P. S. 190.

(i) Contracts to sell and lease lands.

50. In an action by a vendee for damages for the breach of a contract to sell land, where there was no fraud or bad faith in the original contract, and no possession taken and no purchase money paid and no improvements made and nothing changing the position of the vendee, the plaintiff is only entitled to nominal damages. *Rineer v. Collins*, 156 P. S. 342.

51. Upon the breach of a parol contract to lease lands, the measure of damages is the money paid or expense incurred on the faith of the contract. *Young v. Throop*, 1 Lack. Jur. 221.

52. In a suit for refusal to accept an ore lease, the measure of damages is the difference between the stipulated compensation for taking out the ore, and the value of the ore in place which the party had a right to take out, but left unmined. *Kille v. Reading Iron Works*, 141 P. S. 440; affirming s. c. 47 L. I. 464.

53. Where the plaintiff was operating a coal mine on the north side of a road under a written lease from the defendant, and made a parol agreement with the

defendant that if he, the plaintiff, could find coal on the south side of the road, the defendant would lease to him eight or ten acres thereof for as long as it would last at a certain rental, and the plaintiff developed coal on the south side of the road and opened and prepared a pit, and the defendant then refused to execute the lease; it was *held*, that the parol contract was an independent agreement, upon the breach of which the plaintiff was entitled to recover damages to the value of his work done, and that the case was unaffected by the statute of frauds and no change of the written contract by parol was involved. *Heilman v. Weinman*, 139 P. S. 143.

54. Where an oil lease restricted the operations of the lessee to certain specified sites and the lessor and those acting under him drilled on the leasehold, outside the sites designated; it was *held*, that the first lessee had a remedy at law against the lessor to recover damages actually sustained, which damages were to be measured by the difference in value of the plaintiff's leasehold before and after the injury was committed. *Duffield v. Rosenzweig*, 144 P. S. 520; s. c. 150 P. S. 543.

55. Where the plaintiff conveyed a town lot adjoining other lands belonging to him, to the defendant without "the right to drill or mine for petroleum, carbon oil or natural gas, which right is not intended to be conveyed but is forbidden to both parties hereto" and the grantee afterwards drilled a producing well; it was *held*, that the plaintiff was entitled to an injunction restraining operations for oil on the lot conveyed, but he was not entitled to an account as for damages measured by the amount of oil obtained by the defendant in his operations. *Acheson v. Stevenson*, 146 P. S. 228.

56. Where an oil and gas lease with no clause authorizing an assignment gave the lessee an option as to an adjoining tract on terms equal to the best terms offered by any other person, and the

lease was subsequently assigned by the lessee, who made a new agreement with the lessor with the provision that the original lease should remain in full force in all particulars "in which the same is not hereby modified"; it was *held*, that the assignment carried with it the option and the assignee was entitled to the new lease on the best *bona fide* offer made. And where the lessor had fraudulently informed the assignee that he had been offered twenty thousand dollars for the lease, and relying upon such representation the assignee had paid that sum, although the best offer was much less; it was *held*, in an action of deceit that a proper measure of damages recoverable was the difference between the amount paid by the second lessee and the best offer actually received by the lessor. *Guffey v. Clever*, 146 P. S. 548.

(D) Actions ex delicto.

(1) Criminal conversation.

57. In an action for criminal conversation, it is not improper to charge that the jury in assessing damages may take into consideration the social relations of the parties, the apparent affection which existed between husband and wife and the actual misconduct of the seducer; in such a case the husband is entitled to punitive damages and evidence is admissible that the seducer is a rich man, and it is not improper for the court to charge that there is a very great difference in a penalty as between a rich man and a poor man. *Matheis v. Mazet*, 164 P. S. 580.

(2) Malicious prosecution.

58. The plaintiff in malicious prosecution is entitled to recover for the actual loss of his liberty; for the injury to his reputation; for the physical and mental suffering to which he was subjected; for the loss of his time and for all costs and expenses to which he has been neces-

sarily subjected. *Miller v. Hammer*, 141 P. S. 196.

See MALICIOUS PROSECUTION.

(3) Nuisance.

59. Where a party is engaged in manufacturing coke from coal not mined by himself, but purchased at mines of other persons, remote from the land on which the manufacturing is done, he will be held to be liable in damages for a substantial injury to the crops and soil of an adjoining farm, caused by the smoke and vapors emitted from his ovens as a necessary incident of their operation; the measure of damages in such a case is the actual loss of crops and for any permanent impairment of productiveness of the soil, the extent of the loss resulting therefrom in the value of the farm. *Robb v. Carnegie*, 145 P. S. 324.

60. A person engaged in the manufacture of coke from coal slack not mined on the land which is the seat of such manufactory, is responsible to a lower riparian proprietor for the pollution of a stream as an incident of the washing of the slack in preparation for its use in making coke therefrom. Where it appeared that the deposit was begun seventeen years before suit; it was held, on the question of damages, that the question was, as to what extent had the defendants made the condition of the stream worse within six years. In such a case the measure of damages is the cost of remedying the injury unless that equals or exceeds the value of the thing injured, when such value becomes the measure. *Lentz v. Carnegie*, 145 P. S. 612. See *Robb v. Carnegie*, 145 P. S. 324.

See NUISANCE.

(4) Personal injuries and death.

61. In trial for assault, expenses for medical aid, nursing and loss of earnings, the natural results of the injury, may be recovered as damages. *Hawes v. O'Rielly*, 126 P. S. 440.

62. In an action for personal injury

the plaintiff may recover for bodily pain or suffering he may have experienced or is likely to experience in the future; for any pecuniary loss that he has sustained or may sustain; and for the difference in his capacity to earn money. *Schneider v. Pennsylvania Co.*, 2 Cent. 74.

63. If, in an action for negligence, the idea of compensation be fairly brought to the attention of the jury, the judgment will not be reversed because the judge charged the jury that they might consider the pain and suffering which the plaintiff "has undergone and may undergo in the future." *Lake Shore & M. S. Railway Co. v. Frantz*, 127 P. S. 297.

64. In a suit for personal injuries the plaintiff may claim damages for "pains in the head" if of a permanent nature. *Wilson v. Pennsylvania Railroad Co.*, 132 P. S. 27.

65. It is not contributory negligence in a woman advanced in pregnancy to ride in a street car; if injured by the negligence of the company she is entitled to recover damages for miscarriage, a long illness and permanent injuries, caused thereby. *Reading City Pass. Railway Co. v. Eckert*, 2 Cent. 791.

66. In an action for personal injuries, it is not error to charge the jury, that if the injury was the remote cause of the injured person's last sickness and death, a recovery might be had for the pain suffered in that sickness; but it is error to so instruct the jury as to suggest the price in money sufficient to induce a person to undergo voluntarily the pain and suffering complained of, as a measure of the compensation for having been subjected to it. *Baker v. Pennsylvania Co.*, 142 P. S. 503.

67. Mere fright occasioned by a railroad accident but not resulting from or accompanied by physical injury to the person, will not sustain an action for negligence. *Ewing v. Pittsburgh, C. C. & St. L. R. R. Co.*, 147 P. S. 40.

68. One who is injured by the defendant's negligence is entitled to recover

such an amount as will compensate him for his pain and suffering, or any money that he has expended by reason of the injury, for any loss of wages that he has been unable to earn by reason of the accident, and, where it is a permanent injury, for the loss of earning power for the balance of the time that the injury will prevent his working. *Owens v. People's Pass. Ry. Co.*, 155 P. S. 334.

69. Where pain and deformity are the subjects of compensation, in an action for negligence, the question of damages should be left exclusively to the jury. The court refused to interfere with a verdict for twenty thousand dollars. *Orbann v. Philadelphia Traction Co.*, 7 C. C. 39; s. c. 46 L. I. 280. See *Specht v. Pennsylvania Railroad Co.*, 7 C. C. 54; s. c. 24 W. N. C. 317.

70. In an action by the wife in her own name for personal injuries, where she was living with her husband doing the work of the family, she cannot recover damages for diminution of her earning power; such damages must be recovered in a suit by the husband, as he is still entitled to her services, notwithstanding the act of 3 June 1887. *Carr v. Easton*, 7 C. C. 404; s. c. 142 P. S. 139.

71. Where the wife is injured by the negligence of another, the husband is entitled to recover for the medical attendance upon his wife during her illness and for the loss of her services while unable to attend to her domestic duties. *Henry v. Klopfer*, 147 P. S. 178.

72. Where a passenger is improperly compelled to leave a railroad train, the measure of damages is the annoyance and inconvenience done to her, the extra amount of fare she was compelled to pay, and anything growing out of the occurrence, shock, pain or mental suffering. *Baltimore & Ohio Railroad Co. v. Bambray*, 16 Atl. 67.

73. Where it appeared that the plaintiff had dropped his fare in the box in obedience to the posted rule of the company, and that he had no knowledge of private directions given to the drivers to

go through the cars when crowded and collect fares; it was held, that the company was liable for the ejection of the plaintiff for nonpayment of fare, and that the plaintiff was entitled to recover for the injury to his feelings and the humiliation inflicted upon him. *Perry v. Pittsburgh Union Pass. Ry. Co.*, 153 P. S. 236.

74. In an action for false imprisonment as for trespass, in improperly ejecting a passenger, by the employees of a railroad company, the damages include, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation and injury to feelings. *Duggan v. Baltimore & Ohio R. R. Co.*, 159 P. S. 248.

75. Where a passenger is illegally ejected from a street car, his damages are not limited to an amount sufficient to compensate him for his trouble, inconvenience and expense, but he is entitled to substantial damages. *Laird v. Pittsburgh Traction Co.*, 166 P. S. 4.

76. In a suit by a father for the death of his son, the fact that the child did not receive proper care and treatment will not defeat recovery but might reduce the damages. *Bradford v. Downs*, 126 P. S. 622.

77. In a suit by parents for the death of a boy fourteen years of age, a verdict for twelve hundred and fifty dollars was held not to be excessive damages. *Pennsylvania Coal Co. v. Nee*, 13 Atl. 841.

78. In a suit by a widow for the death of her husband, the defendant, on the question of damages, may prove that decedent said he was tired of life, that he did not want to live, that his life had been a failure and his family a failure. *Disbrow v. Nester Township*, 8 Atl. 912.

79. A husband is entitled to substantial damages for the death of his wife; it is neither necessary nor proper that he should prove special damages as for the loss of an animal. *Delaware, Lacka. & W. Railroad Co. v. Jones*, 128 P. S. 308.

80. In an action for death, where there is no evidence to show the earning powers

of the deceased or his habits of industry and thrift, it is improper to charge that the jury might estimate, from his age, health and habits, his earning capacity and the pecuniary loss to the plaintiff. *McHugh v. Schlosser*, 159 P. S. 480.

81. In estimating the damages in an action for negligence, the jury may take into consideration that the plaintiff had Bright's disease of the kidneys, in determining plaintiff's expectancy of life and loss of earning power. *Bunting v. Hogsett*, 319 P. S. 363; s. c. 27 W. N. C. 317.

82. When in an action for negligence the plaintiff is disabled from engaging in employment, the Carlisle tables are not proper as a basis for the verdict. *Rummel v. Allegheny Heating Co.*, 16 Atlan. 78.

83. In an action for negligence resulting in death, where the decedent is shown to have been a healthy, strong man, and his age, occupation and earning power had been made to appear, the Carlisle tables are admissible for the consideration of the jury in determining what was the actual expectation of life of the deceased. *Steinbrunner v. Pittsburgh & Western Ry. Co.*, 146 P. S. 504; *McCue v. Knoxville*, 146 P. S. 580.

See NEGLIGENCE.

(5) Replevin.

84. In replevin for bark removed from trees, the defendant having had notice of plaintiff's title, the measure of damages is the value of the bark where replevined, and not merely its value on the trees. *Phillips v. Stroup*, 1 Mona. 517; s. c. 17 Atlan. 220.

See REPLEVIN.

(6) Riparian owners.

85. The right of an upper riparian owner to divert the water of a stream for manufacturing or other purposes, is limited, as between himself and the lower proprietor, to so much of the water as will not materially or sensibly diminish its quantity; where such diversion materially lessens the flow without actual damage, the lower proprietor is entitled to nomi-

nal damages, but he cannot recover special damages on the ground that it interfered with the water-power, when, during the period covered by his action, he had upon his land no means of applying the water-power and made no attempt to use it, and gave to the defendant no notice of any purpose so to do; in estimating the damages it was inadmissible to prove the rental value of an unoccupied mill site. *Clark v. Pennsylvania R. R. Co.*, 145 P. S. 438. See *Lantz v. Carnegie*, 145 P. S. 612.

86. In an action for overflowing plaintiff's land with surface water from a city street, the measure of damages is the loss in value of the property consequent upon the injury to trees or other property destroyed by the water, and the deprivation of the use of the property during the time it was flooded, and if it became necessary to fill in the ground to keep the water out, the cost of filling should be taken into consideration. *Weir v. Plymouth Borough*, 148 P. S. 566.

87. A riparian owner on a navigable river has no right to the water-power, and cannot recover for the loss of such power from the obstruction and diversion of the water by a neighboring owner; but he can recover for injury to his property by reason of the diversion of the stream from its natural channel in front of his land; damages in such a case would be the depreciation in the value of the property if the injury were permanent, or the cost of removing the obstruction, whichever was the lower amount. *Williams v. Fulmer*, 151 P. S. 405.

88. Where a mine owner throws culm into a stream where the ordinary current will act upon it, he will not be relieved from liability to a lower riparian owner by the fact that the descent of the culm down the stream was quickened by an extraordinary flood which gave the first impulse that lodged it on the plaintiff's land; in such a case the measure of damages is the cost of removing the culm, and if this is impracticable, then the difference in the rental value of the land

caused by the descent of the refuse upon it. *Elder v. Lykens Valley Coal Co.*, 157 P. S. 490.

89. An injury to a subterranean supply of water by the lawful acts of an owner of land on his own property is *damnum absque injuria* unless the stream is well defined and its existence known or easily discernible, or unless the injury be caused by negligence or malice. *Williams v. Ladew*, 161 P. S. 283.

See RIVERS.

(7) Trespass.

90. In an action for the destruction of an unharvested crop of ice, compensation is the measure of damages; that is, the value at the nearest market less the cost of getting it into such market, but including, as a part of the cost, the loss in handling and from shrinkage. *Stauffer v. Miller Soap Co.*, 151 P. S. 330.

91. Any one who makes more than a temporary mooring between high and low water mark in a navigable river is a mere trespasser, and if the owner is thereby prevented from renting his property, such loss and rental value is an essential element of damages. *Wall v. Pittsburgh Harbor Co.*, 152 P. S. 427.

92. In an action for injury to manufactured articles, where the plaintiff has the sole manufacture and monopoly of the article, the measure of damages is simply the expense of manufacturing the article. *Thomas v. Sanderson*, 3 Lack. Jur. 21.

93. In an action of trespass for an unlawful distress the value of the goods, and not the price they sell for, is the measure of damages. *Easterly Machine Co. v. Spencer*, 8 Lanc. 341.

94. Damages awarded to a tenant against a landlord for an alleged illegal distress were held to be excessive. *Holland v. Townsend*, 136 P. S. 392; s. c. 26 W. N. C. 412.

95. In assumpsit for goods of the plaintiff unlawfully appropriated by the defendant, who had been in the habit of purchasing goods from the plaintiff; it

was held, that the defendant by his wrongdoing having prevented the plaintiff from accurately estimating the value of the goods taken, the highest value in kind might be charged against him, and the burden was upon him to show what it was that he actually took. *McCown v. Quigley*, 147 P. S. 307.

96. In trespass for a wrongful levy on a wife's goods the jury may go beyond actual damages, if the evidence shows a wanton invasion of plaintiff's rights, or circumstances of aggravation. *McDevitt v. Vial*, 11 Atlan. 465.

97. In a suit against a sheriff for selling a wife's goods under execution against her husband, if the goods were bought in for her, she can recover only the amount paid; if not so bought in, she is entitled to their value. *Rogers v. McDowell*, 134 P. S. 424.

98. Under an execution issued by a father against his son, the property was purchased by the father, and two days afterwards it was again levied on and sold at the suit of another creditor and again purchased by the father; in an action by the father against the sheriff and the second execution creditor, a sufficiently proper measure of damages was the amount of money the father was obliged to pay for the property at the second sheriff's sale. *Kline v. McCandless*, 139 P. S. 223.

99. Where the defendant under a judgment, which was a lien only on plaintiff's land as terre tenant, levied upon other property of the plaintiff, and the plaintiff, in ignorance of his rights, claimed the benefit of the exemption law, and goods to the value of three hundred dollars were set apart for him and the remainder were sold by the sheriff, and the plaintiff bid or induced his friends to buy in other articles at the sale; it was held, that there was nothing in the plaintiff's conduct to estop him from recovering the value of the goods in an action of trespass for the wrongful levy; and it was further held, that the measure of damages as to such articles as were

bought by the plaintiff, was not their value but the loss he sustained in buying them. *Sensinger v. Boyer*, 153 P. S. 628.

100. Where a railroad company constructed a bridge materially interfering with the landing of boats, it was *held*, in an action by the owner of a ferry, holding a leasehold in the landing, the measure of damages was the difference between the value of the leasehold for the purposes to which it was applied, until the end of the term, and its value for the same term as affected by the construction of the railroad. *Jones v. Pittsburgh & Lake Erie Railroad Co.*, 10 Cent. 413. See *Pittsburgh & Lake Erie Railroad Co. v. Jones*, 111 P. S. 204.

101. If one tenant in common in exclusive possession operate a slate quarry opened and developed, the measure of the damages of his co-tenant under the act of 25 April 1850, sec. 24 (Brightly's Purdon 57), is the fair market value of the slate in place, the royalty or slate-leave to be obtained for the privilege of removal. *Fulmer's Appeal*, 128 P. S. 24.

102. In trespass for injury to land, it is the duty of the court to lay down a rule by which the jury may ascertain the damages in an intelligent manner; as wilfulness affects the measure of damages and not the right thereto, it is misleading to charge that if the trespass was wilful, the plaintiff should have damages. *Stephenson v. Brown*, 147 P. S. 300.

103. Where a defendant by an excavation without negligence, on his own land, causes the land of the plaintiff to fall away, the measure of damages is the amount of the injury actually done and not the diminution in value of the lot of the plaintiff by reason of the act of the defendant. *McGettigan v. Potts*, 149 P. S. 155; reversing s. c. 7 Montg. 185.

104. In trespass for tearing down a fence, the declarations of the defendant, after being remonstrated with, that he was determined to tear down the fence, are admissible to show malice and ill-will and for the purpose of enhancing the damages. *Kennedy v. Erdman*, 150 P. S. 427.

105. Where the evidence established that the defendant tore down the plaintiff's fence with a strong hand after being remonstrated with; it was *held*, that loose conversation between defendant and plaintiff's predecessor in title to the effect that the fence was to be removed to a compromise line was inadmissible in mitigation of damages. *Kennedy v. Erdman*, 150 P. S. 427.

106. Where a witness estimated the damages to a life estate at a sum fifteen times greater than the entire value of the property; it was *held* to be error for the court not to caution the jury as to the worthlessness of the testimony. *Herbert v. Rainey*, 162 P. S. 525.

107. Measure of damages where a neighboring lot has been damaged by the improper construction or repair of a sewer. *Ward v. Gardner*, 2 Atlan. 867.

108. In an action for damages for injuries caused to a city lot by the maintenance of a sewer mouth upon it, the measure of damages is the injury to the rental value of the lot, and evidence is not admissible as to what would be the rental value after the erection of a wharf, or what would be its rental value upon an improvement lease. *Harris v. Philadelphia*, 155 P. S. 76.

109. In an action for injuries from water flowing from a public highway, the measure of damages is the cost of remedying the injuries, unless that equals or exceeds the value of the thing injured, when such value becomes the measure. *Eshleman v. Martic Township*, 152 P. S. 68.

110. Where plaintiff's house was situated on the lower side of a street which was cut out of a hillside, and he built a retaining wall along the lower line of the street to protect the house and lot, and defendant deposited a large amount of earth upon the street in such a way that the water was stopped from flowing along the street and soaked down through the earth, loosening the hillside, so that its downward pressure injured the plaintiff's wall and house; it was *held*, that the plaintiff was entitled to recover and that

the measure of damages was the cost of remedying the injury unless such cost exceeded the value of the property injured, when such value became the measure. *Lucot v. Rodgers*, 159 P. S. 58.

See TRESPASS.

(8) *Trover*.

111. As to the measure of damages in trover for cutting trees by mistake, see note to *Beede v. Lamprey*, 15 Atlan. 136.

See TROVER.

VI. Liquidated damages.

112. A sum, though expressed in a bond as stipulated damages, if unconscionable, and the real damages can be easily and accurately assessed, will be treated as a penalty merely. *Clements v. Schuylkill River E. S. Railroad Co.*, 132 P. S. 445; s. c. 25 W. N. C. 383.

113. In an action for rent on a lease providing for a penalty, in default of payment, the lessor may sue for the rent actually due, if more or less than the penalty. *Wagle v. Bartley*, 11 Atlan. 223.

114. In covenant on a bond in the penal sum of three hundred dollars that the defendants would not engage in the passenger, mail or express business, it was held, that a penalty was contemplated rather than stipulated damages, and that the plaintiff could recover the actual damages sustained. *Moore v. Colt*, 127 P. S. 289.

115. Where the defendant sold to the plaintiffs a general country store for about six thousand dollars and stipulated that he would not carry on the same kind of business within a radius of two miles under a penalty of one thousand dollars to be paid as liquidated damages; it was held, that the amount was not unconscionable and an offer of the defendant to show that no damages had, in fact, been sustained was inadmissible. *Kelso v. Reid*, 145 P. S. 606.

116. Where a municipal contract contains a stipulation for the payment by

contractors of fifty dollars for each day they are in default, such a stipulation will be considered on a breach of the contract, as liquidated damages, whenever the damages are uncertain and incapable of being ascertained by any satisfactory rule. *Malone v. Philadelphia*, 147 P. S. 416.

117. Whether a sum named is liquidated damages or a penalty is controlled by the intent of the parties and the special circumstances of the case; where a lump sum is named, the presumption is that it is a penalty rather than liquidated damages. *Keck v. Bieber*, 148 P. S. 645.

118. Where A agreed to exchange his farm for B's sixteen houses and the latter agreed to finish the houses according to a sample before the time fixed for the exchange, and it was further provided, "and for the true performance of all and every of the covenants and agreements aforesaid, each of the said parties bindeth himself unto the other in the just sum of two thousand dollars as liquidated damages"; it was held, that the sum named could not be regarded as liquidated damages, but as a penalty. *Ross v. Remaly*, 8 Montg. 22.

119. Where the defendant, a physician, sold his practice to another physician and verbally stipulated that at the end of a certain time he would cease practising and the vendee sold the practice to the plaintiff, who was also a physician, and the defendant again began to practise and the defendant and plaintiff entered into an agreement in writing, whereby, in consideration of two hundred dollars, the defendant agreed that he would not practise in the locality for a period of ten years, that he would use his influence in favor of plaintiff, that he would not manufacture or put on sale any medical preparation during the ten years and for the true performance of the covenants he bound himself in the penal sum of four hundred dollars, and before the expiration of the ten years the defendant resumed his practice; it was held, that the

penal sum was a penalty and not liquidated damages, that it was not intended that defendant should have the privilege of practice on the payment of four hundred dollars and that plaintiff was entitled to an injunction for the specific performance of the contract. *Wilkinson v. Colley*, 164 P. S. 35; reversing s. c. 6 Kulp 401.

VII. Double and treble damages.

120. In trespass for treble damages for cutting timber under the act of 29 March 1824 (Brightly's Purdon 2006), a deed from executors *de son tort* consented to by heirs, followed by payment and entry, is sufficient evidence of plaintiff's title. *Keizer v. Beemer*, 13 Atlan. 909.

121. In an action under the act of 29 March 1824 (Brightly's Purdon 2006) if the record shows that the jury gave single damages only, the court may double them. *Kulp v. Bird*, 8 Atlan. 618.

122. In trespass under the act of 29 March 1824 (Brightly's Purdon 2006) for double or treble damages for cutting timber, the jury cannot award interest in addition to the penalty. *McCloskey v. Powell*, 138 P. S. 383; affirming s. c. 8 C. C. 22.

123. The act of 4 May 1869 (Brightly's Purdon 2082), though it gives a tenant in common the same remedy against his co-tenant as against a stranger, does not authorize in his favor the penalty of double or treble damages provided by the act of 29 March 1824 (Brightly's Purdon 2006). *Bush v. Gamble*, 127 P. S. 43.

124. A defendant having a right under contract to cut and remove trees of a specified size, is not liable in treble damages under the act of 29 March 1824 (Brightly's Purdon 2006), for cutting and removing other trees he was not authorized to take. *Shiffer v. Broadhead*, 134 P. S. 539; s. c. 126 Ibid. 260.

125. Under the act 29 March 1824 (Brightly's Purdon 2006), in order to hold a defendant liable for treble damages for

cutting timber, it is not necessary to prove that he was actually seen in the act; it is sufficient if he authorized and ratified the trespass. *Whitney v. Backus*, 149 P. S. 29.

126. The owner of an equitable title may maintain an action of trespass, and recover from a mere intruder, treble damages for cutting down timber trees. *Walton v. Pollock*, 12 C. C. 216.

See TRESPASS.

DEATH.

See PRESUMPTION, VI.: SURETY.

1. Death does not revoke the rule of reference in compulsory arbitration, but the arbitrators, on the death of the plaintiff, cannot make a valid award in his favor, until the proper parties are substituted. *Meehan v. Karolin*, 1 Lack. Jur. 305.

2. The estate of a man presumed to be dead after seven years' absence, should not be distributed without an administration. *Wisler's Estate*, 6 Montg. 159.

3. A presumption of death arises after the lapse of seven years from the time a person was last heard from or known to be alive; where a person was last heard from on Feb. 17th, 1883; it was held, that he would be presumed to have been dead on Feb. 18th, 1890. *Rhodes's Estate*, 10 C. C. 386.

See PRESUMPTION.

DEBT.

1. Debt lies on a policy of fire insurance, though it contains an option to rebuild or replace the building within a certain time. *Heffron v. Kittanning Insurance Co.*, 132 P. S. 580; affirming s. c. 1 Lack. Jur. 235.

2. The acceptance of a devise coupled with a direction to pay a certain sum to a third party, creates a personal liability which the latter may enforce by an action of debt. *Headley v. Renner*, 129 P. S. 542.

DEBTOR AND CREDITOR.

See CONTRACT: EQUITY, XXIII.: LEGACY,
VI.: MERGER, II.: SET-OFF: SUBRO-
GATION.

- I. Joint debtors.
- II. Discharge of debts.
- III. Payment.
- IV. Application of payments.
- V. Accord and satisfaction.
- VI. Collateral securities.
- VII. Compositions with creditors.

I. Joint debtors.

1. Separate actions cannot be maintained against parties to a joint contract. *Boner v. Luhman*, 6 Kulp 97.

2. A joint action does not lie against the lessee in an oil lease and his assignee to recover monthly payments alleged to have become due because of the non-completion of a well. *Glasgow v. Griffith*, 39 P. L. J. 181.

3. The onus is upon a joint debtor to show that a separate note was taken in satisfaction of the joint debt. *Kimberly's Appeal*, 7 Atlan. 75.

4. Where the owners of the surface declared in tort against the lessor and lessee of a coal mine for a joint act in unlawfully and negligently removing the coal without leaving sufficient surface support, and the evidence showed that the coal mine had been demised to the lessee before the acts had been done, and that the acts which caused the injury were done by the lessee; it was *held*, that the lessor *prima facie* was not liable. *Hill v. Pardee*, 143 P. S. 98.

5. Where an injury to land was the consequence of independent acts of trespass on the part of two or more persons, each act is a distinct cause of action, and they do not together constitute a joint trespass; the defendants are liable separately, and one defendant was *held* not to be discharged by a prior quitclaim and release executed by the plaintiff to the other defendant. *Gallagher v. Kemmerer*, 144 P. S. 509.

6. Where the plaintiff's house was injured by an explosion caused by a stranger negligently striking a match in a cellar full of gas, and the gas in the cellar was due to the negligence of the gas company; it was *held*, that the plaintiff had his remedy against either of the wrong-doers, or both, at his election. *Koelsch v. Philadelphia Co.*, 152 P. S. 355.

7. Where the directors of a corporation are jointly liable for its debts, and one of them dies before suit brought, his executor cannot be sued jointly with the survivor, and if he dies after suit brought against all of them, it is optional with the plaintiffs to bring in his administrator or to proceed against the survivors without doing so. *Githers v. Clarke*, 158 P. S. 616.

8. Under the act 2 August 1842 (Brightly's Purdon 1094), judgment may be entered against some of the defendants for want of a sufficient affidavit of defence, while a rule for judgment is discharged as to other defendants, but the liquidation of the judgment must be postponed until the final disposition of the case. *Campbell v. Floyd*, 153 P. S. 84; affirming s. c. 39 P. L. J. 253.

9. In an action against several persons on a joint debt, judgment cannot be entered against certain of the defendants for want of a sufficient affidavit of defence unless judgment be also entered against those of the defendants who have made no defence whatever. *Robinson v. Floyd*, 153 P. S. 98; reversing s. c. 39 P. L. J. 265.

10. Where goods were charged in plaintiff's book of original entries to two persons, an affidavit of defence that the liability of the defendants was joint and not joint and several, and that the defendant was bound for but one-half, and tendering payment of said half, was *held* to be insufficient. *Isaacs v. Logan*, 10 C. C. 272.

11. In an action against several persons on a contract, the verdict must be against all the defendants or none. *Burgess v. Sherman*, 147 P. S. 254.

12. Where two parties are sued in assumpsit and they are not both proven liable, there can be no recovery, and a compulsory non-suit should be entered. *Hemsher v. Book*, 9 Lanc. 258.

13. The release of one of two joint tortfeasors is a discharge of both; and this, though the mutual intention of the plaintiff and the defendant released was that such release should not affect the suit of the plaintiff against the other defendant. *Williams v. Le Bar*, 141 P. S. 149; s. c. 2 Northam. 274.

14. Where a building was leased to two tenants who were jointly and severally liable for the rent, and the lease expired and the tenants held over from year to year; it was held, in an action against one of the tenants for the whole rent, that it was competent for him to prove that the lessor had released the joint and several liability of the tenants for the rent of the whole house and had accepted in place thereof the separate money of each for one-half. *Walker v. Githens*, 156 P. S. 178.

15. Where a purchase money mortgage is made by two persons and an assignee of the mortgage before taking it inquires of one of the mortgagors and is assured that the mortgage is all right, such mortgagor is afterwards estopped for denying the validity of the mortgage, but such estoppel does not operate as against the other mortgagor. *Work v. Darby*, 13 C. C. 269.

16. A release under seal of one of two joint tortfeasors will not discharge the other, where such release shows that no satisfaction was intended, but that it was simply intended to discharge the releasee from the action on the ground that he was not liable. *Derosa v. Hamilton*, 14 C. C. 307.

17. Where the plaintiff obtained a judgment against the principal upon a joint and several bond given by a principal and his surety, and the plaintiff issued execution for less than the amount of the bond against the principal; it was held, that the issuing of such execution did not

indicate the intention or have the effect to make the judgment a final one, or to indicate an intention to relieve the surety who was the only solvent defendant. *Comm'th v. McCleary*, 1 York 45.

18. A bill in equity will lie to enforce contribution, where one of several joint debtors discharges the same for the benefit of all. *Gordon v. Freed*, 4 Montg. 183.

19. One of two joint debtors, who seeks contribution from the other, on account of the payment by him of a judgment against both, must appear with clean hands. If he acted in bad faith in the conduct of the defence of the original suit, he cannot recover. *Flanagan v. Duncan*, 133 P. S. 373; s. c. 25 W. N. C. 491.

20. If a promissory note shows on its face that one of the makers signed as "bail," he is not obliged to contribute if the note be paid by the maker who signed as principal. *Zimmerman v. Bridges*, 2 Cent. 572.

21. One of several directors of an insurance company who has paid off a judgment obtained against the board for the appropriation of the company's funds, is not entitled to contribution from the other defendants, and cannot enforce it by means of an assignment of the judgment to his son. *Boyer v. Bolender*, 129 P. S. 324.

22. If two persons buy stock for speculation through a banking firm, each furnishing separate collaterals, and they subsequently agree that each may dispose of his share separately, the one who suffers the greatest loss cannot make the other contribute thereto. *Keller v. Swartz*, 137 P. S. 65; s. c. 27 W. N. C. 16; 7 Lanc. 371.

23. Where the attorney of an administrator made a deposit of estate money with a private banker and received a certificate of deposit therefor, payable in one year with interest, the transaction was held to be a loan, unauthorized by law, for which the administrator was responsible on the insolvency of the banker; and where the administrator became insolvent and the

attorney, who is also a surety on the administration bond, paid the amount lost; it was *held*, that the deposit having been the act of the attorney and done without the knowledge of his co-surety, the latter was not liable to make contribution. *Eshleman v. Bolenius*, 144 P. S. 269; reversing s. c. 8 Lanc. 9.

24. Where the owner of a second mortgage has released the timber on the land, and then taken an assignment of the judgment on the first mortgage, he will not be permitted to issue an execution on the judgment and sell both the land and the timber, and a vendee of the timber is not limited to a proceeding for contribution or subrogation under the act 22 April 1856 (Brightly's Purdon 1095), nor is the plaintiff in the execution entitled to have a tender of his whole debt as an alternative to the court's control of his execution. *Pratt v. Waterhouse*, 158 P. S. 45.

25. Where land is devised to two sons, who are charged with maintaining the testator's widow and daughters, and one of the sons has performed such duty, he may, by bill in equity, compel the other to contribute to the expense thereof where a question of accounts is raised by the pleadings. *Shillito v. Shillito*, 160 P. S. 167.

26. Where one of two joint indorsers agrees to become such upon the promise of the other that he will be put to no loss, and the promising indorser afterwards pays the whole debt, he cannot hold the other for contribution; such a promise is not a promise to answer for the debt of a third person within the statute of frauds. *Mickley v. Stocksleger*, 10 C. C. 345.

II. Discharge of debts.

27. A debtor in failing circumstances may prefer his creditors, by confession of judgment, as he sees fit. In giving several judgments to his attorney to be entered up, he may prefer his attorney's judgment to the others. *Harris's Appeal*, 5 Cent. 533.

28. If an habitual drunkard does work after inquisition found, and receives pay therefor, his receipt is a valid discharge of the debt. *Black's Estate*, 132 P. S. 134; affirming s. c. 46 L. I. 128.

29. An agreement to release one of two sureties from further liability in consideration of the payment of one-half the debt, cannot be enforced; and this, though the creditor allows the statute of limitations to bar an action on the obligation against the other surety. *Martin v. Frantz*, 127 P. S. 389.

30. The presumption that a note of a third party, taken for a pre-existing debt, merged the debt into the note, may be rebutted by showing the actual intention of the parties to have been otherwise. *Van Haagen's Soap Co.'s Estate*, 141 P. S. 214; affirming s. c. 8 C. C. 84.

31. Mutual indebtedness does not extinguish the debts except there be an application of each to the other. *Seitzinger v. Alspach*, 3 Cent. 399.

III. Payment.

32. Where an attorney at law was employed to prosecute an appeal to the supreme court and collect all moneys due the plaintiff, the payment to such attorney was *held* to be a proper payment. *Lehr's Estate*, 3 York 80.

33. In a suit on a note under seal brought within twenty years, the burden of proving payment is on the defendant, but payment may be presumed from the fact that during that time the holder was constantly pressed for money, while the defendant was abundantly able to pay. *Morrison v. Collins*, 127 P. S. 28.

34. In a suit on a note under seal nearly twenty years old, payment may be established by proof of a settlement of open accounts between the parties about six years after the date of the note, when a balance equal to the amount of the note was found in favor of the maker. *Ibid*.

35. In a contest between a plaintiff and a defendant in a judgment as to

whether certain payments were made on it, the burden of proof is upon the party attempting to show such payments, and where the only evidence is that of the parties to the judgment, who contradict each other, the credits cannot be allowed. *Fuhrman v. Fuhrman*, 2 York 169.

36. In an action for money deposited with defendant by plaintiff's testator, where the defendant proved that she had returned the money to the plaintiff's testator and that when she asked for the papers he said he had torn them up, and that defendant's husband then drew a receipt which was signed and alleged to have been lost, but it was proven to have been seen by one or two witnesses; it was held, that the testimony was sufficient to sustain a verdict for defendant. *Fullam v. Rose*, 160 P. S. 47.

37. Where the plaintiff acknowledged that he received two hundred dollars and the defendant produced a check endorsed by the plaintiff showing the payment of one hundred and fifty dollars; it was held, that the question, whether the check was part of the two hundred dollars or in addition thereto, was for the jury. *Brown v. Burr*, 160 P. S. 458.

38. Where, after the entry of a judgment, portions of the land bound thereby were demised for oil and gas production, and upon the issue of an execution the grantees, under the act 22 April 1856 (Brightly's Purdon 1095), applied for an order on the plaintiff to sell first the unaliened land, or otherwise, on payment of the judgment, to assign the same, and the petitioners paid the money into court; it was held, that independently of the act 22 April 1856, the petitioner having paid the money into court in compliance with an order made at the plaintiff's instance, such payment was the equivalent of a payment to the plaintiff, and it was not error for the court to enter a final order for the assignment of the judgment to the petitioner. *Porter v. Vanderlin*, 146 P. S. 138.

39. A plaintiff who puts in evidence

an affidavit of defence of defendant to a former action on the same contract of sale, without disproving its averments, is bound by its averments, and if it set forth a payment of the contract by notes, his remedy is confined to an action on the notes unpaid, and a verdict should be directed for the defendant. *McCord v. Durant*, 134 P. S. 184.

40. Where payment is alleged in an affidavit of defence, it should be stated with particularity as to time, amount and manner; upon a claim for boarding, the affidavit should at least state that the full amount of each month's board was paid at the end of each month where such was the fact, but in the absence of such a statement the court will grant time for amendment. *McGuire v. Coneay*, 10 C. C. 298.

41. An affidavit of defence alleging payment should state particularly the time, amount and manner of payment, and to whom the same was made; it is a good affidavit which alleges a settlement with the plaintiff for a certain sum and a receipt to the defendant in full satisfaction of all claims. *Deitrich v. Singer Manufacturing Co.*, 4 Dist. Rep. 324.

42. The entry of satisfaction of record on a mortgage destroys the mortgage and all remedies upon it and it also extinguishes the debt upon the bond accompanying the mortgage, if the parties so intend, and whether they do so intend, is a question of fact to be determined by the jury under all the evidence. *Safe Deposit and Trust Co. v. Kelly*, 159 P. S. 82.

43. Where a purchaser at sheriff's sale of a property subject to a mortgage subsequently paid off the mortgage; it was held to be an extinguishment of the debt, and he could not afterwards take an assignment of it and enforce it against the mortgagor. *Fleck v. Hartman*, 8 Montg. 121.

44. A debt due from a mortgagee may be set off against the mortgage debt, but such debt will not *ipso facto* pay the interest on the mortgage so as to prevent a default for non-payment; the defalcation act does not apply to a demand of one

party to that of the other so as to produce either payment, satisfaction or extinguishment. *Gumpert v. Ell*, 7 Kulp 513.

45. The acceptance of a check of a third person, to the creditor's order, is, in the absence of an agreement to the contrary, but a conditional payment. The debtor is not entitled to notice of dishonor, nor is a return or tender of the check necessary before bringing suit for the original debt. *Holmes v. Briggs*, 131 P. S. 233. See s. c. 118 P. S. 283.

46. One, who accepts in payment, an order for a suit of clothes cannot recover on his original account unless he prove a personal notice of the order to the drawee, or that he had left a written notice at his house. *Cox v. Smith*, 3 L. I., November 4, 1846.

47. In a suit by a receiver of a bank the question whether the notes sued on were paid by a check deposited by defendant was properly left to the jury as a question of fact. *Lingenfelter v. Williams*, 9 Atlan. 653.

48. An attempted renewal of a promissory note by giving a forged note is not such a payment as will discharge the liability of the maker. *Second Nat. Bank v. Wentzel*, 151 P. S. 142.

49. Where a note is given for an antecedent debt and a receipt in full is given, the presumption that the debt was not to be paid unless the note was paid, is opposed by the presumption of payment raised by giving the receipt, and the question of payment is for the jury. *Walker v. Tupper*, 152 P. S. 1.

50. Upon a sale of goods, the mere taking of the vendee's note does not extinguish the debt unless it be specially agreed that the note is taken in payment of the debt. *Dougherty v. Bash*, 167 P. S. 429.

51. Where a retail liquor license was paid for by a check and the bank failed the next day before its presentation, it was held to be no payment and the court would revoke the license on failure of the licensee to take up the check.

Comm'th v. Shoenheiter, Public Ledger, 22 November 1890.

52. The receipt at the foot of the deed is but *prima facie* evidence that the consideration money has been paid. *Xander's Estate*, 7 C. C. 482; s. c. 2 Northam. 93.

53. That a receipt is not conclusive evidence of payment, see note to *Kenny v. Kane*, 14 Atlan. 596.

54. A receipt on the back of an order, together with possession of the order, is *prima facie* evidence of payment, and where such a receipt is contradicted, but by one witness, who is not believed by the master, the supreme court will not interfere. *Breidegan v. Enterprise Savings Ass'n*, 141 P. S. 112.

55. Where a creditor accepted from his debtor a certain amount in cash and the remainder in notes of third parties and gave a receipt for the gross sum and the creditor denied that he accepted the notes as an absolute payment; it was held, that the receipt was some evidence of the debtor's intention that it was a payment, but that it was a very feeble proof in support of such contention. *Shepherd v. Busch*, 154 P. S. 149.

56. Undue influence in obtaining a receipt was held not to be established by evidence that the person who received it was the son-in-law of the other party, that she lived with him, that she derived income from the farm on which they lived, that she was illiterate, that she was unable to read or write and that the son-in-law and daughter had great influence with her. *Rockey's Estate*, 155 P. S. 453.

57. A widow's receipt for arrearages of her dower specifying the years for which it was given extinguishes her title to dower for the years specified, and she will not be allowed to participate in the distribution of a fund arising from a sheriff's sale of the land on which the dower is charged. *Fassett v. Frost*, 167 P. S. 448; s. c. 36 W. N. C. 272.

58. A receipt which purports to be in full is *prima facie* evidence of a settlement and satisfaction of all demands of the kind referred to; it is open, however, to explanation by the party giving it, but the mere fact that the claim is greater than the amount receipted for does not amount to such explanation. *Keim v. Kaufman*, 15 C. C. 539.

59. Where one claim is assigned in lieu of another, there being doubt whether the assigned claim was in full satisfaction or on account, parol evidence is admissible to remove the doubt. *Selser's Estate*, 141 P. S. 529; affirming s. c. 7 C. C. 417; s. c. 46 L. I. 411.

60. In an action against the administrator of the maker of a promissory note under seal, where the defendant's evidence tended to show that certain payments had been made by the deceased and certain credits allowed by the payee, who claimed that there was still a small balance due, which the decedent's wife, who was administratrix, then paid and the payee accepted in full settlement of the balance due, the supreme court refused to reverse a judgment upon a verdict for the defendant. *Beck v. Snyder*, 167 P. S. 234.

61. An intent to defraud creditors cannot be presumed from paying a debt before it becomes due and taking a rebate of interest. *Sayers v. Kent*, 3 Cent. 610.

62. The payment of a part of a debt and an agreement by the creditor to look to a particular fund for the remainder, was *held*, not to prevent the creditor from collecting the unpaid portion of his debt from the debtor's estate after the particular fund had failed. *Dickinson's Estate*, 9 C. C. 548; s. c. 28 W. N. C. 94.

63. Where a debtor in his lifetime gives money to a third person to pay the debt, but such payment is not made until after the death of the debtor, such payment will relate back to the time when the money was received by such third

person and the debtor's administrator will not be held responsible therefor. *Carr's Estate*, 15 C. C. 354; s. c. 35 W. N. C. 448.

64. A bond to a husband, payable to his heirs or legal representatives within three months of the decease of the mortgagee, or his wife, or the survivor, is, upon the death, first of the husband and then of his wife, properly payable to the husband's executors. *Briggs v. Briggs*, 134 P. S. 514. The administrator of the wife is not entitled to any of the proceeds. *Good's Estate*, 6 Kulp 71.

65. The payment of the annual interest on a bond may be inferred from the fact that the obligor was at all times able to pay, and that the obligee was dependent upon the interest for her support. *Haines's Appeal*, 2 Cent. 341. See note to *Rockhill v. Rockhill*, 14 Atlan. 762.

66. The relation of debtor and creditor cannot be established by an unexplained delivery of money or a check by one person to another; the presumption in such case is, that the money or check was received in payment of an antecedent debt or loan. *Lowrey v. Robinson*, 141 P. S. 189.

See PRESUMPTION.

IV. Application of payments.

67. For an interesting brief of authorities on the application of payments, see notes to *McCartney v. Buck*, 12 Atlan. 721, and *Pardee v. Markle*, 5 Ibid. 42.

68. Where the defendant guaranteed the plaintiff for all goods sold to a co-operative association which, by sec. 8 of the act 7 June 1887 (Brightly's Purdon 391), is prohibited from taking credit, and after said guaranty, payments were made by defendant out of funds belonging to the association, which payments were applied by the plaintiffs upon an account for goods sold on credit to the association prior to the guaranty; it was *held*, that the defendant could not set up a misapplication of such payments in a suit to recover for the goods sold on

the faith of his guaranty. *Arbuckles v. Chadwick*, 146 P. S. 393.

69. Where neither party makes any appropriation of the sum paid, the law appropriates said sums to the payment of the oldest bills in their numerical order. *Louisville Cotton Mills Co. v. Fritz*, 155 P. S. 144.

70. Where a tax collector expressly appropriates payments to the duplicate of one year by checks drawn on his general fund, and it is impossible to ascertain whether the money so paid was collected in that or the following year, the sureties on his bond for the following year are not entitled to have any of the payments credited to the duplicate of the year for which they are liable. *Comm'th v. Stambaugh*, 164 P. S. 437.

71. Where trustees were authorized by the orphans' court to mortgage certain real estate for five thousand dollars and the mortgagee then loaned to the trustees as individuals and upon security of the mortgage upwards of ten thousand dollars, of which they subsequently repaid eight thousand dollars; it was held, that such repayment would be applied first to the payment in full of the five thousand dollars and interest and that the mortgage was thereby paid in full although not satisfied of record. *Lawrence's Estate*, 14 C. C. 662; s. c. 35 W. N. C. 406.

72. In the absence of a direction by the debtor, a creditor may apply a payment to the least secure account. *Hildreth v. Davis*, 6 Kulp 336.

73. In the absence of an agreement as to the appropriation of payments on account of a debt, the law will apply such payments in the way most beneficial to the creditor. *Trexler v. Schmeyer*, 4 Northam. 182.

74. Where payments are general and there is no appropriation either by the debtor or creditor, such payments must be applied in discharge of the earliest liabilities of a running account. *Keesey v. Noedel*, 2 York 165.

V. Accord and satisfaction.

75. An executed agreement to take the collateral, carried out by surrendering the note when due and retaining the collateral, cannot be attacked in a subsequent suit. *Columbian Bank v. Rogers*, 47 L. I. 534.

76. Where the plaintiff claiming an overpayment, testified that he told the defendant that he proposed to have an account stated by one A, when defendant replied, he would as lief A would state it as any one and he further said, "if you owe me anything you must pay me, and if I owe you I will pay you"; it was held, that the testimony was insufficient to be considered as evidence of a compromise of doubtful rights. *Linderman v. Pomeroy*, 142 P. S. 168.

77. Where an insurance company, after receipt of proofs of loss, adjusted and compromised the claim therefor and promised to pay a certain sum in liquidation of it; it was held, in an action to recover the sum promised, that the company could not set up as a defence the breach by the insured of conditions contained in the policy. The proofs of loss were admissible for the purpose of showing that the company had notice of what property was lost and the amount claimed therefor. *Wagner v. Dwelling House Ins. Co.*, 143 P. S. 338.

78. Where a promissory note was given in repayment of the purchase money of a horse, and the defendant sent to the plaintiff one hundred and forty-five dollars in cash and a receipted bill for one hundred and five dollars for the use of the horse while in plaintiff's hands, the two sums making up the face of the note, and the defendant did not expressly state that the payment was conditioned on the acceptance of the receipt, and the plaintiff kept the cash but returned the receipt; it was held, not to be a full settlement of the plaintiff's claim. *Ziegler v. McFarland*, 147 P. S. 607.

79. An agreement to compromise a claim in consideration of the defendant

entering into the plaintiff's service, cannot be said to be without consideration because the defendant was to be paid for his services. *Potter v. Hartnett*, 148 P. S. 15; reversing s. c. 28 W. N. C. 120.

80. Where a person injured, agreed to take from the defendant a certain sum in full satisfaction of the damages caused by the goring of plaintiff's horse by defendant's bull, which sum was subsequently paid; it was *held*, that such receipt was a bar to a subsequent action for the subsequent death of the horse. *Currier v. Bilger*, 149 P. S. 109. See s. c. 12 C. C. 348.

81. An agreement under seal to give in place of promissory notes amounting to over seven thousand dollars, the sum of three thousand in cash and four thousand dollars in securities and to pay the attorney's fees in the suit on the notes, was *held* to be supported by sufficient consideration. *Hosler v. Hursh*, 151 P. S. 415.

82. Where the defendant agreed in writing to pay a sum in cash and a sum in securities to be satisfactory to the plaintiff, the above to be in lieu of two notes upon which plaintiff had brought suit; it was *held*, that the agreement was executory and contemplated the performance of the promise and a tender of performance, though made promptly and in good faith, was not satisfaction. *Hosler v. Hursh*, 151 P. S. 415.

83. Payment by a third party of a sum of money less than the amount of a judgment, with the understanding that it should be in full satisfaction of the judgment, is a valid accord and satisfaction. *Fowler v. Smith*, 153 P. S. 639.

84. A partial payment of an undisputed claim cannot be treated as an accord and satisfaction; and this, although there is an actual agreement to receive the amount paid as an extinguishment of the debt. *Comm'th v. Cummins*, 155 P. S. 30.

85. The parties to a contract may at any time rescind it either in whole or in part by mutual consent, and the surrender of their mutual rights is a sufficient consideration; where, after a personal con-

flict between the owners of timber land and the assignees of the contract for cutting the timber, the parties came together and agreed upon a settlement, and put its terms in writing which was signed by both and partly carried out; it was *held*, that such an agreement was not an accord, but a compromise and a binding contract, and an action for the price of the timber could be brought in the name of the assignee of the contract. *Flegal v. Hoover*, 156 P. S. 276.

86. An offer to prove that the controversy between the parties was settled by an agreement partly in writing and partly in parol, cannot be refused on the ground that verbal testimony is not admissible to alter a writing; the court cannot know in advance whether any part of the testimony is objectionable to the rule. *Wolf v. Wolf*, 158 P. S. 621.

87. Where a taxpayer furnished materials to the supervisors for which he was allowed a credit on his road taxes, and a dispute having arisen between him and the supervisors, he brought suit against the township before a justice, and at the hearing, the justice, with the consent of the parties, made an entry on his docket that the parties appeared and settled by the defendants giving the plaintiff a credit in full of all road taxes, including the current year, and the township subsequently sued the taxpayer for such road taxes; it was *held*, that the written agreement of the parties on the docket of the justice was conclusive against the claim; and this, though neither of the parties had signed the docket. *French Creek Township v. Moore*, 165 P. S. 229.

88. Where a testator was indebted to his son, and shortly before his death transferred certain securities to his son; it was *held*, that the presumption was that it was the testator's intention to discharge or redeem the debt, and where such transfer preceded the maturity of the debt, there was a presumption of accord and satisfaction, where the amount of the securities was nearly the face of the debt. *Stewart's Estate*, 15 C. C. 380.

89. Where the plaintiff held a judgment against the defendant for one hundred and sixty-one dollars, and the defendant sent him a check for seventy-five dollars "in full of all claims," accompanied by a letter saying, "if satisfactory, accept it, if not, return to me," and the plaintiff endorsed it and received the money on it; it was *held*, that this did not amount to an accord and satisfaction of the judgment. *Tucker v. Murray*, 10 Lanc. 235.

90. Where the defendant bought a lot of tobacco from the plaintiff under a written contract, and refused to pay the price, alleging defects, and offered the plaintiff a check for two-thirds of the price, which the plaintiff accepted without further protest; it was *held*, upon a suit for the balance, that the offer and acceptance of the check amounted to a mutual rescission of the contract and the making of a new one. *Smith v. Cohn*, 170 P. S. 132.

91. An agreement to settle without an actual settlement will not amount to an accord and satisfaction. *Alderfer v. Boyer*, 7 Montg. 53.

VI. Collateral securities.

92. One who loans money to an executor on a pledge of estate assets, with a knowledge that it is to be used for private purposes, cannot hold the said assets against the legatees under the will of the pledgor's testator. *Bell v. Farmer's Deposit Nat. Bank*, 131 P. S. 318.

93. The renewal of a promissory note for the payment of which collaterals have been deposited, does not affect the right of the creditor to retain or compel collection. *Kimberly's Appeal*, 7 Atlan. 75.

94. A bank holding collateral for the payment of certain notes, cannot refuse to reassign the collateral, because the pledgor is indebted to it upon an entirely distinct cause of action. *McIntire v. Blakeley*, 12 Atlan. 325.

95. Where money was borrowed on a collateral note with an agreement that on

the non-payment of the note the payee was to transfer the certificate of stock, put up as collateral, to himself as his own property and in payment of the note; the non-payment of the note and receipt of dividends by the payee was not such a transfer as would cancel the note. *Fulleton v. Mobley*, 15 Atlan. 856. See *Columbian Bank v. Rogers*, 47 L. I. 534.

96. Though a creditor may not apply a collateral for any other purpose than that for which it was given, yet he may avail himself of any number of collaterals he may hold, until paid. *Pepper v. Watts*, 7 Lanc. 241.

97. In trover for bonds held by defendant as collateral, defendant is entitled to his expenses incurred in saving to the collaterals a large part of their value at the time of the alleged conversion. *Reynolds v. Cridge*, 131 P. S. 189.

98. In trover for bonds held as collateral, it is some evidence of abandonment that the plaintiff before the conversion, when asked by the defendant to aid him in the protection of the bonds, told the defendant that he considered them worthless, and refused the request. *Ibid*.

99. If shares of stock be pledged as collateral, the right to vote the same may be determined by agreement between the debtor and creditor; so they may appoint a third person to hold the certificate and vote the stock. *Shelmerdine v. Welsh*, 47 L. I. 26.

100. An extension of time upon the original obligation is sufficient consideration for a promissory note given as collateral therefor. *Van Gorder v. Freehold Bank*, 7 Atlan. 144.

101. One who gives time to an insolvent debtor in consideration of the transfer of stock as collateral, takes no more than the debtor owned and can honestly transfer; he is not a purchaser for value. *Linnard's Appeal*, 3 Atlan. 840.

102. The directors of a wool-grower's exchange, who discounted their individual notes for a dealer, and took the latter's collateral, having subsequently paid the notes, are themselves entitled to the col-

lateral indemnity. *Atkinson's Appeal*, 11 Atl. 239.

103. Where a yacht belonging to a social club is pledged to a member as security for a loan to pay the purchase money, the treasurer of the club, on the sale of the yacht, must account to the pledgee for the sum received; that the treasurer paid bills of the club and for supplies for the yacht is no defence. *Loew v. Austin*, 140 P. S. 41.

104. Where an unincorporated business association purchased real estate in the name of its trustee and a part of the purchase money was secured by mortgage and a part was paid in cash by the treasurer, from a fund contributed by certain members, who received certificates of "stock," and there was afterwards a consolidation with another like organization, and subsequently new certificates were issued by the consolidated association; it was held, that the consolidated association was the equitable owner of the property, and the contributors had no proprietary interest therein, but their certificates were an informal pledge of the real estate to secure the repayment of the sums contributed by them and constituted an equitable lien upon the property. *Crawford v. Gross*, 140 P. S. 297; reversing s. c. 7 C. C. 419.

105. Where an officer of a corporation, at the time of receiving an advance of money, gives his individual note for the amount, the presumption is that the note was given as the consideration and not as a security for the money; this presumption may, however, be rebutted by showing that the money was, in fact, lent to the corporation for its own use and that the note was given as a collateral security. *Van Haagen's Soap Co.'s Estate*, 141 P. S. 214; affirming s. c. 8 C. C. 84.

106. The negotiability of a promissory note is not destroyed by a clause in the note stating that it is accompanied by collateral security. *Valley Nat. Bank v. Crowell*, 148 P. S. 284.

107. Where stock is held as collateral and stands in the name of the pledgee,

he is entitled to the dividends, and where such dividends have been paid to the pledgor, the pledgee may sue the company for the amount thereof. *Boyd v. Conscohooken Worsted Mills*, 149 P. S. 363; affirming s. c. 7 Montg. 209.

108. An accommodation judgment note under seal, when given without restriction, may be pledged to secure an antecedent debt of the payee, but where the payee has received it with the restriction that he use it to obtain a loan, he cannot pledge it for an antecedent debt and a judgment entered thereon will be opened. *Altoona Second Nat. Bank v. Dunn*, 151 P. S. 228.

109. Where stock has been deposited with a broker to secure advancements which have all been paid, the broker has no right to pledge the stock with another person for his own indebtedness in such a way as to irrevocably pass the title, and if he does so, he is liable to the owner for its value. *Van Voorhis v. Rea*, 153 P. S. 19.

110. Where a promissory note was given, payable at a future day with interest payable semiannually, subject to certain other collateral agreements which provided, that in case the note should not be paid at maturity, the plaintiff should look to certain securities alone for payment of the note and he expressly waived all right to proceed against any other property of defendant; it was held, that plaintiff could not sustain an action to recover semiannual interest accrued on the note, as there was no personal liability attached to the maker for the payment of either principal or interest. *Reed v. Cassatt*, 156 P. S. 156.

111. Where collateral securities are deposited for the payment of a promissory note, such deposit has no effect to prevent the running of the statute of limitations against the right of action upon the note; but the pledge survives and the debtor cannot demand a return of the collateral until the debt has been paid. *Hartranft's Estate*, 153 P. S. 530; affirming s. c. 8 Montg. 81.

112. A judgment which has been given as collateral security for the payment of promissory notes, does not lose its priority of lien by the renewal of the notes as they fall due. *Laucks v. Michael*, 154 P. S. 355.

113. Where a judgment has been paid in full, it may be agreed between the parties that such judgment shall not be satisfied of record, but shall remain as collateral for a new loan made or to be made; judgment creditors whose liens accrue subsequently to such an agreement cannot object to it. *Merchants National Bank v. Mosser*, 161 P. S. 469.

114. Though a debt be barred by the statute of limitations, the collateral remains liable and a third person who has furnished the collateral will not be held to be prejudiced by the debtor giving a bond for the debt, in place of a note which has been barred by the statute. *Kulp v. Brant*, 162 P. S. 222; affirming s. c. 9 Montg. 161.

115. Where the maker of a promissory note deposited with the payee certain stock as collateral and the indorsers in the maker's absence, and without his knowledge and consent, substituted their own notes for the original note, which was marked "paid," and the payee retained the collateral as security for the substituted note, and in a subsequent accounting between the indorsers and the maker of the original note, the indorsers were allowed credit for the amount of the note; it was held, that the maker was entitled to recover the collateral from the payee. *Searight v. Carlisle Deposit Bank*, 162 P. S. 504.

116. Where stock is deposited with a broker as collateral for purchases, and it is pledged by the broker and sold by the pledgees, the measure of damages for the conversion of the stock is its market value at the date of the conversion. *Jamison's Estate*, 163 P. S. 143; reversing s. c. 3 Dist. Rep. 217.

117. Where goods deposited with a creditor as collateral security for a debt have been sold, the debtor cannot collu-

sively waive his right to an account from the creditor, so as to defeat the right of his attaching creditor to require an account from the creditor of the proceeds of the sale. *Merchants & Manufacturers Nat. Bank v. Baeder Glue Co.*, 164 P. S. 1.

118. Where stock is deposited as collateral to secure a debt and the creditor sells the stock after refusing to accept the amount of his debt, because the debtor declined to pay another debt to another person for which the collateral was not pledged; such creditor is guilty of an unlawful conversion, and the measure of damages is the real value of the collateral at the time of the sale. *Blood v. Erie Dime Savings & Loan Co.*, 164 P. S. 95.

119. Where stock was pledged as collateral for the payment of a debt and the debtor died insolvent and the pledgee transferred the stock to his own name; it was held, that the presumption was that he appropriated the stock as part payment, but this presumption might be rebutted by evidence that the transfer was simply made as a matter of convenience and with no intention of transferring the title. *Morgan's Estate*, 11 C. C. 536; s. c. 30 W. N. C. 509.

120. Where a person dies insolvent and a creditor holds collaterals, he is entitled to a dividend from the estate on the whole amount of his claim; and this, irrespective of the amount realized from the collaterals. *Morgan's Estate*, 11 C. C. 536; s. c. 30 W. N. C. 509.

121. Where a mortgagee held a fire policy as a collateral security, but the proceeds of the sale of the land was sufficient to satisfy the debt; it was held, upon a distribution of the assigned estate of the mortgagor, that a fund derived from the policy in payment of a fire loss was distributable as personalty among all the creditors and that subsequent lien creditors had no standing to demand a preference. *Hatfield's Estate*, 12 C. C. 251.

122. Where the plaintiff brought suit on a contract, by which the defendant guaranteed to pay to the plaintiff, a sum

loaned by the plaintiff to a third party in case the latter did not repay the loan at maturity, and it appeared that upon such payment certain securities deposited by the plaintiff were to be returned; it was *held*, to be a good defence that the plaintiff had failed to demand payment from the defendants accompanied by tender of the collateral; and it was further *held*, that such tender could not be made at bar upon a hearing of the rule for want of a sufficient affidavit of defence. *Scott v. Patterson*, 13 C. C. 614.

123. Where the defendant gave notes for goods, which were never delivered, and the notes were deposited by the payee in a bank as collateral for a debt, and a creditor of the payee attached the notes, and the payee paid his debt to the bank and the bank assigned the notes to the attaching creditor; it was *held*, that there was an entire failure of consideration, that the attaching creditor was not a holder for value and that the defendant was not liable. *Second Nat. Bank v. Anderson*, 14 C. C. 513.

124. The holder of a promissory note who takes it before maturity in payment of an antecedent debt, cannot be subjected to equities which might have furnished a defence between the original parties; but where the paper is taken as collateral security, the defendant may aver any ground of defence which would have been competent between the original parties. The question as to whether the note was transferred in payment or only as collateral, is for the jury. *Gleason v. Crider*, 14 C. C. 670. See *Gleason v. Crider*, 5 York 19.

125. Where a promissory note was drawn by B to A's order, who endorsed it, and it was then discounted at bank by B, who gave to A his judgment bond as collateral security for the said note and all renewals thereof, and afterwards A endorsed another note for B for a different amount, which was not covered by the collateral, and subsequently both notes were combined on renewal into

one; it was *held*, on A's issuing execution on his judgment, that the collateral protected the combined note to the amount of the first note and that A was entitled to be paid the same out of the proceeds of the execution before a subsequent judgment creditor; and this, although he had not yet actually paid the combined note. *Fulmer v. Boyer*, 11 Lanc. 209.

126. Where a policy of fire insurance for six thousand dollars was assigned by the policy holder, as collateral security to the amount of three thousand dollars, and subsequently the buildings were destroyed and the insurance money was attached by a creditor, and on the trial the jury found that a certain sum was in the hands of the garnishee subject to the transfer as collateral and there was nothing to show that interest had been included in the verdict; it was *held*, on a distribution of the fund that the assignee was only entitled to three thousand dollars without interest. *Swartley v. McCracken*, 7 Montg. 49.

127. Where money is borrowed and personal property delivered as security for the loan, and the loan is tendered back, and the lender declines to receive the money and refuses to return the property, assumpsit does not lie for the value of the property unless the defendant has sold the article and received the money or otherwise made some profit out of it. *Lodge v. Supplee*, 11 Montg. 92.

128. Where the owner of stocks signs a blank power of attorney to transfer and delivers them to another party who pledges them as collateral security for the payment of a note of the owner drawn to the order of the pledgor, the pledgee being an innocent holder takes title and may retain the stocks until the debt of the pledgor is paid; and this, although it subsequently appear that the name of the owner of the stocks to the note is a forgery. *Herd v. Pittsburgh Nat. Bank of Commerce*, 42 P. L. J. 298.

129. Where a mortgage was given to secure an existing indebtedness from the mortgagor to the mortgagee, which indebtedness was for acceptances of notes and drafts by the mortgagee for the accommodation of the mortgagor; it was *held*, that such mortgage could not be stretched so as to be made a security to the mortgagee and his partner for liabilities of the mortgagor and his partner. *Keesey v. Noedel*, 2 York 165.

VII. Compositions with creditors.

130. If an agreement of composition state that it shall not be binding unless signed by all the creditors, he who sets it up as a release must show that the condition has been complied with. *Artman v. Truby*, 130 P. S. 619.

131. Where an agreement of composition was to be void if not signed by all the creditors, and the debtor's property was placed in the hands of a trustee for sale and distribution, a creditor is not estopped from treating the agreement as void for non-compliance of the condition, by reason of his neglect to give such notice at the sale. *Ibid.*

132. A creditor who is not present at a meeting of creditors is not bound by an agreement between those present not to bring suit. He can attach a sum of money deposited by the debtor in accordance with such agreement. *Bausman v. Burger*, 135 P. S. 499; s. c. 26 W. N. C. 355.

133. Where a plaintiff had substantially agreed to the same agreement as the other creditors for a composition, he was *held* to be bound by it although he had not signed the same paper with the other creditors. *Eisenhart v. Lynn*, 29 W. N. C. 113.

134. A separate composition made by a member of a firm after its dissolution under the act 22 March 1862 (Brightly's Purdon 1648), while it works an absolute discharge of the settling partner so far as the creditors are concerned, does not release him from his liability to contribu-

tion to his co-partners. *Kurtz v. Wigton*, 34 W. N. C. 219.

DECEDENTS' ESTATES.

See ASSUMPSIT, VI. : DESCENT : DEVISE : ELECTION : EXECUTION : JUDGMENT : LEGACY : ORPHANS' COURT : ORPHANS' COURT SALES : PARTITION : REGISTER OF WILLS : WILLS.

I. Lien of debts.

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(a) General principles.

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VIII. Advancements.

I. Lien of debts.

1. The lien of a judgment is continued, as to land bound by it, for five years after the defendant's death, although he aliened the land after the rendition of the judgment. A *scire facias* within that time will continue the lien against the terre tenant. *Stevenson v. Black*, 1 Cent. 353.

2. The lien of a judgment against a decedent, though more than five years old at his death and not revived, is without limitation against heirs and devisees. *Shannon v. Newton*, 132 P. S. 375; affirming s. c. 5 Montg. 167; *Shannon v. Walker*, 132 P. S. 383.

3. For the purposes of lien and execution, a judgment obtained against a decedent in his lifetime may be revived against

his administrator alone. Execution should issue upon the original judgment, but if issued upon the revival, it is a mere irregularity which will not affect the purchaser's title. *Grover v. Boon*, 124 P. S. 399.

4. The widow and heirs must be proceeded against within ten years in order to charge real estate of the decedent in their hands. If not proceeded against within that time, a judgment improvidently entered against them will be stricken off. *Allen v. Krips*, 125 P. S. 504; s. c. 119 *Ibid.* 1.

5. A sheriff's sale of land under a judgment against an administrator, if made without a *scire facias* to the widow and heirs, is void at the instance of any of the creditors of the decedent. *Mangan's Appeal*, 11 Atlan. 805; affirming *Mangan's Estate*, 4 Kulp 149.

6. Though a creditor had a lien by virtue of a levy at the time of the defendant's death, the preference is lost by subsequently staying the writ of execution. The lien could not be preserved by an agreement of the executor or his counsel. *Hughes's Estate*, 1 Lack. Jur. 317.

7. The lien of debts against the real estate of a decedent will not be extended by indefinite conversations between the administrator *d. b. n.* and the widow and heirs. *Welsh's Appeal*, 7 Cent. 498.

8. The debt due an administrator from the estate is barred by the statute unless within the prescribed time he takes some step to continue the lien. *Gabler's Appeal*, 5 Cent. 314.

9. If a *fi. fa.* be issued in the lifetime of the decedent, though not served until after his decease, inquisition being waived in the note, a *scire facias* need not issue to the widow and heirs. *Davey's Estate*, 9 C. C. 125.

10. In a *scire facias* against an executor, widow and devisees, to charge the testator's real estate with the payment of a debt under sec. 34 of the act 24 February 1834 (Brightly's Purdon 596), a prior judgment for the same debt against the

executor is conclusive upon him when defending as a devisee. *Comm'th v. Cochran*, 146 P. S. 223.

11. In a *scire facias* against an executor, widow and devisees, to charge the testator's real estate with the payment of a debt under sec. 34 of the act 24 February 1834 (Brightly's Purdon 596), a devisee may not defend on the ground that land sought to be charged was devised to him in payment of a prior indebtedness. *Comm'th v. Cochran*, 146 P. S. 223.

12. Where an administrator advances his own money to pay the debts of his intestate, he must proceed under the act 24 February 1834 (Brightly's Purdon 591), to preserve a lien for his advances against the intestate's land; if he fails to do so he cannot, after the expiration of five years, recover his advances from such land. *Merkel's Estate*, 154 P. S. 285.

13. Under the act 24 February 1834 (Brightly's Purdon 592), where creditors have not revived the lien of their debts within five years of the death of a decedent, they cannot participate in a fund raised by a sale eleven years after his death. *Cake's Estate*, 157 P. S. 457.

14. A *scire facias sur mechanics' lien* is not within the act 24 February 1834, sec. 34 (Brightly's Purdon 596), which requires widows and heirs to be made parties, in order to charge a decedent's real estate with the payment of decedent's debts. *Reece v. Haymaker*, 164 P. S. 575; affirming s. c. 42 P. L. J. 74.

15. Under the act 24 February 1834, sec. 24 (Brightly's Purdon 591), a debt unsecured by a mortgage or judgment ceases to be a lien against a decedent's real estate, five years after the death of the decedent. *Ferguson v. Yard*, 164 P. S. 586.

16. Under the act 24 February 1834, sec. 24 (Brightly's Purdon 591) an action for the recovery on a sealed note or bond must be brought within five years after the death of the obligor; otherwise his real estate is discharged of all liability even in the hands of heirs and devisees. See

act 8 June 1893 (Brightly's Purdon 592). *Lentz's Estate*, 10 Montg. 77.

17. After the expiration of five years from the death of the decedent, his lands are discharged from the lien of his debts even in the hands of heirs and devisees, unless an action for the recovery of the debts be brought within that time. *Jackson v. Tozer*, 4 Northam. 98.

18. Where land is sold in partition the proceeds must be distributed as land, and where the creditors of a deceased owner failed to commence suit within five years from the death of their debtor, their claim on the fund was *held* to be gone and the money must be distributed to his heirs. *Stoner's Estate*, 8 York 27.

II. Assets.

19. The presumption that a sum of money found in a decedent's house was part of his estate, may be rebutted by evidence that his wife had borrowed the same amount from her sister and given her note therefor. *Karch's Estate*, 133 P. S. 84.

20. If real estate upon which a decedent held a policy of fire insurance be destroyed by fire after his death, the insurance money is an asset of the estate with which the administrator is chargeable; the right of the heirs thereto is subordinate to that of the creditors. *Nichol's Appeal*, 128 P. S. 428.

21. The good-will of a liquor business was held not to constitute an asset of the estate, where the decedent had no business at the time of his death, but simply a claim to the return of his business after a certain debt for which it was pledged was paid. *McGovern's Estate*, 2 Northam. 194.

22. Co-executors were ordered to invest a fund to pay certain legacies as they fell due; the executor in whose hands the money remained became insolvent; a transcript of the decree was entered in the common pleas; the other executor paid the legacies and claiming to be subrogated to the judgment in the common

pleas, received a dividend thereon out of the assigned estate of his co-executor; *held*, that the dividend belonged to him and was not assets of the estate. *Miller's Appeal*, 127 P. S. 95.

23. A creditor has no right to take possession of a decedent's personal property; he is liable therefor in an action by an administratrix subsequently appointed. *Bungard v. Miller*, 8 Atlan. 209.

24. A creditor of a decedent's estate who takes the assets of the estate in payment of a debt of the administrator, is chargeable with the misapplication. So the estate is not bound by such a transaction. *Miller v. Comm'th*, 2 Cent. 830.

25. Heirs and devisees are not required to account to creditors for the rents, issues and profits of the decedent's lands accruing after his death. *Reiff's Estate*, 5 Montg. 171.

26. By the act of 22 April 1846 (Brightly's Purdon 1982) all personal property of an estate is liable to state taxation in the hands of an administrator or executor, just as they had been while in the possession of the decedent. *Wister's Estate*, 7 C. C. 325; s. c. 46 L. I. 270.

27. Pending an issue in the common pleas as to whether certain funds are assets of a decedent's estate or belong to the executrix, the orphans' court will not interfere and order her to file her account of the same. *Keily's Estate*, 9 C. C. 175; s. c. 47 L. I. 514.

28. Where a decedent in his lifetime made a bank deposit to the credit of himself as "trustee for Polly McKim" and at the time of his death the deposit so stood; it was *held*, that Polly McKim was entitled to the fund; and this, though the pass-book might not have been delivered to her; and the bank having paid the money to the executor, the beneficiary was entitled to recover the fund on presenting a claim therefor on distribution in the orphans' court. *Gaffney's Estate*, 146 P. S. 49.

29. An award arising out of a French spoliation claim passes under the will of the original owner; it is not such a spe-

cial and peculiar fund as must be distributed among those whom the court shall ascertain were the next of kin. *Leffingwell's Estate*, 1 Dist. Rep. 225; contra *Carey v. Morris*, 1 Dist. Rep. 229.

30. Where the decedent died two years after the death of his wife, and during his lifetime he had endorsed certain obligations due him over to her and they were found after his death among his writings; it was *held*, that in the absence of any evidence showing a delivery they remained his property and were part of his estate. *Emig's Estate*, 3 York 111.

31. An United States pension accruing on the death of a husband and paid to the widow is exclusively her property, and she is not accountable to her husband's estate for any part of it. *Quickel's Estate*, 5 York 71.

III. Of the debts of decedents.

(a) Jurisdiction of the orphans' court.

32. The distribution of a decedent's estate among creditors belongs exclusively to the orphans' court; a creditor cannot by an attachment execution on a judgment obtained after the death of a decedent, appropriate to the payment of his debts a *chose in action* due to the estate of the decedent. *Strouse v. Lawrence*, 160 P. S. 421; reversing s. c. 13 C. C. 131.

33. The orphans' court has jurisdiction of a claim by a poor district for money paid by it to the insane hospital for the support of the decedent's insane son. *Pitcairn's Estate*, 37 P. L. J. 184.

34. The orphans' court has jurisdiction on distribution, of a claim for damages arising from the decedent's breach of covenants in a contract between him and the claimant. The pendency of a common-law action does not oust such jurisdiction. *Guth's Appeal*, 2 Cent. 767.

35. Where executors sold the claimant's property as the property of the decedent and part of the fund had been distributed to creditors without notice; it was *held*, that on an adjudication of

the executor's account, the orphans' court had jurisdiction to award the balance to the claimant, although he claimed adversely to the estate, upon his releasing the executors from further responsibility to him on his judgment against them in trespass. *Morgan's Estate*, 14 C. C. 62; s. c. 33 W. N. C. 575.

36. Where an auditor is appointed to distribute the proceeds of the real estate of a decedent married woman, he can only consider the claims of those who claim through the decedent; he cannot pass upon the question whether the real estate could be considered as her separate property, she having purchased it entirely with borrowed money. *Marsh's Estate*, 8 Lanc. 353; s. c. 4 Del. 526.

37. A claimant against a decedent's estate may withdraw his claim before the auditor and bring his action at law, but, where the fact of such withdrawal is not established, his action at law will be non-suited. *Kreckel v. McCullagh*, 12 Lanc. 179.

38. After argument of exceptions to an adjudication, a creditor may be allowed to amend his claim and a re-hearing may be granted to correct a clear error at law. *Morgan's Estate*, 11 C. C. 536; s. c. 30 W. N. C. 509.

See ORPHANS' COURT.

(b) Proof of debts.

39. In a proceeding by a claimant against a decedent's estate, a legatee or heir, under the act of 23 May 1887 (*Brightly's Purdon* 817), may testify in behalf of the estate, whether such testimony relates to occurrences before or after the decedent's death. *Third Nat. Bank v. Hunsicker*, 6 Montg. 73.

40. The burden of proof is upon the claimant against a decedent's estate. The claim must be sustained by sufficient proof; the absence of negative proof on the part of the administrator is not sufficient. *Heffner's Estate*, 134 P. S. 436; s. c. 26 W. N. C. 229.

41. A claim against a decedent's estate cannot be established by vague declara-

tions of the decedent. *Thompson's Appeal*, 13 Atlan. 952; affirming *Rhode's Estate*, 43 L. I. 58.

42. Oral evidence of declarations or admissions should be clear, positive and specific, to establish a claim against a decedent's estate. *McCann's Appeal*, 9 Atlan. 48.

43. If the words used by a testator be appropriate to express the fact of a gift, the meaning of the words must be left to the jury. The words were — "where are those notes I gave you?" — "take them and keep them." *Jacques v. Fourthman*, 137 P. S. 428; s. c. 26 W. N. C. 491.

44. Upon an allegation of forgery, and a disagreement between experts on the subject, the validity of the note against a decedent's estate may be sustained by his admissions and declarations. *Fox's Appeal*, 11 Atlan. 228.

45. A claim against a decedent's estate may be proven by the decedent's own entries in the books of the claimant, showing that he, the decedent, had taken money of the claimant without right. *Roberts's Appeal*, 126 P. S. 102.

46. A claim for services cannot be established by the declarations of the decedent specifying no particular service and no amount of compensation, in the absence of proof of an express contract or demand in the decedent's lifetime. *Murray's Estate*, 6 C. C. 632; s. c. 24 W. N. C. 175.

47. A claim for services against a decedent's estate must be sustained by proof of services actually rendered. Evidence that deceased had said that claimant had done a great many things for him; that he owed him \$5000 for the services he had done and was going to give it to him, is not sufficient to establish the claim. If service be rendered on the promise of a legacy, the promisee takes his chances. *Miller's Estate*, 136 P. S. 239; s. c. 26 W. N. C. 416.

48. The statements of a purchaser at the time of the execution of the deed to his son are, upon the distribution of the former's estate, evidence to show that he

paid the purchase money and the deed was put in his son's name "for safety" from creditors. *Gillespie's Estate*, 7 C. C. 305; s. c. 46 L. I. 444.

49. A claim against a decedent's estate cannot be established by an *ex parte* affidavit. *Bortz's Estate*, 2 Northam. 81.

50. Neither the daughters of a decedent nor their husbands are competent to establish the decedent's ownership of lands against adverse claimants, the result of which is to surcharge administrators of a solvent estate; neither can heirs establish their own claim against an estate, nor can they volunteer as witnesses to defend an action against the estate. *Lazarus's Estate*, 6 Kulp 53; affirmed in s. c. 142 P. S. 104; and reversed in s. c. 145 P. S. 1.

51. A note of decedent signed by a mark must have its execution clearly and satisfactorily established. *McMahon's Estate*, 132 P. S. 175.

52. A book account of an executor against the estate, running back forty years, not being one of original entry, is not admissible to prove a claim against the estate. *Geiger's Appeal*, 1 Mona. 547; s. c. 24 W. N. C. 264.

53. Possession of papers by an administrator, showing the indebtedness of the estate to him, is weakened by the possibility of their having come into his possession as such administrator. *McGeary's Appeal*, 5 Cent. 852; affirming *McGeary's Estate*, 33 P. L. J. 404.

54. A wife who claims that she loaned money to her deceased husband, has the burden upon her to establish that fact fully and clearly. *Brunner's Estate*, 6 Mont. 115.

55. It was held that the evidence was sufficient to establish a loan from the wife to the decedent. *Shirk's Appeal*, 14 Atlan. 413; s. c. 13 Cent. 77.

56. To a note held by a wife against her husband, other creditors cannot set off advances made by him for the improvement of her separate estate, unless the evidence shows intentional fraud. *Newell's Estate*, 37 P. L. J. 432.

57. Upon a claim for board and care of a decedent by the wife of a debtor, the estate may set off the debt of the husband to the estate. *Bowler's Estate*, 8 C. C. 522; s. c. 47 L. I. 298.

58. Claims for services against a decedent's estate not presented as a legal demand until after the death of the alleged debtor will have every intentment and presumption made against them. The declarations of the decedent amount to nothing when confronted by the due bills of the claimant found in the hands of the decedent. *Koecker's Estate*, 47 L. I. 505.

59. Claims against a dead man's estate which might have been made against himself while living, are always subject to just suspicion. *Mueller's Estate*, 159 P. S. 590.

60. A claim against a decedent's estate cannot be established by declarations of the claimant made in the absence of the decedent. *Mueller's Estate*, 159 P. S. 590.

61. Upon a claim upon a promissory note against a decedent's estate, where the signature of the decedent is proven by a witness who saw him sign it, and its genuineness was testified to by a daughter of the decedent and her husband and the only testimony to the contrary is that of expert witnesses; it was held, that the evidence was sufficient to warrant a finding that the notes were genuine. *Patterson's Estate*, 166 P. S. 119.

62. Where a mother claimed the sum of one thousand dollars against her son's estate, and she produced a power of attorney appointing her his attorney to sell certain stock and also produced three entries in her son's books in which the debt was admitted; it was held, that the evidence was sufficient to cast upon the accountants the burden of showing payment by the testator to his mother in his lifetime. *Burton's Estate*, 15 C. C. 367.

63. A claim against a decedent's estate will not be allowed upon the mere agreement of all the heirs, some of whom are

minors. *Hawthorne's Estate*, 11 Lanc. 52.

See ASSUMPSIT, VI.

EVIDENCE.

(c) Liability for debts.

64. A physician who made several visits a day, but promised the decedent that he would charge for but one a day, is bound by such a promise. *Thomas's Estate*, 6 C. C. 642; s. c. 46 L. I. 139.

65. The expenses of a wake will be allowed as funeral expenses, if not unreasonable. *Johnson's Estate*, 8 C. C. 1.

66. A claimant who made a tombstone, under an arrangement with the administratrix not to put it up until he was paid or his claim was allowed by the court, is entitled to be awarded its value, though the work yet remains in his yard. *Crosson's Appeal*, 125 P. S. 380.

67. Taxes assessed and levied after decedent's death must be paid by the heirs. *Thomas's Estate*, 5 Kulp 213.

68. A judgment against a decedent being satisfied and the satisfaction eight years after his death being stricken off, under a claim of subrogation, such claim was not enforceable against the intervening rights of other creditors. *Allegheny Valley Railroad Co. v. Dickey*, 131 P. S. 86.

69. An ancillary administrator, having the same foreign domicile as the decedent, is not entitled to the payment of his individual debt out of the proceeds of the ancillary administration. *Gray's Appeal*, 8 Cent. 414; s. c. 116 P. S. 263.

70. A judgment in an amicable action between a claimant and an administrator of a lunatic's estate to test the amount due for maintenance and attendance until her death and burial, is a bar to any further claim against the estate to the time of burial. *Montgomery's Appeal*, 7 Atlan. 231.

71. The payment of a part of a debt and an agreement by the creditor to look to a particular fund for the remainder, was held, not to prevent the creditor from collecting the unpaid portion of his debt

from the debtor's estate after the particular fund had failed. *Dickinson's Estate*, 9 C. C. 548; s. c. 28 W. N. C. 94.

72. A decedent's estate is not liable for the failure of the executor to carry out an agreement of sale made by him; an executor is liable personally on his own contracts and engagements. *Yerkes v. Richards*, 11 Lanc. 308. See s. c. 153 P. S. 646.

73. A devisee of mortgaged premises is not entitled to call upon the devisees of other lands, not charged by the testator with the payment of debts, for contribution; and this, though the debt be secured by the testator's bond. *Van Emon's Estate*, 39 P. L. J. 423.

74. Where a judgment given by the decedent and his two sisters and subsequently marked to the use of his sisters, was a first lien against the undivided interest of the decedent in a farm which had belonged to his deceased father, and the second lien thereon was a mortgage executed by the decedent, his mother, brother and two sisters, and execution was issued on the mortgage, but before the sale the parties agreed that the sum of sixty-five hundred dollars should be the appraised and ascertained value of the farm, and the farm was bought at a sheriff's sale by an outside party for fifty dollars and conveyed to the brother and two sisters for one dollar; it was held, on the distribution of the estate that the two sisters were estopped by said agreement from claiming a dividend on their judgment out of the funds of the estate, it appearing that the decedent's share of the said valuation of sixty-five hundred dollars was sufficient to extinguish their judgment. *Drennen's Estate*, 10 Lanc. 221.

(d) Payment of debts.

75. The purchase money due on a land contract is such a debt of the decedent as the administratrix has a right, in her discretion, to pay. *Graham's Estate*, 6 Kulp 269.

76. Where the claimants brought suit

before a justice against the decedent's executor and obtained judgment, and the defendant appeared before the justice after judgment and declared that he had not sufficient assets to satisfy the same and the prothonotary refused to enter transcripts because his fees were not paid in advance; it was held, that the right of the plaintiffs to participate in the distribution of the estate was not thereby prejudiced. *Kennedy's Estate*, 7 York 38.

77. The personal estate is the primary fund for the payment of debts. A payment of interest on a mortgage by an administrator is a proper disbursement. *Merkel's Estate*, 131 P. S. 584.

78. To exonerate the personal estate from the payment of legacies and debts, there must be more than a mere charging of the real estate; the personal estate must appear to be exonerated by express words or necessary implication. *Mann's Appeal*, 14 Atlan. 270; s. c. 13 Cent. 76.

79. A voluntary bond payable at the maker's death and given for the purpose of defrauding the maker's wife of her rights in his estate cannot be sustained where the donee is a party to the fraud; where such a bond has been given to a person who is neither a party nor a privy to the fraud, it will be paid out of the personal estate, but the widow will be entitled to compensation against the heirs out of the real estate. *Hummel's Estate*, 161 P. S. 215.

80. An executor of an insolvent estate who, in good faith, and in the belief that the estate is solvent, pays a judgment against the decedent and marks such payment of record, is entitled to subrogation out of the personal estate, but not out of the real estate against junior liens of record at the date of the sale. *Searight's Estate*, 163 P. S. 222.

81. An administrator acting as trustee for the sale in partition of a decedent's real estate, will not be ordered to pay, out of the proceeds, debts of the decedent which were not a lien on the land.

Transue's Estate, 141 P. S. 170; affirming s. c. 2 Northam. 359.

82. A creditor cannot sit quietly by for years and allow the proceeds of the sale of residuary real estate to be used for other purposes than the payment of his debt, and then be permitted to come in on the fund arising from the sale of real estate specifically devised. *Pyott's Estate*, 160 P. S. 441.

83. Where a testator gave to his nephew an annuity and bequeathed all his personal property to his wife; it was held, that the primary fund to pay the annuity was the real estate and that the intention of the testator to exempt his personal estate from the payment of the annuity and to charge it upon his land was clear. *Nathan's Estate*, 36 W. N. C. 184.

84. Where the executors of a deceased widow paid the debts of her husband, the same should be taken from the principal and not from the income. *Vanderford's Appeal*, 12 Atlan. 491.

85. The holder of a bond accompanying a mortgage executed by a decedent in his lifetime, is entitled to payment out of the general estate of the decedent unless a demand is made that the land shall first be exhausted by a sale under the mortgage. *Tubb's Estate*, 161 P. S. 252; affirming s. c. 7 Kulp 223.

86. Where a person dies insolvent and a creditor holds collaterals, he is entitled to a dividend from the estate on the whole amount of his claim; and this, irrespective of the amount realized from the collaterals. *Morgan's Estate*, 11 C. C. 536; s. c. 30 W. N. C. 509.

87. Executors may set apart out of the personalty a sum sufficient to secure, when due, the payment of a bond executed by the testator and secured by a mortgage of real estate owned by him at the time of his death. *Burton's Estate*, 15 C. C. 367.

88. Where there is a claim against a testator's estate on account of a balance alleged to be due by him as trustee, a sufficient sum will be set aside to await

the settlement of his account as trustee. *Pickering's Estate*, 4 Dist. Rep. 263.

89. Upon a claim by a partner of the decedent for a share of profits, an award was made in accordance with a "statement" forwarded to the claimant by the decedent, shortly before his death and the original accounts. *Ziegler's Appeal*, 4 Atlan. 837.

90. Partnership creditors have no right to come against the separate estate of one of the partners, until his separate creditors have been paid the principal of their debts in full, unless there is no partnership property and no solvent surviving partner. *Stauffer's Estate*, 15 C. C. 492; s. c. 36 W. N. C. 150.

91. Where the creditor of a firm obtains a judgment upon which he may levy upon either firm property or upon the separate property of the partners, that fact does not change or enlarge his rights as against the separate creditors of the partners nor enable him to come in on the same footing with separate creditors against the estate of a deceased partner. *Stauffer's Estate*, 15 C. C. 492; s. c. 36 W. N. C. 150.

92. Upon the distribution of the individual estate of a deceased partner where the fund for distribution is insufficient to satisfy separate creditors, the claim of a firm creditor must be refused. *Moffat's Estate*, 42 P. L. J. 92.

93. A creditor who, by reason of an executor's insolvency, fails to receive a sum awarded him upon a first account, may come in on a second fund for a *pro rata* share. *Pomeroy's Appeal*, 127 P. S. 492.

94. A debt owing by the decedent will be awarded to the creditors' administrator, and not to the assignee of an heir. *Hilty's Estate*, 9 C. C. 72.

95. Payment to a creditor will be suspended, where it appears that the decedent held a judgment against the creditor, and that a rule to open the same is still pending. *Teaf's Estate*, 7 C. C. 463; s. c. 26 W. N. C. 310.

96. Where an auditor's report award-

ing a claim has been confirmed absolutely, an assignee of the claim has a standing in court to ask for an order on the executor to pay over. *Odenwelder's Estate*, 3 Northam. 12.

97. Upon a bill to compel the application of real and personal property which an executrix in her own individual name had conveyed to a trustee, to the payment of a judgment recovered against her as executrix; it was *held*, that the bill was fatally defective, where there was no averment that any portion of such property formerly belonged to, or was derived from, the decedent's estate. *Ferguson v. Yard*, 164 P. S. 586.

98. Where a testator bequeathed a house to his widow and directed his executor to devote the income of his farm to her comfortable support until her death, when it was to go to his son-in-law, and after her death he directed "the balance of my estate (after all charges have been paid, including payment of all my wife's or widow's funeral expenses, etc., as of mine)," to be distributed; it was *held*, that such direction did not admit or authorize the payment by the executor for nursing, attendance and produce furnished to and boarding the widow, out of the principal of the estate. *Koehler's Estate*, 10 Lanc. 171.

99. A devisee of mortgaged premises is not entitled to call upon the devisees of other lands, not charged by the testator with the payment of debts for contribution; and this, though the debt be secured by the testator's bond. *Van Emon's Estate*, 39 P. L. J. 423.

IV. Of the exemption.

(a) Right to the exemption.

100. An adult child residing with her father at the time of his death, and dependent on him, is, where there is no widow, entitled to the exemption. *Barr's Appeal*, 1 Mona. 764.

101. Under the act of 14 April 1851 (Brightly's Purdon 584), an unmarried

adult daughter without means of support, living with and dependent upon her father, is entitled to participate in the exemption allowed out of his estate. *Halbe's Estate*, 9 C. C. 512; s. c. 27 W. N. C. 440; 48 L. I. 86.

102. An unmarried adult daughter without means of support, who lived with, and was dependent upon, her father, is entitled to the exemption out of his estate. *Young's Estate*, 15 C. C. 374; s. c. 35 W. N. C. 316.

103. Where minor children allow over two years to elapse after the remarriage of their mother before making their claim for the exemption, such claim is barred. *Cronan v. Scranton*, 2 Lack. Jur. 413.

104. Where the decedent's minor children by a divorced wife had been supported by their father to the time of his death; it was *held*, that they were entitled to their *pro rata* share of the exemption; and this, although by his consent they were living with their mother in another state. *Nelson v. Thomson*, 2 Dist. Rep. 844.

(b) Of the widow's exemption.

105. If it do not appear that the decedent left any property within the county or state, the widow's rule for her exemption will not be discharged, but will be continued for further information. *Fowler's Estate*, 8 Lanc. 92.

106. Where a widow's petition alleges that her husband died in Philadelphia on a specified date, it will be presumed that he was a resident of the commonwealth and that she sustained the family relation towards him and that she is entitled to the exemption; in this case the court stayed proceeding upon the petition until the audit of her account as executrix. *O'Neill's Estate*, 11 C. C. 491.

107. Upon the death of an intestate with no debts and having property valued at less than three hundred dollars, sufficient title to maintain trespass as to her exemption will pass to the widow, without either administration or distribu-

tion. *Roberts v. Messinger*, 134 P. S. 298; s. c. 26 W. N. C. 70.

108. A widow's claim for exemption has preference over the undertaker's claim for funeral expenses. *Weir's Estate*, 10 C. C. 187; s. c. 28 W. N. C. 268.

109. The claim of the widow of her exemption outranks a claim for funeral expenses. *Formad's Estate*, 14 C. C. 104.

110. The widow's exemption is entitled to preference to the expenses of administration excepting the fees of register for granting letters, and it is also entitled to be preferred to the funeral expenses. *Norton's Estate*, 1 Lack. L. N. 3; s. c. 12 Lanc. 101.

111. Upon a distribution of money realized by a sale of a decedent's real estate, a judgment given to secure part of the purchase money will be preferred to the widow's exemption; where there were two judgments, the second of which was for part of purchase money and the amount for distribution exceeded the widow's claim for exemption; it was held, that the second judgment would be preferred to the first judgment to the amount of the widow's claim, and the balance as between judgment creditors would be paid on account of the first judgment. *Engel's Estate*, 4 Northam. 198.

112. Where the administrator was a son of the decedent and between the time of the death and the allowance of the widow's exemption, he advanced funds and maintenance to his mother; it was held, that he would not be permitted to retain the same out of the amount of the exemption. *Norton's Estate*, 1 Lack. L. N. 3; s. c. 12 Lanc. 101.

113. Upon a rule on executors to pay to the widow the balance of her exemption, it is no defence that, after the appraisal had been confirmed, she appropriated to her own use a part of the assets of the estate. *Beil's Estate*, 3 Northam. 85.

114. In a contest between a widow and children as to the widow's right to the exemption, both parties are competent

to testify to facts occurring in the lifetime of the decedent. *Venus's Estate*, 2 York 193.

115. Where the widow of an intestate was in the state lunatic asylum as an insane pauper; it was held, that the poor district under the act 13 May 1889 (*Brightly's Purdon* 1709) had no right to claim her three hundred dollar exemption; if allowable, a claim could only be made by her committee. *Kielty's Estate*, 8 Kulp 19.

(c) When a widow is entitled.

116. The right of a widow to claim her exemption is not affected by her necessities, her wealth or poverty or the value of her estate. *Palethorp's Estate*, 14 C. C. 286; s. c. 34 W. N. C. 68.

117. Where two cohabited as husband and wife with the understanding that a ceremony should be subsequently performed, and the man died in the meantime, the survivor was not entitled to a widow's exemption. *Grimm's Estate*, 131 P. S. 199; affirming s. c. 35 P. L. J. 213.

118. A wife living in a foreign country, and who has never formed part of her husband's family here, is not entitled to the benefit of the exemption act. *Monk's Estate*, 9 Montg. 113.

119. It is no ground for refusing to allow a widow's exemption that its allowance will defeat the payment of funeral expenses and costs of former administration. *Groome's Estate*, 7 C. C. 519.

120. A widow's claim of her exemption is not affected by her subsequent death before final confirmation. *Buddy's Estate*, 7 C. C. 466.

121. Where a widow died on the night of the day upon which letters testamentary were granted upon her husband's estate; it was held, that as there had been no demand, election or appraisal of the exemption in her lifetime, the same could not be claimed by her executors. *Beck's Estate*, 7 York 118.

122. Where a widow remarries before making her claim for her exemption, she

is barred from making such claim. *Cronan v. Scranton*, 2 Lack. Jur. 413.

123. A widow's right to her exemption is not ousted by her subsequent marriage. *Venus's Estate*, 2 York 193.

124. Where a widow remarries and dies without having made claim to the exemption, her executor is not entitled to make claim therefor; the statute confers merely a privilege to retain, it is not an absolute transfer on the part of the estate. *Machemer's Estate*, 140 P. S. 544.

125. A widow's claim of her exemption is not forfeited by her marriage subsequent to the making of her claim. *Drygalski's Estate*, 6 Kulp 50.

126. Where property has been levied upon by the sheriff upon a judgment against a husband containing a waiver of the exemption, and the debtor dies before the sheriff's sale, his widow is not entitled to have property set apart to her to the value of three hundred dollars; the death of the debtor does not revoke the waiver. Neither is she entitled to receive three hundred dollars out of the proceeds of the sale. *Barrett v. Barrett*, 9 C. C. 454.

127. Where a husband left his wife in a foreign country with the understanding that she was to follow him when he should have made a home for her, and he subsequently settled here but did not inform his wife of his whereabouts and afterwards committed bigamy and then died; it was *held*, that the first wife was entitled to the exemption where it appeared that she was always willing to join her husband and would have done so if she had not been kept in ignorance of his whereabouts. *Grieve's Estate*, 165 P. S. 126; affirming s. c. 11 Lanc. 149.

128. Where a wife without sufficient excuse withdraws from her husband's roof and society, she cannot claim her exemption as his widow; where the costs were imposed upon the widow and there was no fund belonging to her before the court, they were directed to be paid out of the decedent's estate. *Kahn's Estate*, 16 C. C. 72; s. c. 3 Dist. Rep. 806.

129. Where a widow had been deserted by her husband and had obtained a divorce *a mensa et thoro* and for ten years she had not seen or corresponded with him nor asked nor obtained from him any support; it was *held*, that she was not entitled to her exemption. *Fyock's Estate*, 9 Lanc. 89.

130. Where a wife left her husband's house because it would be more agreeable to live in a house of her own and with an understanding that if he would not bother her, she would never bother him; it was *held*, to be such a desertion as would prevent her from claiming the three hundred dollar exemption out of his estate. *Ross's Estate*, 6 Kulp 521; s. c. 10 Lanc. 24.

131. A widow who was compelled to leave her husband's house and lived apart from him for nineteen years, is entitled to her exemption. *Dewalt's Estate*, 38 P. L. J. 275.

132. Where it appeared that a wife left her husband "because he was getting worse every day and she did not want to have the trouble with him"; it was *held*, that upon his death she was not entitled to claim the exemption out of his estate. *Sanders's Estate*, 1 York 115.

133. Where it appeared that a wife had obtained from the court an order of maintenance for desertion and there was no evidence of his having offered to live with her again; it was *held*, that she would not be barred from her claim to her exemption by evidence of declarations made by her that she would never live with him because he was not her equal. *Quickel's Estate*, 5 York 71.

134. Where it appeared that a wife had left her husband on account of his sickness and inability to support her; it was *held*, that her right to the exemption was not barred because she was not living with him at the time of his death nor with him during his last sickness or death nor attended his funeral. *Groom's Estate*, 6 York 139.

135. A widow has a right to claim her exemption although her husband has

directed that the legacy bequeathed to her shall be in lieu of dower and exemption and she has elected to take under the will. *Peeble's Estate*, 157 P. S. 605.

136. Where a man and his wife entered into a contract that she should have five hundred dollars out of his estate in full for her share, and she received the five hundred dollars given her by the terms of the contract; it was *held*, that she could not claim the three hundred dollar exemption in addition thereto. *Plank's Estate*, 1 York 108.

137. Where an ante-nuptial contract provided that in the case of either the death of the husband or wife the property of the one dying should go to his or her heirs free from any claim by the survivor; it was *held*, that upon the death of the husband the wife could not claim her exemption. *Venus's Estate*, 2 York 193.

138. A widow, by joining in a petition for the sale of a minor child's interest in the decedent's real estate, thereby waives her right to claim her exemption. She cannot claim it out of the fund in the hands of the guardian. *McChesney's Estate*, 6 C. C. 663.

139. Where a testator bequeathed to his wife the income of one-third of his estate and also the three hundred dollar exemption and the widow elected to take under the will; it was *held*, that she was entitled to both the three hundred dollar exemption allowed under the act 14 April 1851 and the additional three hundred dollars as bequeathed in the will, and that her interest in the crops attached immediately upon the death of the testator. *Snider's Estate*, 16 C. C. 233.

(d) Of the demand.

140. A widow will not be charged with laches in presenting her claim for exemption, where her husband had deserted her and was long apart from her at the time of his death. *Groome's Estate*, 7 C. C. 519.

141. If the appraisement be filed within a year after the granting of letters of administration, there is not such gross

laches as will deprive the widow of her exemption. *Buddy's Estate*, 7 C. C. 466.

142. A delay of three years is a conclusive waiver of the right of exemption. *Fox's Estate*, 5 Kulp 218.

143. Where a widow within thirty days of the death of decedent elects to take cash, she is entitled to her exemption, though she did not file a formal appraisement until three years thereafter. *Dean's Estate*, 7 Lanc. 162.

144. A delay of five years in a claim for a widow's exemption operates as conclusive proof of a waiver of the right. *Donoghue's Estate*, 7 C. C. 319; s. c. 46 L. I. 454.

145. A widow waives her exemption by waiting three years to make her demand, as against a purchaser under a judgment against the decedent. *Davey's Estate*, 9 C. C. 125.

146. A delay of ten months was *held* not to bar the widow's claim for exemption. *McCann's Estate*, 9 C. C. 408; s. c. 27 W. N. C. 439; 48 L. I. 57.

147. If the estate consists of money, a demand for an appraisement is unnecessary. *Dewall's Estate*, 38 P. L. J. 275.

148. Where the exemption was claimed in cash and before any expenses had been incurred or any rights had intervened; it was *held*, that a delay of eleven months in making the claim did not render it invalid. *Weir's Estate*, 10 C. C. 187; s. c. 28 W. N. C. 268.

149. Where the widow was administratrix, she was allowed her exemption after using the estate for four years under a family agreement to that effect; it was *held*, that a formal demand upon herself was not necessary, as the fund was already in her hands as administratrix. *Cocker's Estate*, 11 C. C. 243.

150. A widow will not be deprived of her exemption on account of delay in claiming it, when such delay is satisfactorily explained and it appears that no one has been prejudiced by it; the fact that a widow who is also administratrix fails to file her inventory or

account in strict accordance with law, does not affect her claim to her exemption. *Kelly's Estate*, 14 C. C. 51.

151. Unreasonable delay on the part of a widow in claiming her exemption will defeat her right to it; the right to determine the question of unreasonable delay is exclusively for the orphans' court. *Neill v. Kuhn*, 15 C. C. 565.

152. Where the decedent died in 1882, and letters were issued January 3, 1887; it was *held*, that a claim for exemption made May 21, 1890, must be denied on the ground of unreasonable delay. *McNeill's Estate*, 6 Kulp 168.

153. A claim for exemption made by a widow and minor children over seven years after the decedent's death is too late; the widow cannot set up as an excuse the delay in taking out letters of administration. *Cronan v. Scranton*, 2 Lack. Jur. 413.

154. Where a decedent died in November 1889, and letters were granted in May 1894, and the appraisement of the widow's exemption was made in July 1894; it was *held*, that this was too late; the question whether the widow has lost her right by laches is between her and her husband's creditors generally, and an act of one creditor will not be permitted to operate to the prejudice of the others. *Hoffeditt's Estate*, 4 Northam. 285.

155. Where the widow was the executrix, and it appeared that the exemption was used by her for the support of herself and children, and it appeared that the entire estate was given to her for life; it was *held*, that no formal notice of her claim of exemption was necessary, and neither was advertisement necessary, and that she was not deprived of her exemption because of not having made her claim for fifteen years when her account was filed. *Bourguignon's Estate*, 28 W. N. C. 315.

156. Where an administrator's only interest in the estate is compensation for his services, he is a competent witness to prove the widow's notice of her claim for the exemption. *Venus's Estate*, 2 York 193.

157. Where a widow notified the executors of her husband's father's estate that she had been informed that her husband was entitled to money from that estate and that she claimed her exemption out of that fund, and she made her claim immediately after the second letters of administration were granted on her husband's estate; it was *held*, that she was not guilty of such laches as would bar her right to the exemption. *Groom's Estate*, 6 York 139.

158. A delay of two and one-half years by a widow in demanding her exemption is not necessarily evidence of a waiver. *Snider's Estate*, 16 C. C. 238.

(e) Election of property.

159. If a widow claims more cash than exists, the claim cannot be supplemented after her death by securities for which no demand has been made. *Buddy's Estate*, 7 C. C. 466.

160. A widow having made her claim for cash may, upon learning that there is no cash, ask for the amount out of the proceeds of the sale of real estate. *McCann's Estate*, 9 C. C. 408; s. c. 27 W. N. C. 439; 48 L. I. 57.

161. A widow is entitled to her exemption out of goods which were levied on by the sheriff before the death of decedent. *Meier's Estate*, 6 Kulp 102.

162. Where a widow elected to retain three hundred dollars in cash out of the personal estate, and it appeared that the decedent left no cash, and the real estate was sold for debts, and the sale confirmed a year after decedent's death and two days after the filing of the widow's petition, and no appraisement of the real estate followed the petition; it was *held*, that the widow's claim would not be allowed out of the proceeds of the realty. *Formad's Estate*, 14 C. C. 104.

163. Where a decedent left no cash and the personalty had been converted into cash by public sale, before the widow's claim was filed, and the widow claimed three hundred dollars in cash out of the personal estate; it was *held*, that

no appraisement of the personal property having been made, the widow would not be allowed her exemption out of the fund created by its sale. *Formad's Estate*, 14 C. C. 104.

164. Where a widow claims her exemption in money when there is no money belonging to the estate and she declines to return the personalty and refuses an appraisement of it, she cannot wait until the personal property is sold and turned into cash and then apply for her three hundred dollars out of the proceeds. *Venus's Estate*, 2 York 193.

165. A decree fixing a widow's right to her exemption in cash cannot be attacked collaterally at the audit of the administrator's account. *Carr's Estate*, 15 C. C. 354; s. c. 35 W. N. C. 448.

166. Damages assessed for land taken under a power of eminent domain after the decease of the owner, form no part of his estate, and no exemption can be had out of them by widow or minor children. *Cronan v. Scranton*, 2 Lack. Jur. 413.

167. Where the appraisement set forth that the widow elected to retain certain articles and an "amount in cash to be derived from sale \$277.44," and the appraisers reported that she elected to retain the residue of three hundred dollars out of money and evidences of indebtedness included in the general appraisement; it was held, that she was entitled to receive the balance of her claim out of such money and evidences of indebtedness. *Steward's Estate*, 5 York 9.

168. A widow electing to take her exemption in real estate takes it discharged of an ordinary judgment lien, not for purchase money. *Graves's Estate*, 134 P. S. 377; s. c. 26 W. N. C. 69.

169. Where a widow makes a demand for an appraisement of the real estate, she may claim her exemption out of a fund arising from its sale; and this, although no appraisement has been actually made. *Thomas's Estate*, 152 P. S. 63.

170. If a widow under the act of 14 April 1851 (Brightly's Purdon 584), elects to take real estate to the value of three

hundred dollars, and it is set aside to her by the appraisers, the title passes to her though she die prior to confirmation. *Daggett's Estate*, 7 C. C. 338.

171. A widow may claim her exemption out of real estate devised, and it is not a valid objection that the appraisement does not show that there was any personal property. *Klein's Estate*, 14 C. C. 72.

172. A widow electing to take her exemption from the realty cannot subsequently come in upon the personal property. *Engel's Estate*, 4 Northam. 198.

173. Where a widow claims real estate not exceeding six hundred dollars under the act 27 November 1865 (Brightly's Purdon 586), the proceedings will not be vitiated by the mere fact that she neglected to affix her signature to the paper in which she declared such an intention. *Beaverson's Estate*, 1 York 173.

174. Where the widow made her demand in writing electing to retain real property to the value of three hundred dollars, and the appraisers reported that they could not set it apart to her without spoiling the whole and the report was duly advertised and confirmed; it was held, that her right to receive the three hundred dollars out of the real estate would not be denied upon oral testimony that she wanted money instead of property. *Quickel's Estate*, 5 York 71.

175. Where a woman claiming to be the widow of the decedent claimed her exemption in the usual form, and the appraisement showed that the personal estate amounted to but eighteen dollars, which was set apart to her, and she demanded the balance out of the real estate, and the appraisement was confirmed in 1888; and in 1890 proceedings in partition were instituted and the alleged widow claimed sole title to the land and on the trial of her right in the common pleas, judgment was entered for the defendants and the land was then sold under the partition proceedings by the administrator acting as trustee, and the administrator was the brother

of the alleged widow and paid the balance due under the exemption proceedings to his attorney, who also acted as the attorney for the alleged widow; it was *held*, that such payment was erroneous notwithstanding the confirmation of the appraisement, because he knew that she was not the legal widow of the deceased, because he knew that she had abandoned her claim under the exemption law and had claimed the land in her sole right and because, as trustee making sale in partition, it was no part of his duty to distribute the fund. *Culver's Estate*, 7 Kulp 219.

(g) Of the appraisement.

176. If the widow elects to take her three hundred dollars in money no appraisement is necessary. *Dean's Estate*, 7 Lanc. 162; *Groome's Estate*, 7 C. C. 519.

177. The allowance of a widow's exemption will not be avoided because one of the appraisers was surety for the widow as administratrix. *Macalitioner's Estate*, 26 W. N. C. 296; s. c. 47 L. I. 213.

178. Under the act of 27 November 1865 (Brightly's Purdon 586), the property set apart to the widow must not exceed in value six hundred dollars; so the appraisers should find that it cannot "be divided without prejudice or spoiling the whole." *Kennedy's Estate*, 4 Del. 168.

179. The return of the appraisers must be accepted as the true value of the goods set apart to the widow under her claim of exemption. *Drygalski's Estate*, 6 Kulp 50.

180. Real estate having been appraised in partition proceedings need not be specially appraised on account of the widow's claim. *McCann's Estate*, 48 L. I. 57.

181. Where, upon a claim for the exemption out of real estate, made by a widow within three months after her husband's death, the appraisement was duly had and made, and the papers left in the office of the register of wills, without being approved by the orphans' court and filed of record therein, and it appeared that no one was injured by the delay, it was not error to confirm a second

appraisement regularly made and presented more than three years after the husband's death. *Williams's Estate*, 141 P. S. 436.

182. Where a widow is also executrix of her husband's estate, she may retain her exemption in money without notifying herself as executrix; and this, without appraisement and without her filing a petition. Such a claim was allowed at the adjudication six years after the testator's death, but would have been refused for laches if the claim had been to retain personalty capable of appraisement or the proceeds of realty. *Birk's Estate*, 11 C. C. 569.

183. The confirmation of a widow's appraisement by the orphans' court is a judgment *in rem* conclusive and binding upon all the world, and can only be questioned on the ground of fraud. *Transue's Estate*, 2 Northam. 393.

184. Upon exceptions to a widow's election, it will be presumed that the oath taken by the appraisers was according to law; and this, although such oath is not affixed to the appraisement. *Beaverson's Estate*, 1 York 173.

V. Preferred debts.

185. Under the act 24 February 1834, sec. 21 (Brightly's Purdon 591), it was *held*, that a claim for wages by a laborer on the decedent's farm was not entitled to preference as "servant's" wages. *Graham's Estate*, 2 York 186.

186. Preferred rent should be apportioned to the death of the tenant; and this, whether payable at that time or not. *Walker's Estate*, 6 C. C. 515.

187. Interest will not be allowed on rent preferred; and this, whether said rent was due and payable before the date of the death of the tenant or not. *Vandegrift's Estate*, 3 Dist. Rep. 421; s. c. 6 Del. 51.

188. Upon the settlement of the estate of a lessee, where the lease provided that certain taxes which the lessee agreed to pay should become part of the rent; it

was *held*, that such taxes would be allowed as a preferred claim; and it was further *held*, that the claim need not be for the last year, provided the amount did not exceed one year's rent. *Morgan's Estate*, 11 C. C. 536; s. c. 30 W. N. C. 509.

189. A husband is primarily liable for medical attendance and other expenses incident to his wife's illness and death; and this, although she has a separate estate. Where he is insolvent such expenses will be deducted from his distributive share of her estate. *Waesch's Estate*, 166 P. S. 204; affirming s. c. 14 C. C. 387.

190. A husband is primarily liable for the funeral expenses of his wife; even where by direction of her will such expenses are to be paid out of her own estate, he will not be allowed to claim as creditor for such expenses so as to exhaust the estate and deprive other creditors of payment. *Wheeler's Estate*, 4 Dist. Rep. 265.

191. Where the constitution of a beneficial society provided that those persons who were legally entitled to receive the funeral benefit should notify the society of the death; it was *held*, that the executor was entitled to receive out of the benefits an amount sufficient to pay the funeral expenses. *Oelsen v. Schiller Death Beneficial Society*, 9 Lanc. 113. In such a case the beneficiary could not subsequently recover from the decedent's estate the amount of such funeral expenses on the ground that the decedent's estate was primarily liable therefor; the doctrine of subrogation does not apply. *Schaubel's Estate*, 12 Lanc. 166.

VI. Distribution.

(a) General principles.

192. The law of the domicile governs the distribution of personalty. *Wisler's Estate*, 6 Montg. 159.

193. The estate of a man presumed to be dead after seven years' absence, should not be distributed without an administration. *Wisler's Estate*, 6 Montg. 159.

194. The next of kin of an intestate who are entitled to his estate may, if there are no creditors, make distribution among themselves without raising an administration. *Rapp's Estate*, 12 C. C. 609.

195. An administrator is protected by a decree of distribution, notwithstanding he made the payment before the actual decree was made. *Comm'th v. Shipman*, 3 Cent. 257.

196. The death of either debtor or creditor does not stop the running of the statute of limitations; upon distribution, an administrator cannot set off against a legatee a debt due the estate which is barred by the statute. *Light's Estate*, 136 P. S. 211; s. c. 27 W. N. C. 21.

197. One who pays the fund to the accountant has no standing, upon its subsequent distribution, to claim the same adversely to the estate. *High's Estate*, 136 P. S. 222; s. c. 26 W. N. C. 450.

198. One who shares in the distribution of the assets of an estate is estopped from subsequently claiming that certain of the assets were her personal property. *Patterson v. Dushane*, 137 P. S. 23; s. c. 27 W. N. C. 41.

199. Where a decedent was a native of Germany, but lived in England for fourteen years, and there abandoned his wife and left England for this country; it was *held*, upon distribution of his estate, that his domicile of choice having been abandoned, his domicile of origin was resumed by operation of law, and as his relatives in Germany had asked for the distribution of his estate in this jurisdiction, the estate would be distributed in accordance with the laws of this state. *Bremme's Estate*, 13 C. C. 177; s. c. 32 W. N. C. 135.

200. Where an estate is subject to the payment of an annuity and also a fixed sum at the annuitant's death, and the original securities retained by the executor, although presently yielding an income more than sufficient to pay the annuity, are of fluctuating value, the court will not set apart any portion of

them to meet the annuity and distribute the balance. *Christian's Estate*, 13 C. C. 283.

201. An executor retains securities of fluctuating value at his peril, but where they cannot be sold presently without prejudice to the estate, the court will not order an immediate distribution. *Christian's Estate*, 13 C. C. 283.

202. Where a testator devised his residuary estate to certain persons in trust to be divided *pro rata* among certain specified institutions, the orphans' court awarded a balance in the hands of the executors, consisting of unconverted assets, to the trustees for conversion and distribution. *Pepper's Estate*, 13 C. C. 407; s. c. 32 W. N. C. 323.

203. A fund created by the contributions of the members and payable to the next of kin of a deceased member of the beneficial association, is not subject to the debts of the member and should not be paid to his administrator, but should be distributed directly to the next of kin, and where an administrator receives such a fund and charges himself with it in his account, it will be awarded to the persons so entitled. *Zinn's Estate*, 14 C. C. 33.

204. Upon the audit of an administrator's account the orphans' court may, in its discretion, set aside a sufficient sum to cover a claim in the common pleas against the accountant. *Bennett's Estate*, 132 P. S. 201; s. c. 25 W. N. C. 343.

205. The orphans' court in its discretion may delay distribution of an estate or set apart a portion to await the result of pending litigation. *Kern's Estate*, 4 Dist. Rep. 73.

206. Where letters of administration were taken out in this state in the forum where the assets were found, but the domicile was in another state, and the next of kin and sole heir resided in the said forum and the only known creditor presented his claim there, although he resided at the decedent's domicile; it was *held*, that it was not necessary for the administrator to remit the balance in his hands to an administrator to be appointed

at the decedent's domicile, for distribution. *Weaver's Estate*, 12 Lanc. 57.

207. A judgment obtained against an executor does not conclude heirs and devisees in the distribution of the real estate of the testator; they may question any item included in the judgment. *Zuber's Estate*, 10 Montg. 137.

208. Where A executed and delivered a paper under seal directing her executor, in consideration of moneys advanced, to pay a certain sum of money at her death to the executors of B; it was *held*, that the paper was not testamentary and upon a distribution of A's estate, B's executors were entitled *pro rata* with A's other creditors. *Holt's Estate*, 39 P. L. J. 335.

209. Where the principal of an estate is not to be distributed immediately, the auditing judge will not determine any question as to its future distribution, but the distribution of income will be determined although the incidental effect will be to bind the future distribution of the principal. *Potter's Estate*, 4 Dist. Rep. 329.

210. Where a mortgagee claims against the general estate of an insolvent decedent, he will be allowed a dividend on the principal of his bond and interest to the date of the decedent's death; where an estate is insolvent, interest upon all claims can only be computed to the decedent's death. *Keebler's Estate*, 4 Dist. Rep. 346.

211. Upon the distribution of a decedent's estate, where it appeared that forty-six settlements had been made among the heirs during seventeen years without any inventory, appraisement or account filed; it was *held*, upon distribution, that the court would not set aside such settlements at the instance of a widow of one of the distributees, who was also one of the executors, who assisted in the distribution. *Palethorp's Estate*, 168 P. S. 98.

212. Upon the distribution of the estate of a deceased partner, the surviving partners are entitled to reimbursement in the orphans' court for the payment of the in-

dividual debts of the deceased out of firm assets after his death. *Scott's Estate*, 42 P. J. L. 475.

(b) Distributive shares.

213. It is in the discretion of the orphans' court, on distribution, to permit legatees to take the securities in specie. *Brown's Appeal*, 12 Cent. 684; s. c. 14 Atl. 130.

214. If a child be shown to be the child of a decedent, she is presumed to be legitimate. *Simpson's Estate*, 4 Del. 129; s. c. 1 Lack. Jur. 193.

215. Upon the death of an intestate without issue, an adopted child is entitled, as against the widow, to two-thirds of the personal estate of the decedent. *Rowan's Estate*, 132 P. S. 299; affirming s. c. 6 C. C. 461.

216. Second cousins, being grandchildren of deceased uncles and aunts, are not entitled to participate as against first cousins, being children of deceased uncles and aunts. *Rogers's Estate*, 131 P. S. 382.

217. Upon a devise of the whole estate, to "be settled and divided by law" to widow and children, distribution should follow the intestate laws. *Clever's Estate*, 38 P. L. J. 94.

218. Upon a limitation of personality to the "heirs" of a first-taker, the word "heirs" includes a widow or a husband. *Ashton's Estate*, 134 P. S. 390; s. c. 26 W. N. C. 41; reversing 7 C. C. 366.

219. Upon a bequest of personal property to the "heirs" of a tenant for life in equal shares, his widow and two nephews are entitled to the fund in equal third parts. *Ibid.*

220. Surplus income, not being disposed of by the testator, passes under the intestate laws. *Rhodes's Estate*, 147 P. S. 227; affirming s. c. 26 W. N. C. 233; 47 L. I. 246.

221. The principle of a ground-rent paid off in the lifetime of one who had a vested estate must be distributed as personality. *Shepherd's Estate*, 8 C. C. 520; s. c. 47 L. I. 299.

222. Upon a conversion of real estate

by a direction to executors to sell, the proceeds should be distributed as required by the character of personality. *Lomeson's Estate*, 5 Kulp 405.

223. The interest of a deceased legatee is payable to his executors; it is the latter's business to carry out the will of his decedent. *Laughlin's Estate*, 131 P. S. 333; affirming s. c. 36 P. L. J. 189.

224. Upon distribution of a grandfather's estate, who left a daughter who is since deceased leaving children, the administrator of the daughter should claim her share before the auditor. *Simpson's Estate*, 4 Del. 129; s. c. 1 Lack. Jur. 193.

225. Notwithstanding the act of 3 June 1887, a husband is still liable for his wife's necessities and such bills will be charged against his share of her estate. *Weber's Estate*, 25 W. N. C. 220.

226. Where, after a specific bequest, it is provided by codicil that the legatee shall receive "only the sum of one dollar as the full amount of his share," this does not exclude him from sharing in that part of the estate of which the deceased died intestate. *Bell's Estate*, 8 C. C. 454.

227. Where a codicil revoked an absolute gift as to four sons and substituted trusts, such a codicil must be read as if written in the original instrument, and controls the distribution under the same of a share of another brother who died without issue. *Bullock's Estate*, 7 C. C. 439; s. c. 46 L. I. 270.

228. If there be fraud in an administrator not paying over to heirs, who are under his guardianship, their distributive shares, the statute only runs from the discovery of the fraud. *Gabler's Appeal*, 5 Cent. 314.

229. If upon adjudication it appears that some of the distributees have received more than their share of the income, the excess will be ordered to be repaid out of future shares. *Vanderford's Appeal*, 12 Atl. 491.

230. A sole legatee of all the personal property is bound by a family settlement under seal providing for an equal distri-

bution among all the children "for the purpose of settling all doubt and carrying out the intention of the decedent." *Johnson's Estate*, 8 C. C. 1.

231. The release of an interest in the estate of a decedent, if obtained by a fraudulent suppression of the truth in respect thereto and without consideration, is void. *Brooks v. First Presbyterian Church*, 128 P. S. 408; s. c. 135 P. S. 137.

232. A provision in a will that "I would rather prefer to have a division made, etc." is but precatory, and the executors have no power to postpone distribution until the period referred to. *Warner's Estate*, 130 P. S. 359.

233. Upon the distribution of a fund raised here under ancillary letters the orphans' court will not pass upon a question as to what is the law of the domicil, but will direct the fund to be paid to the administrator *cum testamento annexo* at the domicil. *Ruebsam's Estate*, 26 W. N. C. 311.

234. Where an insolvent residuary legatee is indebted to the estate, the amount due by him is properly deducted from his share of the fund, and this, though the fund be held by an assignee without notice of the indebtedness. *Dull's Estate*, 137 P. S. 116.

235. Where a testator left two sons and married daughter and devised to one son a farm "at \$2650" and to the other a farm "at \$5000," with cross-remainders on the death of either without issue, and he bequeathed the sum of \$5.00 to his daughter and her husband each, for their full share; it was *held*, that there was no personal obligation on the devisee to pay the sums at which their farms were valued, nor were said sums charged upon the devises, so as to raise a fund undisposed of by the will in which the daughter could share. *Knaub's Estate*, 144 P. S. 322.

236. Where residuary legatees have, by mistake, received an amount in excess of their interest, they will be required to refund to the widow her share, but interest will only be allowed from the

date at which the demand for restitution was made. *Grim's Estate*, 147 P. S. 190; affirming s. c. 48 L. I. 86.

237. A family arrangement whereby the heirs requested the executor to make advances to another heir to save her home from sale by execution, and charge the same against their shares, will be upheld even against a married woman. *Good's Estate*, 150 P. S. 307.

238. Under the French spoliation act of 1891, where an appropriation was made to pay a claim to the next of kin of the claimant, and when the act was passed all of the claimant's children were dead but there were living four grandchildren, children of a son, and thirteen great-grandchildren, who were the issue of seven deceased children of a daughter; it was *held*, that the four living grandchildren were each entitled to take one-eleventh in their own right, as the nearest of kin, and that one-eleventh would go to the representatives of each of the deceased grandchildren *per stirpes*. *Clement's Estate*, 160 P. S. 391; overruling *Clement's Estate*, 150 P. S. 85 and in effect affirming *Clement's Estate*, 10 C. C. 481. See *Clement's Estate*, 13 C. C. 129; s. c. 2 Dist. Rep. 341; *Stokes's Estate*, 10 C. C. 527; s. c. 29 W. N. C. 162.

239. Where certain relatives do not participate in a partial distribution, although entitled to do so, the inequality will be corrected on a subsequent distribution of other funds belonging to the estate. *Yetter's Estate*, 160 P. S. 506.

240. A petition to open the confirmation of an auditor's report and to decree a redistribution will not be allowed, where the petition does not allege fraud, or that the money sought to be recovered had not been paid out to the distributees mentioned in the decree. *Bear's Estate*, 162 P. S. 547; affirming s. c. 11 Lanc. 65.

241. Where a testator directed his estate to be kept intact and undistributed for five years, and empowered his executors to sell and convey his real estate within that period for the purpose of raising money, and to incur either his

personal or real estate for the same purpose and at any time before final settlement to sell and convey his real estate for the payment of debts, and he directed that at the end of five years his estate should be divided among his widow and children as under the intestate laws; it was *held*, that the latter were not entitled to the income of the real estate during the five years. *Searight's Estate*, 163 P. S. 218.

242. Upon the adjudication of an executor's account, where it appeared that a devisee had died intestate thirteen years before, leaving a husband and two children, and that by the death of one of the children the husband became entitled to two-thirds and the surviving child to one-third, and further that the real estate had been converted into personalty; it was *held* to be within the discretion of the court to award the fund to the administrator of the devisee or directly to her husband and child, but that the former was the safer course. *Sweed's Estate*, 10 C. C. 463; s. c. 28 W. N. C. 544.

243. Upon the distribution of a decedent's estate, it is by no means clear that the orphans' court has jurisdiction to set off against the share of a distributee the difference between his bid at an executor's sale and the amount obtained at a resale rendered necessary by his failure to comply with his bid; the court will not do so, however, where the parties claiming such set-off have not presented facts and circumstances which in equity and good conscience entitle them to be sustained in their claim. *Morgan's Estate*, 11 C. C. 152; s. c. 30 W. N. C. 243.

244. Where the fund for distribution arises from the sale of property standing in the name of one person and the real ownership is in another, the latter may follow the proceeds upon its distribution by the orphans' court; and this, though, as a general rule, persons claiming adversely to the estate of a decedent cannot be heard in the orphans' court. *Mar-*

tin's Estate, 11 C. C. 245; s. c. 30 W. N. C. 461.

245. Where certain legacies were payable at the termination of a life estate, which life estate consisted of the income on certain bonds, and the legacies aggregated the same value as the face of the bonds, and it appeared that the bonds were depreciating in value and might not realize enough at the death of the life tenant to pay the legacies in full, the court upon distribution set apart two thousand dollars from the residue, out of which to meet any deficiency which might result to the legatees if the entire residuary estate were distributed. *Lathrop's Estate*, 14 C. C. 245.

246. Where a person has been absent and unheard of for over twenty-five years an administrator appointed under the act 24 June 1885 (*Brightly's Purdon* 575), cannot be compelled to pay over the fund to the heirs without positive proof of the death of such absent person; and this, even though distribution has been reported by an auditor whose report has been absolutely confirmed. *Beck's Estate*, 15 C. C. 564; following *Scott v. McNeal*, 154 U. S. 34.

247. The orphans' court has jurisdiction to adjust the equities between co-distributees where a sufficient balance remains in the hands of the accountant, but it cannot compel contribution by a distributee who has been overpaid by a foreign executor or under the decree of a foreign court. *Wheeler's Estate*, 4 Dist. Rep. 265.

248. Where a testator devises his estate to executors in trust to collect the income and pay the same to his widow for the maintenance of herself and minor children, and if she should die or remarry during the minority of any of his children, then the income to be paid to the guardian of any of the minors for their maintenance; and the balance of the income was directed to accumulate until his youngest child should have attained the age of twenty-one years or until the decease of his widow if she should re-

main his widow so long, and if his widow married, distribution was to be made as soon as his youngest child should reach the age of twenty-one years; it was *held*, that distribution must await the minority of the youngest child, although the widow died before that time. *Barnes's Estate*, 9 Montg. 129.

249. Where the decedent held the legal title to certain real estate which was subject to a resulting trust and he sold it by articles of agreement, and after his death the sale was consummated by proceedings in the orphans' court and his administratrix received the purchase money; it was *held*, upon a distribution of his estate which was insolvent, that the *cestui que trusts* were entitled to the distribution of their equitable proportion of the purchase money. *Otterman's Estate*, 38 P. L. J. 323.

250. Where a distribution is made by executors in good faith in accordance with the agreement of the widow, she is estopped from afterwards contesting such distribution. *Risher's Estate*, 40 P. L. J. 131.

251. Upon the distribution of a decedent's estate where it appears that an heir is indebted to the estate in an amount greater than his distributive share, the balance should be divided among the other heirs, but where such balance was awarded to the accountants, the auditor's report was not set aside, as it appeared there was another account to be filed. *Hostetter's Estate*, 8 York 127.

252. Upon the distribution of a decedent's estate, the creditor of an heir, who has attached his share or acquired a lien on his undivided interest in the real estate by the entry of a judgment after the decedent's death, can take nothing but what remains of the share after payment of the amount he owed the decedent. *Kunkle's Estate*, 6 York 123.

253. Where a grantor demised and leased all the coal under certain lands with the privilege of mining and removing the same, to have and to hold for the term of ninety-nine years and to pay a fixed rate per ton for coal mined but not

less than a stipulated sum each year; it was *held*, that the transaction constituted a sale of the coal, and the rentals maturing after the death of the grantor were payable as purchase money to his administrators and distributable as personalty to those entitled thereto. *Lazarus's Estate*, 145 P. S. 1; reversing s. c. 6 Kulp 53.

254. A "lease and demise" of all the anthracite coal in and upon and under certain land which the party of the second part can take from the same within and during the term of twenty-five years, with the usual clauses as to minimum, etc., amounts to a sale of the coal in place and not to a mere license to take the coal, and after the death of the grantor the royalties accruing are distributable as personalty, the share of a daughter who died after her father being distributable to her husband and children according to the law of the state in which she was domiciled. *Hancock's Estate*, 7 Kulp 36.

255. Where land is purchased with firm assets and title is taken in the names of the individual partners under an agreement that upon the death of one, the survivors may purchase his interest, such land is personalty as between the co-partners, and upon the death of a partner and such purchase by the survivors, the fund will be distributed to his representatives as personalty. *Barber's Estate*, 14 C. C. 167.

256. Where money is applied by trustees under a power to the purchase of real estate, it is not thereby converted into realty for the purposes of distribution; realty will be distributed to the same persons and in the same proportions as if the money had been invested in personalty. *Ingersoll's Estate*, 15 C. C. 19; s. c. 36 W. N. C. 249, 251.

257. The proceeds of cemetery lots conveyed to the decedent, his heirs at common law and assigns, and sold under the order of the orphans' court, will be distributed as real estate. *Holbrook's Estate*, 1 Dist. Rep. 259.

258. Money received in condemnation proceedings from a railroad for a right of way will be distributed as personal property. *Hough's Estate*, 3 Dist. Rep. 187.

259. Where land is sold under the Price act, the proceeds retain the character of real estate and descend as such. *Hough's Estate*, 3 Dist. Rep. 187.

260. Where the land of an intestate had been sold in partition at the suit of other tenants in common, it was *held*, that the proceeds descended as personal property, and must be distributed as such under the intestate law. *Hough's Estate*, 3 Dist. Rep. 187.

261. Where the real estate of a lunatic was sold in 1871, and in 1872, upon his being adjudged restored to sanity, the committee was suspended and filed an account of the proceeds of the sale, which, however, they retained and reinvested, until 1885, when he was reinstated as committee; it was *held*, upon the death of the lunatic, that such proceeds of sale must be distributed as personalty; and it was further *held*, that the auditor to distribute had no authority to inquire into the mental condition of the lunatic during the years he had been adjudged restored to sanity. *Jones's Estate*, 3 Dist. Rep. 318.

262. Where a contested will was by agreement admitted to probate, and a certain sum was paid over to the trustee for the heirs at law and next of kin in proportion to the value of their interests; it was *held*, that the distribution of the fund must be governed by the terms of the agreement; that if any real estate appeared to have come to the testator *ex parte paterna*, the proceeds must be distributed to the heirs *ex parte paterna*; but counsel fees and collateral inheritance tax was properly deducted from the whole fund; and that proceeds of real estate derived *ex parte paterna* must be awarded to the executor of a deceased heir to be distributed as personal property. *Pep- per's Estate*, 4 Dist. Rep. 101.

263. Where the confirmation of an account has been obtained by fraud, and

distribution made in accordance with the decree, the court has power in the absence of laches to order a restitution by the distributees. *White's Estate*, 1 Dist. Rep. 508; s. c. 12 C. C. 93. See s. c. 163 P. S. 388; affirming s. c. 2 Dist. Rep. 207.

VII. Refunding bonds.

264. An executor is not entitled to a refunding bond for money awarded by the orphans' court to a distributee. *Gunkel's Estate*, 6 Lanc. 217.

265. Payment to a legatee without a refunding bond, even after a decree making distribution, will not be ordered where the executor shows that certain creditors failed to present their claims. *Freedley's Estate*, 5 Montg. 134.

266. Where an executor or administrator makes payment in conformity with a decree of the orphans' court, directing distribution, he is protected by the decree; and this, though a refunding bond was not exacted from the distributee. *Ferguson v. Yard*, 164 P. S. 586.

267. The orphans' court has jurisdiction to demand a refunding bond, where distribution is claimed upon the ground that there is a presumption of death as to some of the distributees. *Meaher's Estate*, 10 C. C. 221; s. c. 28 W. N. C. 275.

268. A refunding bond for the value of assets transferred by an executor under the direction of the court will not be required where the executor is fully protected by a bond conditioned for the return of the assets in specie. *Christian's Estate*, 13 C. C. 415.

269. Where an executor makes a voluntary payment to a legatee without taking security approved by the court, he does so at his own risk and a subsequent confirmation of his account, in which he has taken credit for such payment will not protect him against the subsequent claims of creditors; such legatees may be compelled to contribute to the payment of creditors, notwithstanding five years have elapsed

since the confirmation of the executor's account. *Robins's Estate*, 4 Dist. Rep. 277.

VIII. Advancements.

270. Where a decedent declares that certain advancements to his children shall be deducted from their shares, they cannot deny the existence of the indebtedness charged, nor the amount thereof. *Eichelberger's Estate*, 135 P. S. 160; s. c. 26 W. N. C. 209.

271. Where a daughter gave to her mother an acknowledgment for a sum of money received, and paid a payment of interest thereon; *held* to be an advancement, and that it should be charged against her share of the estate. *Bucknor's Estate*, 136 P. S. 23; s. c. 26 W. N. C. 237; affirming s. c. 7 C. C. 361.

272. A deed of a farm from father to son was *held* to be an advancement. *Lewis's Appeal*, 127 P. S. 127.

273. If a father purchase a property with his own funds and put the deed in his son's name for "safety" from creditors, the son is liable to his estate for the purchase money. *Gillespie's Estate*, 7 C. C. 305; s. c. 46 L. I. 444.

274. If a father and children be tenants in common, payments by the father for the protection and preservation of the property, are presumed to be intended as a gift or advancement. *Chase's Estate*, 7 C. C. 298; s. c. 46 L. I. 445.

275. But this rule does not apply to enforced payments by the father's estate of premium notes on a policy of insurance, in which the deceased and his children held a joint interest. *Chase's Estate*, 7 C. C. 300; s. c. 46 L. I. 445.

276. If a parent lend money to a child and take security, it is a debt and not an advancement; if payable on demand, it bears interest from the time of demand. *Daisz's Estate*, 6 Lanc. 177; affirmed in *Daisz's Appeal*, 128 P. S. 572.

277. Where a son executed a judg-

ment-note to his father who subsequently bequeathed it to him, it was *held* that it was altogether inexplicable, if intended as an advancement, that it should have been put in such a form. *Potts's Appeal*, 10 Atlan. 887.

278. Interest on advancements is chargeable from one year after the ancestor's death. *Butler's Estate*, 37 P. L. J. 442.

279. A debt converted by a testator into an advancement bears interest only from the time fixed by him. If no date be fixed by the will, interest is chargeable upon the expiration of a year after decedent's death. *Patterson's Appeal*, 128 P. S. 269.

280. Advancements are not chargeable with interest. *Bender's Estate*, 10 Lanc. 157.

281. Upon a remainder to children and cross-remainders amongst them, on their dying unmarried and without children, and a proviso that one should not be paid his share until he reached thirty-five years, the orphans' court has no jurisdiction to grant him an advancement to go into business. *Gould's Estate*, 6 C. C. 639; s. c. 46 L. I. 179.

282. An advancement is not established by a clause in the will directing that money given to my children and charged against them shall be deducted from their shares. *Light's Estate*, 136 P. S. 211; s. c. 27 W. N. C. 21.

283. An entry by a father in his account book of a charge against his daughter for cash paid her, indicates an advancement; such inference stands until overthrown by other evidence. *Auchy's Estate*, 7 Montg. 21.

284. The court refused to interfere with the finding of an auditor that a debt was converted into an advancement. *Sickler's Estate*, 2 Mona. 23. See *Bittle v. Bittle*, *Ibid.* 17.

285. Upon the distribution of a fund in the orphans' court produced by a sale in partition, where one of the heirs was indebted to the decedent, he will be charged with the advancement, and if his

share is insufficient to discharge his indebtedness to the decedent's estate, his creditors can take nothing in the distribution. *Dickinson's Estate*, 148 P. S. 142.

286. Where a testator directs that the debts due by his children shall be treated as advancements, the fact that one of such children takes only a remainder interest in real estate, will not prevent the debt being turned into an advancement nor permit a recovery thereon by the executors. *Snider v. Snider*, 149 P. S. 362.

287. Where a farm was conveyed by a father to a son and notes were given to the father in favor of a brother and sister, but the father retained possession of the notes; it was *held*, upon a rule to open judgments entered on said notes after the death of the father, where the defendant contended that the conveyance of the farm was intended merely as an advancement, and that the judgments did not represent any indebtedness, that the evidence was insufficient to sustain the contention. *Doty v. Doty*, 155 P. S. 285.

288. Where a testator directed that notes which he held against his children should be deducted from their share and he had various accounts against his children, but the notes were not entered in the charge book, and the notes constituted the principal part of the personal estate and more than enough to pay the pecuniary legacies, and if the notes were held to be advancements there would be no personality to pass under the residuary clause, and the widow's share would be very small in comparison with what the children would receive; it was *held*, that an intention to convert the notes into advancements was not consistent with a purpose to pass the balance of the personal estate under the residuary clause, and that no inference of such intention could be drawn from the direction to deduct the debts of his children from their shares of his estate. *Strock's Estate*, 158 P. S. 355.

289. Where a testator at the time of

his death held two notes against one of his sons who was an executor, and the son became involved and to protect the estate gave a judgment to secure the payment of the two notes, and having subsequently relieved himself from his financial embarrassment, the judgment was satisfied by the other executor who retained the notes, which by the testator's directions were to be deducted as advancements; it was *held*, that the court properly refused to strike off the satisfaction of the judgment, and that legatees under the testator's will had no standing to invoke the assistance of the judgment for the purpose of protecting their shares. *Rush v. Rush*, 161 P. S. 629.

290. Where a testator charged his sons with certain advancements entered in a memorandum book; it was *held*, that upon the sons electing to take under the will they had no standing to contest the correctness of the amounts charged against them in the testator's book. *Schell's Estate*, 15 C. C. 372.

291. Where a testator at the time of his death holds a note against a legatee, the presumption is that it is a debt unless words are found in the will showing a purpose to change it into an advancement. *Firman's Estate*, 2 Dist. Rep. 261.

292. Whether a conveyance to a married woman by her father was, as between them, an absolute or only a conditional advancement out of his estate, is a question which must be settled between his heirs and herself; the determination of such a question cannot affect the right of a subsequent creditor of the husband who has not been injured. *Jones v. Stern*, 7 Kulp 343.

293. Where a decedent makes advancements and afterwards makes his will without taking any notice of the advancements, each child or grandchild can claim whatever is given to him or her by the will; and this, without being liable to any abatement on account of such advancements. *Reinhold's Estate*, 8 Lanc. 217.

294. Where a son owes his father money which cannot be collected because of the statute of limitations, the father may, by his will, direct that such indebtedness may be deducted and withheld from such son's share in the distribution of his estate, so as to make an equal distribution of his whole estate among his children. *Huber's Estate*, 9 Lanc. 337.

295. An advancement made by a father after the date of his will, is an ademption of the legacy given to his child by the will. *Bender's Estate*, 10 Lanc. 157.

296. Where certain children have received as advancements more than their shares of the estate, they cannot be compelled to refund the excess to the estate, but an auditor will not allow such children to participate in a distribution of certain moneys distributable under the terms of the will to all the children until they have paid back amounts to equalize all the shares. *Bender's Estate*, 10 Lanc. 157.

297. Where the share of a son was claimed by attaching creditors; it was *held*, that another son was competent to testify as to declarations made to him by his father to establish advancements made to his brother. *Wiest's Estate*, 12 Lanc. 41.

298. Where the entries in the decedent's memorandum book were headed "Dr." and "Cr."; it was *held*, that this was not sufficient in itself to establish the relation of debtor and creditor between the father and son, and prevent the charges from being considered as advancements, but that the whole book and the surrounding circumstances should be taken into consideration. *Wiest's Estate*, 12 Lanc. 41.

299. Where a transfer of property by a parent to a child appears to have been a sale for a valuable consideration, the burden of proving that it was in fact an advancement, is upon those who make such an allegation. *Donat's Estate*, 3 Northam. 105.

300. Where a testator directed his executors "to advance by way of loan," to his son, a sum of money on the arrival of the son at a certain age, and the son reached said age in his father's lifetime, when the father gave him the said sum and took the son's note therefor, and the father by a codicil directed that such note should bear interest to be deducted from the son's income under the will during his mother's lifetime, and at the latter's death the principal should be deducted from the share then payable to the son; it was *held*, that the transaction was a loan and not an advancement; and where the testator had blended his whole estate until partition be made by a trustee and the son was bequeathed a share of the blended estate; it was *held*, that the loan became a charge on his whole estate including the real estate. *Handy's Estate*, 167 P. S. 552; s. c. 36 W. N. C. 265.

301. Where a testator, after payment of annuities to his wife and sister, gave the income of his estate to his children and their issue *per stirpes* in equal shares until the death of all his children, when the principal was to be divided as if he had lived until then and died intestate, and he afterwards advanced large sums of money to one of his daughter's and executed a codicil that the principal of the advancements should be brought into hotchpot and added to the capital in the hands of the trustee, and should be so done as to reduce the share of the daughter and her descendants in the income by an amount equal to six per cent upon the principal thus already in their hands; it was *held*, that the daughter or her children could not participate in the distribution of the income until an amount equal to six per cent per annum upon the advancement should have been received by each of the remaining children of the testator. *Farnum's Estate*, 4 Dist. Rep. 389.

DECEIT.

See CONTRACT, V.: FRAUD.

1. An action of deceit will not lie upon a statement which could not deceive, and as to the truth of which the plaintiff must have had full knowledge. *Oil Well Supply Co. v. Exchange Nat. Bank*, 131 P. S. 100.

2. The vital element in an action of deceit is that of an intention to defraud. If the defendant has done nothing, which could have deceived a person put on his guard at all points, the action cannot be maintained. *Kern v. Simpson*, 126 P. S. 45. See *Kern v. Middleton*, 16 Atlan. 640.

3. Where a lessor is guilty of deceit in inducing the lessee to accept the lease, the latter may stand to the bargain and recover damages without tendering a reconveyance of the lease, or he may rescind the contract and recover back the money paid. *Guffey v. Clever*, 146 P. S. 548.

4. Where a person has been induced, by the misrepresentations of the officers of a corporation, to subscribe to its stock, he may rescind the contract and sue in deceit the corporation and its officers, for the amount paid for the stock. *Lare v. Westmoreland Specialty Co.*, 155 P. S. 33.

5. Where the plaintiff had purchased land from one Williams but refused to accept the title until the land was released from the lien of a certain deed of trust in favor of the defendant given to secure six promissory notes, and Williams then went to the defendant and told him that the land had been sold and asked him to sign a release which recited a conveyance to the plaintiff on a prior date, and the defendant objected to signing the release because it was general and he did not then own two of said notes, but he was assured by Williams that the plaintiff knew of the ownership of the two notes and then signed the release, believing at the time that the conveyance to the plaintiff had been made and the plain-

tiff thereafter accepted the title and the land was afterwards sold under the trust deed for the payment of the said two notes; it was held, that the defendant was under no duty of diligence toward the plaintiff and was not liable to him in an action for deceit. *Phillips v. Craft*, 139 P. S. 125.

6. There is no special confidential or fiduciary relation between an officer of a corporation and a person from whom he purchased the stock of the corporation; a master's finding that such an officer had no knowledge at the time of the purchase of any movement which would tend to increase the value of the stock, and had not been guilty of any misrepresentation or concealment, would not be reversed except for manifest error. *Krumbhaar v. Griffiths*, 151 P. S. 223.

7. Where a vendor of timber made a false estimate to his vendee as to the amount of the timber on the tract, and his employees, by his directions, showed the vendee only the best part of the timber and stated that that was the general average; it was held, that a bill would lie for the rescission of the contract of sale. *Brotherton v. Reynolds*, 164 P. S. 134; *Mahaffey v. Ferguson*, 156 P. S. 156.

8. Where a purchaser of standing timber goes upon the land and has an opportunity to see the timber, he cannot defend an action for the purchase money, on the ground that he was deceived by the vendor's misrepresentations of the quality and quantity of the timber; nor will he be permitted to claim that such misrepresentation amounted to a warranty. *Mahaffey v. Ferguson*, 156 P. S. 156. See *Brotherton v. Reynolds*, 164 P. S. 134.

9. An action of deceit will not lie for alleged false and fraudulent representations in an exchange of lands, in describing the land of the defendant as in one county where it is in another, such false description being evidently a mistake. *Williams v. Beninger*, 11 C. C. 150.

10. In an action for deceit in the sale of stock, there can be no recovery without proof that the sale was effected by means

of representations made to the buyer which were known to the seller to be false. *High v. Berret*, 148 P. S. 261.

11. In an action for deceit the scienter must be proven; where the defendant certified to the correctness of a signature on a check which was in fact forged, and he testified that he had seen the depositor write and was familiar with his signature, and that his statement to the cashier was based upon the belief founded upon such knowledge; it was *held*, that letters of the depositor were admissible in evidence, as the resemblance of the genuine writing to the forgery went directly to the question of the defendant's good faith. *Lamberton v. Dunham*, 165 P. S. 129.

12. An action of deceit by a vendee of land against a vendor to recover damages for misrepresentations made by the vendor's agent as to the quantity of the land conveyed, cannot be sustained in the absence of clear evidence of fraud and of some evidence of participation or knowledge on the part of the principal or circumstances which should have put him upon inquiry. *Freyer v. McCord*, 165 P. S. 539.

13. In an action to recover money invested through alleged fraudulent representations of defendant, it is error for the court to call the attention of the jury to the fact that the defendant had held a high and honorable position in the community, and that his reputation was at stake. *Rosenagle v. Handley*, 151 P. S. 107.

14. Where an oil and gas lease with no clause authorizing an assignment, gave the lessee an option as to an adjoining tract on terms equal to the best terms offered by any other person, and the lease was subsequently assigned by the lessee who made a new agreement with the lessor with the provision that the original lease should remain in full force in all particulars "in which the same is not hereby modified"; it was *held*, that the assignment carried with it the option, and the assignee was en-

titled to the new lease on the best *bona fide* offer made. And where the lessor had fraudulently informed the assignee that he had been offered twenty thousand dollars for the lease, and relying upon such representation, the assignee had paid that sum although the best offer was much less; it was *held*, in an action of deceit, that a proper measure of damages recoverable was the difference between the amount paid by the second lessee and the best offer actually received by the lessor. *Guffey v. Clever*, 146 P. S. 548.

15. The measure of damages in an action for deceit in the sale of stock is the difference between the real value of the stock at the time of the sale, and the fictitious value at which the plaintiff was induced to purchase. *High v. Berret*, 148 P. S. 261.

DEDICATION.

See HIGHWAYS, I.

1. Where the owner of land lays it out in lots, which he afterwards conveys according to a plan, which shows that the lots are upon a street, such a conveyance is a dedication of the land covered by the street to the use of the lot-owner; the grantor can retain no title to such street against the lot-owner without an express reservation in his deed. *Dobson v. Hohenadel*, 148 P. S. 367.

2. Where lots were sold by the owner and described as bounded by a street, and there was a long uninterrupted use of the street by the public, and the fences were set back, and thereafter the owner failed to exercise any right of ownership of the ground; it was *held*, that they were all circumstances from which a jury might find a dedication to public use. *Nally v. Pennsylvania R. R. Co.*, 10 Montg. 15.

3. Where the owner of land opened an alley and declared that he had no further control over it and applied to the borough authorities to put and keep it in order; it was *held*, to be sufficient evidence of its

dedication. *DuBois Cemetery Co. v. Griffin*, 165 P. S. 81.

4. The acceptance of the dedication of an alley may be established by evidence of the expenditure of public money upon it by the borough. *DuBois Cemetery Co. v. Griffin*, 165 P. S. 81.

5. A use of land by the public jointly with the owner does not establish a dedication, no matter how long such joint use is continued. *Weiss v. South Bethlehem Borough*, 136 P. S. 294; s. c. 26 W. N. C. 433.

6. Where an abutting owner constructs a board walk along the side of a township road for his own convenience, it is in no sense a dedication of it to the public; he may remove it at his pleasure. *Comm'th v. Barker*, 140 P. S. 189.

7. Where a bill was filed by a city to restrain the maintenance of a private fence as an obstruction to a dedicated public street, and there was no evidence of dedication other than that the street was called for in certain lithographic maps and in certain unrecorded contracts, and it appeared that the land over which the street was claimed to run had been conveyed by the owner in lots according to a recorded plan whereon the alleged street did not appear; it was *held*, that the bill for an injunction was properly dismissed. *Scranton v. Thomas*, 141 P. S. 1; affirming s. c. 2 Lack. Jur. 1.

8. Where the plaintiff's grantors were the trustees of a church, and eight months before they executed the deed to the plaintiff, they passed a resolution to sell the lot to him on the condition that he remove the house and widen the alley fourteen feet, but the deed did not contain any such reservation, and after the conveyance the plaintiff moved back his line eight feet, and the borough subsequently widened the alley by taking six more feet of the plaintiff's land; it was *held*, that the evidence was insufficient to show any agreement on the part of the plaintiff to donate the six feet. *Evans v. Lütitz*, 162 P. S. 561; affirming s. c. 11 Lanc. 109.

9. A reference in a deed to a proposed street by name, does not amount to a dedication of the street to public use. *Franklin Street*, 4 Del. 240.

10. Where a street has been dedicated and laid out on the city plan, but not physically opened, the passage of an ordinance for the laying of a sewer is a clear acceptance of the dedication, and the judgment of councils as to the propriety or necessity of the sewer is final and conclusive. *Philadelphia v. Thomas*, 152 P. S. 494.

11. Where a landowner dedicates his land for the purpose of a street with the same effect as if the street had been opened by legal proceedings, he cannot afterwards maintain an action for damages resulting from the grading, where the opening and grading have been done at the same time and in conformity with a plan existing at the time of the dedication. *Righter v. Philadelphia*, 161 P. S. 73.

12. Where a borough passed an ordinance designating a street as four rods wide, and the property owners applied for a restraining order to prevent the authorities from tearing up the sidewalks and shade trees, in answer to which the borough averred a dedication of a width of four rods before the incorporation of the borough; it was *held*, that the quarter sessions had no jurisdiction, and that the remedy of the property owners was by an action of trespass. *Camp v. Port Allegany*, 11 C. C. 122.

13. If a borough street be dedicated by a former owner, as of fifty-five feet in width, but the same be not accepted by the borough, which subsequently lays out a narrower street thereon, the owner of a lot thereon is entitled to the use of the original width as a street. *Fisher v. Lynch*, 2 Northam. 330.

14. A borough and its officers were restrained by a preliminary injunction from interfering with the plaintiff railroad company laying a second track upon land acquired by plaintiff's lessor from the commonwealth, but which had been

permissively used as a passageway by the public for more than twenty-one years. *Pennsylvania R. R. Co. v. Freeport*, 138 P. S. 91.

DEED.

See ALTERATION: ASSIGNMENT FOR CREDITORS: CONSTRUCTION: EASEMENTS: ESTOPPEL: EVIDENCE, XIII.: EXECUTION, XII.: FRAUD: MORTGAGE: TAX SALES: WAGES.

- I. What is a valid deed.
- II. Proof of execution.
- III. Delivery of deed.
- IV. Acknowledgment.
- V. Recording.
- VII. Recitals.
- VIII. What passes by a deed.
 - (a) General principles.
 - (b) Extent of the grant.
 - (c) Appurtenances.
 - (d) Reservations, restrictions and exceptions.
- IX. Construction of deeds.
- X. Executory limitations.
- XI. Custody of deeds.

I. What is a valid deed.

1. An assignment on the back of a fee simple deed by the grantee therein, of all his right, title and interest, etc., "in and to the within deed" passes a fee simple to his assignee without the word "heirs" or its equivalent. *Lemon v. Graham*, 131 P. S. 447.

2. The erasure of the grantor's signature after the delivery of a deed was held to be ineffectual to revest the title in the grantor. *Turner v. Warren*, 160 P. S. 336; affirming s. c. 5 Del. 249, 297.

3. A deed describing a tract but by three courses and distances and though by a different tract number, as containing the same number of acres as the land in dispute, is, in ejectment, if identified by witnesses as the land in dispute, admissible in evidence. *Van Horn v. Clark*, 126 P. S. 411.

4. A written contract for a sufficient consideration, though not under seal, to convey to the vendee the right and privilege of digging all the ore on the vendor's land, is equivalent to a conveyance of the title to the ore in fee. *Fairchild v. Dunbar Furnace Co.*, 128 P. S. 485.

5. An article of agreement without acknowledgment or words of inheritance in which the vendor, in consideration of certain covenants, agrees to sell and "does sell and convey," is but an executory contract of sale. Equity, in the absence of positive proof of fraud, accident or mistake, will not reform such a contract by inserting words of inheritance. *Pierce v. McCracken*, 5 Cent. 283.

6. An infant's deed is but voidable; title passes and remains in the grantee until some clear act of disaffirmance is made after coming of age. *Logan v. Gardner*, 136 P. S. 588; s. c. 26 W. N. C. 497. See *Logan v. Gardner*, 142 P. S. 442.

7. Where an owner of land prior to his marriage executed a deed conveying the land to his intended wife, and also prepared a blank will to be signed by her after their marriage devising the same land to him; it was held, that her failure or neglect to make a will did not divest her legal title in the land. *Turner v. Warren*, 160 P. S. 336; affirming s. c. 5 Del. 249, 297.

8. A deed of her land by a married woman is void, unless also executed by her husband. *Henrici v. Davidson*, 149 P. S. 323.

9. Where a deed was made by a married woman without the joining of her husband and a purchase money mortgage given by the grantee; it was held, that while the title of the grantee was void under the deed, yet she was estopped by her mortgage from denying her title, and this estoppel operated as against her judgment creditor, who had obtained a judgment against her subsequent in date to a second deed of conveyance to her executed by the original grantor and her husband. *Hirsch v. Tillman*, 13 C. C. 251.

10. Where a married woman and one of several heirs, joined with the other heirs in a conveyance to her husband of part of the real estate of her father, and took as consideration therefor a judgment note for the purchase money, and her husband did not join in the deed; it was *held*, that the failure of the husband to join in the deed rendered it absolutely void and of no effect, and that her estate in the land remained in her and no interest of hers having passed by the deed to her husband, it did not pass by his subsequent assignment for creditors, and she had no claim under the judgment note to any part of the proceeds of the sale of the land by her husband's assignee. *Ruby's Estate*, 5 York 149.

11. Services rendered by the grantee in a deed, to the grantor, and recognized by the grantor, are a valid consideration; it is not necessary that there should be an original contract to compensate for the services. *Doran v. McConlogue*, 150 P. S. 98.

12. A mortgage voluntarily executed by a grantee to a third party, but at the request of the grantor to secure the latter's debt, is a valuable consideration in support of the deed; and this, although the mortgage was executed after the deed was made; such a mortgage is binding upon the grantor by way of ratification of the original deed and also by way of estoppel. *Doran v. McConlogue*, 150 P. S. 98.

13. Where a father conveyed a property to his daughter on the agreement that he was to have his home with her for the remainder of his life, and the deed was delivered to her but not recorded, and she returned the deed to the father with a distinct agreement between them that the property was to be conveyed by the father as if no conveyance had ever been made to her; it was *held*, that it was not material to inquire whether such a course of conduct was effectual to work a rescission of the deed, and that a claim of the daughter against the father's estate for the purchase money received by him on a sub-

sequent sale could not be sustained by reason of the fact that she wholly failed to perform the service which was the consideration of the deed. *Fink's Estate*, 157 P. S. 292.

II. Proof of execution.

14. A deed was properly admitted in evidence where alterations in the date were properly noted in the attestation clause; and this, though a similar alteration in the date of the acknowledgment was unexplained. *Bowlby v. Thunder*, 3 Cent. 911. See s. c. 105 P. S. 173.

15. Where a person witnesses a deed, there is no presumption that the description was read to him and such witnessing will not estop him from asserting his title to the land thereby conveyed. *Wahl v. Pittsburgh & Western Ry. Co.*, 158 P. S. 257.

See EVIDENCE XIII.

III. Delivery of a deed.

16. Where a deed to plaintiff duly acknowledged but not recorded, was found among the papers of the plaintiff's stepfather, who was also his guardian, and there was evidence that it was executed in settlement of his guardianship, the question of delivery was properly left to the jury. *Stoney v. Winterholter*, 11 Atlan. 611.

17. Upon a contract to sell land to three vendees, a delivery of the deed to one amounts to an acceptance of delivery by all. *Payne v. Echols*, 15 Atlan. 895.

18. Upon a contract "to sell and convey by a deed of warranty," the covenant is fulfilled by the delivery of a deed of special warranty. *Ibid*.

19. The delivery of a deed raises the presumption of a gift or payment of the consideration money; to rebut such a presumption the proof must be clear and convincing; and this, between husband and wife. *Lazarus's Estate*, 6 Kulp 53; affirmed in 142 P. S. 104; and reversed in 145 P. S. 1.

20. A condition annexed to a devise, that the devisee pay one thousand dollars, a deed for the land being already executed and left in escrow by the testator, does not work an equitable conversion; the devisee took under the deed; and the grant became void when the grantee refused to pay. *Smith's Estate*, 6 Kulp 76.

21. Where executors claiming under a power of sale brought ejectment, and there was more than a scintilla of evidence tending to show a delivery of a deed to the defendant by the decedent in his lifetime, the question of delivery was properly submitted to the jury. *Lutes v. Reed*, 138 P. S. 191.

22. The signing, attestation and acknowledgment of a deed by the grantor and the recording of it, raises a presumption of delivery, which cannot be overcome by declarations of the grantor that the deed was not delivered; the possession of the grantor thereafter is in trust for the vendee, and the statute of limitations will not begin to run until the grantor asserts an adverse holding by some unequivocal act brought to the knowledge of the vendee. *Ingles v. Ingles*, 150 P. S. 397; *Connor v. Bell*, 152 P. S. 444.

23. Where an owner of land, prior to his marriage, executes a deed of land to his wife and delivers it to her, the fact that the deed both before and after marriage was kept in the husband's safe, does not affect the legal character of the delivery. *Turner v. Warren*, 160 P. S. 336; affirming s. c. 5 Del. 249, 297.

24. The delivery of a deed of assignment for creditors is effective, though made to but one of the assignees mentioned in the deed. *Hodenpuhl v. Himes*, 160 P. S. 466.

25. Where the future delivery of a deed is merely to await the lapse of time or the happening of some contingency and not the performance of any condition; it will be deemed the grantor's deed presently, but where the future delivery depends upon the payment of

money or the performance of some other condition, it will be deemed an escrow and in such a case it will not be deemed the deed of the grantor until the second delivery. *Landon v. Brown*, 160 P. S. 538.

26. Where an owner of land subject to a judgment executed a deed to his son and delivered it to a third person, to hold until all the debts of the grantor had been paid by the son, and he further directed in his will that the deed should not be delivered to his son until the debts were paid, and after the grantor's death the son obtained possession of the deed without having paid the debts and subsequently signed an amicable *scire facias* to revive the judgment as terre tenant and also as his father's executor; it was held, that the son took the land under the deed and not under the will, that his title was a voidable one and that the amicable *scire facias* operated to continue the judgment against the land. *Landon v. Brown*, 160 P. S. 538.

27. After the death of the grantor and grantee and the execution and acknowledgment of the deed, the question of delivery is for the jury; where the deed after the grantee's death was seen wrapped in a brown paper among the grantee's papers, and the daughter of the grantee when she was about to die asked the grantor to look after all the papers and the business of the family, and after the grantor's death the deed was found in a safe used in common by the grantor and the family of the grantee; it was held, that the evidence was sufficient to establish a delivery of the deed. *Cummings v. Glass*, 162 P. S. 241; affirming s. c. 5 Del. 109.

28. Where a decedent in his lifetime made certain deeds, and in his will, executed upon the same day, he said that he had deposited them with his executor for safe keeping until his death, upon which event he commanded his executor to deliver them to the several grantees, and after the execution of the deeds, but before the testator's death, a part of one of

the tracts was taken by a railroad company and the damages were paid to his executor after the testator's death; it was *held*, that the grantee's title related back to the delivery to the executor and that the damages paid to the executor belonged to the grantees under the deed. *Geisinger's Estate*, 11 C. C. 168.

29. Where A and his wife executed deeds to each of their four children subject to the condition that all rents should be collected by the grantors and applied to their own use for life, and the deeds were delivered to their counsel to remain in his hands until the death of the grantors; it was *held*, that upon their death the grantees were entitled to the delivery of the deeds which would relate back to the original delivery to the grantors' counsel. *Van Emon's Estate*, 39 P. L. J. 423.

30. Where a deed is not intended for the benefit of the grantee nor actually delivered to him, but is placed in the hands of the beneficiary, and the grantee subsequently acquiesces by executing and delivering a deed to the beneficiary, no other delivery to the first grantee is necessary. *Kyte v. Kyte*, 8 Kulp 1.

IV. Acknowledgment.

31. As between the grantor and grantee in a deed, acknowledgment is unnecessary. *Cable v. Cable*, 146 P. S. 451.

32. Under the act of 25 May 1878 (Brightly's Purdon 635), equity will reform the acknowledgment of a married woman to an oil and gas lease. That act excludes from its operation only cases in which actions were commenced before its passage. *Manufacturers' Natural Gas Co. v. Douglass*, 130 P. S. 283.

33. If the actual facts be in accordance with the law, an acknowledgment, defective owing to the absence of venue, the failure to show a justice of the proper county, and the omission to state the presence and acknowledgment of the husband of one of the parties, may be reformed under the act of 25 May 1878

(Brightly's Purdon 635). *Oressona Saving Fund and Building Association v. Sowers*, 134 P. S. 354; s. c. 26 W. N. C. 133.

34. A party claiming under a lost deed from a married woman must prove that it was properly acknowledged under the statute. *Logan v. Gardner*, 136 P. S. 588; s. c. 26 W. N. C. 497. See *Logan v. Gardner*, 142 P. S. 442.

35. A certificate of acknowledgment to a deed dispenses with the common law proof of execution; and this, notwithstanding a notice that proof of execution would be required. *Sutherland v. Ross*, 140 P. S. 379; affirming s. c. 6 Montg. 203. See s. c. 160 P. S. 29.

36. The certificate of a separate acknowledgment in the absence of fraud or misrepresentation is conclusive. *Citizens' Saving & Loan Ass'n v. Heiser*, 150 P. S. 514.

37. Where a married woman executes and delivers a deed and receives the purchase money, but does not acknowledge the deed until several months after the execution, her creditors, who have in the meantime obtained a judgment, acquire no lien upon the land conveyed. *Meade v. Clarke*, 159 P. S. 159.

38. Where the date of the acknowledgment of a deed is within the lifetime of the grantee, the grantor and his wife are not competent witnesses after the death of the grantee to testify that the deed was a forgery and that on the day of the alleged acknowledgment they were not in the county specified. *Sutherland v. Ross*, 160 P. S. 29. See s. c. 140 P. S. 379.

39. A deed from a county treasurer for land sold at a tax sale will not pass the title unless the acknowledgment be made in open court and there be a record thereof on the minutes of the court; parol evidence of the acknowledgment, or the deed itself with the certificate of acknowledgment endorsed thereon, is insufficient when the minutes of the court show no registry of the acknowledgment. *Lee v. Newland*, 164 P. S. 360.

40. A certificate of acknowledgment of

a married woman to a mortgage which fails to show that the mortgage was read or otherwise made known to her, is fatally defective; the act 25 May 1878 (Brightly's Purdon 635), permitting defective certificates to be reformed, does not authorize the reforming of a certificate of acknowledgment except to conform to the facts as established by the evidence in the case. Where the magistrate was dead, and the plaintiff testified that the mortgage had been read to the defendant, but was contradicted squarely and directly by the defendant and her husband; it was *held*, that the evidence was insufficient to justify the court in reforming the certificate. *Spencer v. Reese*, 165 P. S. 158.

41. Where a husband and wife each held by separate titles an undivided interest in land, and entered into a contract for its sale, and the wife died before the purchase money was paid and deed delivered; the orphans' court decreed a specific performance of the contract; and this, although the wife had not separately acknowledged the contract of sale. *Reed v. Stouffer*, 14 C. C. 505.

42. Where a deed is executed by a *feme sole* and acknowledged by her after her subsequent marriage, it is not necessary that her husband should join in such acknowledgment. *King v. Davis*, 13 C. C. 657.

43. Since the passage of the act 8 June 1893 (Brightly's Purdon 1299), a separate acknowledgment of a deed by a married woman, is no longer necessary. *Reed v. Stouffer*, 14 C. C. 505.

44. A deed of a married woman executed by herself and husband in 1846, but defectively acknowledged by her, was rendered valid by the acts 11 April 1848, 24 January 1849 and 25 April 1850 (Brightly's Purdon 641), note *b*. *Schrawder v. Snyder*, 142 P. S. 1; reversing s. c. 6 Montg. 66.

45. All defective acknowledgments made prior to the year 1890 are validated by the act 12 May 1891 (Brightly's Purdon 643). *King v. Davis*, 13 C. C. 657.

46. Where a bill to reform a defective

certificate of acknowledgment avers that the wife of the grantor was examined separate and apart from her husband, but that this, by accident and mistake, does not appear in the certificate, and the answer unequivocally denies the averment, such answer is responsive to the bill and must stand until overcome by sufficient proof. *Hand v. Weidner*, 151 P. S. 362; affirming s. c. 2 Lack. Jur. 78.

47. An acknowledgment of a deed by a married woman before a United States commercial agent in Canada, is sufficient to pass her title to land in Pennsylvania. *Moore v. Miller*, 147 P. S. 378.

48. Under the acts 19 May 1893 (Brightly's Purdon 646), 25 May 1893 (Brightly's Purdon 1610), acknowledgments may still be taken before any notary public of the commonwealth, and it is not necessary that he should have been a resident of the county in which the conveyed lands lie. *Davey v. Ruffell*, 162 P. S. 443; affirming s. c. 33 W. N. C. 347; 14 C. C. 272.

V. Recording.

49. If a grantee neglects to record his deed, and the grantor executes another deed to one, who takes with notice of the first, a vendee of the second grantee without notice is protected. *Phillips v. Stroup*, 1 Mona. 517; s. c. 17 Atlan. 220.

50. Under the act 18 March 1775 (Brightly's Purdon 646), a mortgage which is recorded after the expiration of six months from the date of its execution, has priority over a deed recorded within six months from the execution of such deed, where the recording of the mortgage is prior to the recording of the deed. *Fries v. Null*, 154 P. S. 573; s. c. 158 P. S. 15.

51. Where a purchaser fails to record his deed within six months from its date and a second purchaser for value and without notice from the same vendor places his deed on record before the deed of the first purchaser is recorded, the title

of the second purchaser will prevail. But where the only consideration which the second purchaser gave was an agreement to satisfy a judgment against the vendor which he failed to do before the first deed was recorded; it was *held*, that the question whether he was a *bona fide* purchaser for value without notice, was for the jury. *Duff v. Patterson*, 159 P. S. 312.

52. Under the act 19 May 1893 (Brightly's Purdon 646), the law remains as it was under the act 18 March 1775, with the single exception that the time within which a purchaser must record his deed is reduced from six months to ninety days. *Davey v. Ruffell*, 162 P. S. 443; affirming s. c. 33 W. N. C. 347; 14 C. C. 272.

53. Where two deeds are made of different dates from the same grantor to different persons, and neither is recorded within six months, the one first recorded will take priority; where the deed first executed is not recorded, but is recited in a mortgage recorded before the second deed is recorded, such recital will not save the mortgage as against the second deed. *Collins v. Aaron*, 162 P. S. 539; affirming s. c. 10 Lanc. 213.

VII. Recitals.

54. A recital of a purpose for which the land conveyed is to be used, does not convey a conditional estate. *Wilkes-Barre v. Wyoming Historical Society*, 134 P. S. 616; s. c. 26 W. N. C. 297.

55. The acknowledgment of the payment of the purchase money in the body of a deed and in the receipt is always open to explanation. A different consideration may be proven which would give rise to a trust. *Nichols v. Nichols*, 133 P. S. 438; s. c. 25 W. N. C. 506; reversing s. c. 1 Lack. Jur. 42. See *Nichols v. Nichols*, 149 P. S. 172.

56. The receipt at the foot of a deed is but *prima facie* evidence that the consideration money has been paid. *Xander's Estate*, 7 C. C. 482; s. c. 2 Northam. 93.

57. A recital in the deed in the line of title under which both parties claim in an ejectment, that the grantor was seized of the title, is sufficient to warrant a finding that the title was out of the commonwealth. *McGrew v. Harmon*, 164 P. S. 115.

VIII. What passes by a deed.

(a) General principles.

58. A deed to the grantee for life, then to his heirs, and in default of heirs then to the grantor, vests an absolute fee simple title in the grantee. *Douglas v. Irvine*, 126 P. S. 643.

59. A deed by a tenant for life and remainderman in fee, vests a good title in fee in the grantee. *Dorsey's Appeal*, 2 Cent. 591.

60. The omission of the words "successors and assigns" in a deed to a corporation, does not defeat the title. *Wilkes-Barre v. Wyoming Historical Society*, 134 P. S. 616; s. c. 26 W. N. C. 297.

61. Where real estate was purchased by a married woman with her own funds and a deed made in trust for her during life, and to her children at her death, with a provision that the trustee should sell at any time at her request; it was *held*, that upon such sale the purchase money became the sole property of the *cestui que trust*. *Weber v. Ueberroth*, 13 Atlan. 194.

62. A right to remove or use at will a house on another's land does not amount to a fee; it is a mere license to let the building remain until a reasonable time after notice that it must be removed, and up to that time to use it. *Lockard v. Robbins*, 7 Cent. 565.

63. A conveyance of land to trustees and their successors in office forever, in trust for a charitable use, to continue perpetually, will pass a title in fee simple notwithstanding the absence from the deed of any words of inheritance. Such a conveyance does not create a conditional estate, but a trust for the charitable use, and is not liable to be

defeated by non-user or alienation in the absence of an express condition to that effect. *Sellers Church's Petition*, 139 P. S. 61.

64. Where a deed conveyed land to the grantor's mother for her support and maintenance and should there be any remainder, the same to revert to her legal heirs subject to the will of his father, and the deed further constituted the father the grantee's sole trustee and attorney during his natural life, with full power to sell, rent, lease and devise for and in her name, and to receive all moneys due to said estate; it was *held*, that the entire beneficial interest in the premises were conveyed to the father and mother, and a sheriff's sale under a mortgage executed jointly by them passed a good title in fee simple. *Huber v. Crosland*, 140 P. S. 575.

65. An instrument granting, demising, leasing and farm-letting all the merchantable coal under such land with the exclusive right to mine and remove the same "until the exhaustion thereof under the terms of this indenture," was *held* to vest in the lessee an estate in fee simple in the coal. *Lillibridge v. Lackawanna Coal Co.*, 143 P. S. 293.

66. An agreement under seal to let a married woman and her husband occupy a lot rent free during the term of their lives, they paying taxes and at their death the property to revert back, was *held* to constitute a lease for the lives of the grantee and her husband and the survivor of them and was hence a freehold estate in land. *Overseers of Brady v. Overseers of Clinton*, 148 P. S. 311.

67. A deed to a grantee and her heirs for the use of the grantee and her heirs, enumerating as her heirs four of her children by name, creates a tenancy in common in the grantee and the four children with an immediate right of possession in all. *Brazington v. Hanson*, 149 P. S. 289.

68. A written contract though not under seal, which grants the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance of the

title to the coal or ore in fee. *Plummer v. Hillside Coal & Iron Co.*, 160 P. S. 483. See *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 162 P. S. 114.

69. Where a deed conveyed certain real estate "unto the said Susanna Phillips, Margaret Phillips, Mary Phillips and Susan T. Phillips, their heirs and assigns and to the heirs and assigns of the said Susan T. Phillips forever"; it was *held*, that the four grantees took only an estate for life with remainder in fee to the heirs of Susan T. Phillips. *Phillips v. Phillips*, 4 Del. 476.

70. Where land is conveyed to a religious society for the purpose of erecting a house of worship, the grantee as between it and the grantor takes an absolute estate including the right of alienation; if the grantee intends that the property shall revert if applied to other uses, such intention must be clearly expressed in the deed, it cannot be implied. Where, however, the charter of the religious body prohibits alienation except by and with the consent of a certain other body, that assent must be first obtained. *First German M. E. Church's Petition*, 1 Lack. L. N. 89.

(b) Extent of the grant.

71. The points of the compass specified in the description must yield to the adjoiners. *Stroup v. McCloskey*, 3 Cent. 613.

72. The description in the deed will not be controlled by an experimentally located line by the surveyor. *Kuhns v. Fennell*, 15 Atlan. 920.

73. Where a vendor at the request of his vendee marked the line between them for the express purpose of showing the latter where to build his fence and locate his house; it was *held*, that the courses and distances in the deed must give way to the boundary found on the ground. *Roos v. Connell*, 7 Kulp 113.

74. Where the plaintiffs in ejectment claimed the land by a deed subsequent in date to the unrecorded deed of the defendant from the same grantor, a point that if certain stakes marking corners

were visible and readily discovered, plaintiffs were put upon inquiry, was *held* to have been properly refused, where the evidence disclosed that the stakes were hidden among underbrush and that the plaintiffs had no actual knowledge of their existence. *Brothers v. Mitchell*, 157 P. S. 484.

75. Where land was conveyed and the grantor marked the line upon the ground upon which the grantee built, and subsequently the grantor conveyed to a third person adjoining land, describing it by courses and distances and calling for the first grantee's land as a boundary; it was *held*, that the courses and distances in the second deed would be controlled by the line marked upon the ground. *Matlack v. Hogue*, 13 C. C. 214.

76. Where a deed conveyed a certain piece of land, describing the same, and gave the privilege to fence in and occupy ten feet in front of the front line for the purposes of yard, piazza, porches, cellarways, vaults and bay-windows, and this was followed by the usual clause conveying the appurtenances, remainders and estate of the grantor to the grantee, his heirs and assigns; it was *held*, that the ten foot privilege was conveyed in fee simple, burdened with the restricted use running with the land. *Comm'th v. Nelson*, 3 Lack. Jur. 261.

77. Where the owner of adjoining dwellings conveyed one, the front line of the lot conveyed was ascertained by beginning at the middle of the division wall and measuring thence along the line of the street. *Warfel v. Knott*, 128 P. S. 528.

78. The description in a deed describing the front line as beginning at a "stone in a public road," the depth of the lot as therein mentioned should be measured from the middle of the road and not from the side thereof. *Kohler v. Kleppinger*, 5 Atlan. 750.

79. A conveyance of a lot 19 feet 5 inches in front and in depth 120 feet, means a lot of that width throughout its entire length; and this, though it is made

subject to the use of an alley, at the terminus of which the lot is reduced to 17 feet in width by a fence. *Breneiser v. Davis*, 134 P. S. 1.

80. As to the extent of the grant when a lot is bounded by a public street, see notes to *Ayers v. Railroad Co.*, 3 Atlan. 889, and *Kohler v. Kleppinger*, 5 Ibid. 751.

81. The reservation of a lot described as extending along the side of a street, out of a conveyance of land to the middle of the street, will include title to the middle of the street. *Hamilton Street*, 148 P. S. 640; affirming s. c. 7 Montg. 67.

82. An intention to restrict a grant to the side of a street may be inferred from the grant of a right of way over the street by the same conveyance. *Hobson v. Philadelphia*, 150 P. S. 595.

83. Where a street or road is called for as a boundary in a contract for the sale of land, the middle line of the street is always intended unless the contrary plainly appears. *Firmstone v. Spaeter*, 150 P. S. 616; reversing s. c. 11 C. C. 147.

84. Where the plaintiff bought his land by metes and bounds referable to a town plot calling for a street, and there was no evidence that the town authorities accepted the street as a public highway; it was *held*, that the plaintiff had a sufficient property right in the trees on the sidewalk to sustain an action against a stranger for their wanton destruction. *Huling v. Henderson*, 161 P. S. 553.

85. A conveyance of land bounded by one side of a public road passes the fee to the middle of the road; and this, though the road on the other side be bounded by a navigable river. *Lotz v. Reading Iron Co.*, 10 C. C. 497.

86. Where land is bounded by a public road, a conveyance of the land gives the grantee a title to the middle of the road in the absence of a reservation, and upon the vacation or abandonment of the road the adjoining owners have a right to use the land it had occupied as their own, each to the centre of the street. *Flick's Estate*, 6 Kulp 329.

87. A conveyance to the side of an unopened street duly laid out under an act of assembly, gives to the grantee such an interest in the land occupied by the street as entitles him to a jury of view to assess damages. *Lafayette Street*, 7 Montg. 59.

88. The ownership of lands bounded by streams of water, lakes, ponds, etc., is considered in a note to *Linthicum v. Coan*, 2 Atl. 831.

89. Where a deed sixty years old calls for a corner at the end of a bridge, the exact position of which is disputed, the question of the location of the bridge should be submitted to the jury. *Krepps v. Carlisle*, 157 P. S. 358.

90. The question of the location of the property conveyed or the application of the grant to its proper subject matter is a question of fact to be determined by the jury with the aid of extrinsic evidence. *Steigleder v. Marshall*, 159 P. S. 77.

91. Where the plaintiff in ejectment showed title to a tract that included the land in dispute, and the defendant put in evidence a deed to himself from plaintiff's ancestor, and the bearing of a certain line; with a statement that it was at right angles with another line, were inconsistent, and there were other circumstances showing that the bearing was a mistake; it was *held*, that the burden of proof was on the defendant to show that the disputed land was enclosed in the disputed line. *Henry v. Huff*, 143 P. S. 548.

92. Where a deed conveyed a tract of land by metes and bounds and called for "other land" of the grantor as an adjoiner on the east, "together with the right of mining and removing all the mineral that may be reached under said grantor's land from the land above described and hereby conveyed"; it was *held*, that the description was sufficiently certain to indicate the mineral in the grantor's land east of the tract conveyed, and that parol evidence was admissible to locate it. *Pearl v. Brice*, 152 P. S. 277; reversing s. c. 11 C. C. 606.

93. Where a deed for coal described the farm by courses and distances and as

containing thirty-five acres and one hundred and fifteen perches; it was *held*, that as the manifest intention of the parties was to convey all the coal in and under the entire farm, the courses and distances must yield to cover the fraction of an acre lying outside of the lines. *McGowan v. Bailey*, 155 P. S. 256; s. c. 146 P. S. 572.

94. Where the eastern boundary of a lot was not stated in the description and there was nothing else in the deed to show what was the lot to the east of the land conveyed, and the evidence as to the location of the eastern line was conflicting; it was *held*, that its position was a question of fact for the jury. *Smith v. Horn*, 168 P. S. 372.

(c) Appurtenances.

95. Where, upon the delivery of an absolute deed, the grantee delivered a bond conditioned that he should give to the grantor during life one-fourth the crops, and that the grantor should have the privilege of operating his oil wells on the premises and might at any time at his own pleasure remove any buildings and the machinery of the said wells; it was *held*, that the grantee had title to said machinery as a part of the freehold, and that the right to remove the same was a purely personal privilege which died with the grantor's person. *Shields v. Delo*, 145 P. S. 393.

96. Where the language of the *habendum* of a lease for 999 years was "with every privilege to the premises belonging or in any way appertaining, whether ways, water-courses, mines or minerals"; it was *held*, that the deed carried the right to take minerals from the land demised and for that purpose to dig the soil and open the mines. *Providence School Fund v. Jessup*, 6 Kulp 251.

97. Where the grantor in a deed conveyed to the grantee a tract of land and also a right of way over a portion of his other land; it was *held*, that such right of way passed to subsequent purchasers of the land without being ex-

pressly mentioned in their deeds. *Hamp v. Mylin*, 9 Lanc. 161.

(d) **Reservations, restrictions and exceptions.**

98. Where a deed of a farm reserved a right of way to the grantor's other lands, it was *held*, that there was nothing in the reservation to exclude the grantee from also passing over the strip reserved or from such use of it as did not interfere with the grantor's use of it or his right of way. *Moffitt v. Lytel*, 165 P. S. 173.

99. Where a deed reserves a right of way for all occupiers of lots bounding upon it, the grantee who accepts the deed is estopped from denying such right. *Eket v. Gunn*, 166 P. S. 384; affirming s. c. 35 W. N. C. 291.

100. A reservation in a deed of a portion of the land, until the expiration of a lease, having no words of inheritance, is a reservation during the lifetime of the grantor only; if it should be construed as only an exception, it would be only until the expiration of the lease. *Green's Appeal*, 12 Cent. 559; s. c. 13 Atlan. 972.

101. Where a deed conveyed lands in fee, reserving the right to use the lot by the grantors during their joint natural lives, it was *held*, that the instrument was not merely testamentary but a conveyance, and being made in trust for children of the grantor who were minors, created merely a dry trust which was executed on the majority of the beneficiaries; an ejectment, therefore, for the recovery of the land by a *cestui que trust*, was properly brought in his own name. *Cable v. Cable*, 146 P. S. 451.

102. Where a grantor in a deed reserved the right to build over and above a narrow strip or alley "in like manner as the same is now done"; it was *held*, that the reservation construed by the surrounding circumstances related merely to the point and manner of the location of the structures over the alley and not to the height of such structures.

Meigs v. Lewis, 164 P. S. 597; reversing s. c. 33 W. N. C. 483.

103. Where, in 1772, the plaintiff's predecessor granted a strip of land eight feet wide, to the county commissioners, adjoining the county jail, reserving use of the same for an open yard or garden for the purpose that the same should "be and remain forever hereafter unbuilt on, in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to the said wall," and the commissioners in 1848 sold the jail property, to defendant's predecessors, a new jail having been erected in another place; it was *held*, that the title of the county was a base fee which determined upon the sale of the jail property, and defendants alleging that they had succeeded to the rights of the county commissioners, a bill *quia timet* would lie to remove the cloud upon the plaintiff's title and for the cancellation of the deed of 1772. Such a bill is an independent head of equity jurisdiction and does not require any accompaniment of fraud, accident, mistake, trust or account or any other basis of equitable intervention. *Slegel v. Lauer*, 148 P. S. 236; affirming s. c. 10 C. C. 347.

104. Where the grantor reserved the right to maintain a dam across a certain creek "where the dam now is," it was *held*, that the reservation covered the right to maintain not only the breastwork but also the banks at the sides of it and to go upon the land to repair them if washed away. *Edgett v. Douglass*, 144 P. S. 95.

105. A reservation of the profits of one-half of all the stone, coal and mineral hereafter discovered amounts to a reservation of the *corpus* of such coal and mineral in place. *Weakland v. Cunningham*, 7 Atlan. 148.

106. Upon a conveyance of land reserving all oil and gas in and under the said land with free mining privileges of all kinds; it was *held*, that the only minerals excepted out of the grant were the oil

and gas and that the phrase "mining privileges," was referable to them and did not extend the exception to coal, iron and other substances not named. *Moody v. Alexander*, 145 P. S. 571.

107. Where the plaintiff conveyed a town lot adjoining other lands belonging to him, to the defendant without "the right to drill or mine for petroleum, carbon oil or natural gas, which right is not intended to be conveyed but is forbidden to both parties hereto," and the grantee afterwards drilled a producing well; it was *held*, that the plaintiff was entitled to an injunction restraining operations for oil on the lot conveyed, but he was not entitled to an account as for damages measured by the amount of oil obtained by the defendant in his operations. *Acheson v. Stevenson*, 146 P. S. 228.

108. Where a deed for land which was underlaid with coal contained a clause that the grantor reserved for himself, his heirs and assignees "a free toleration of getting coal for their own use without hindrance or denial"; it was *held*, that the title to the coal passed to the grantee subject only to the privilege in the grantor, his heirs and assignees for supplying their personal needs for fuel from the coal granted. *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 162 P. S. 114.

109. A reservation of "all the pine and hemlock timber growing on said land," applies only to living trees of suitable size for use at the date of the deed. *Andrews v. Wade*, 4 Cent. 689.

110. The violation of a building restriction in a deed may not be restrained where there has been a change of surroundings in the neighborhood, in the character of the improvements, and in the purposes to which they are applied. *Orne v. Fridenberg*, 143 P. S. 487.

111. Equity will not interfere by way of a mandatory injunction to restrain the maintenance of structures upon an adjoining lot in violation of restrictive conditions in a deed, when there has been long-continued delay in asserting the right and

a remedy exists at law. *Orne v. Fridenberg*, 143 P. S. 487.

112. Where land was subject to a covenant that no manufactory, workshop, steam-engine house, smithery or other building for offensive purposes or occupation, or building of any kind to be used for any purpose other than as and for a genteel cottage or dwelling-house, stable or coach-house, should ever be built upon the land, and the lessees of defendant in September 1887 built on the land a boat-house, club-house and a carpenter shop for repairing boats, and notice to remove the same was not given until January 1889, the court refused a mandatory injunction; a mandatory injunction will not be issued where complainant's rights are not clear. *Gatzmer v. St. Vincent School Society*, 147 P. S. 313.

113. Where an owner of three adjoining lots executed three deeds on the same day to three different persons, and the deed for the middle lot contained a covenant, that the grantee should not build upon the rear of the lot, but the other two deeds did not refer to such restriction but did recite the fact of the conveyance; it was *held*, that the restriction was in the nature of a covenant running with the land and created an easement of light and air in favor of the adjoining lots. *Muzzarelli v. Hulshizer*, 163 P. S. 643.

114. Upon a restriction in a deed that all buildings should be erected not less than fifteen feet back from the fence line; it was *held*, that a porch extending the whole width of the house as a substantial and integral part of the building was clearly a violation. *Ogontz Land & Improvement Co. v. Johnson*, 168 P. S. 178; s. c. 36 W. N. C. 307; reversing s. c. 14 C. C. 86.

115. An exception in a deed is invalid if the land described in the exception would not have passed in the description of the land conveyed. *Henderson v. Mac-lay*, 5 Cent. 225.

116. A recital in a deed excepting all lots which have been granted to any

person for burial lots, is constructive notice to all claiming under the deed that the burial lots were excluded from its operation; and this, although the deed for the burial lots be not recorded until after the deed containing the exception. *Hancock v. McAvoy*, 151 P. S. 439.

117. Where a deed recited that it was subject to a dower in a third party, and at her decease the principal to the heirs, and it was subsequently decided that the dower was no charge on the land, an action of debt for the principal of the dower by the heirs will not lie against the grantee, they being neither parties nor privies. *Levan v. Bickel*, 1 Mona. 680; s. c. 17 Atlan. 206.

118. Where the defendants claimed under a deed in 1889 subject to certain leases for oil purposes, *inter alia* to "J. Beaumont 3 acres" without further description or identification, it was error to charge the jury as matter of law that the defendants took subject to a lease executed in 1882 to C. G. Beaumont and J. B. Drake under which the plaintiff claimed. Whether the lot leased and that conveyed were identical was necessarily for the jury, and could be determined only by extrinsic testimony. *Thompson v. Riddelsperger*, 144 P. S. 416.

119. Upon an executory contract to sell lands to a railroad company for a right of way, where it was stipulated that the company should construct and maintain a good and sufficient crossing over the right of way, on the premises; it was held, that the landowner was entitled to have inserted in his deed such an exception and reservation, and that he could maintain equitable ejectment to compel the acceptance by the railroad company of a deed containing such a reservation. *Hall v. Clearfield & Mahoning Ry. Co.*, 168 P. S. 64.

120. Where a landowner divided the land into lots and conveyed several lots with the right to the use of an alley lying to the east of them and he subsequently conveyed the fee simple title to the soil

of the alley together with a lot lying to the west of it, and recited the reservation of the right to use the alley granted to the owners of the first lots conveyed, and after the execution of this deed he conveyed to plaintiff's predecessor in title a lot at the head of the alley and to the south of it; it was held, that under the deeds, the plaintiff had no right in the alley, but that it was for the jury to say whether, at the time of the execution of the deed to plaintiff's predecessor in title, the alley was notoriously used as appurtenant to the plaintiff's ground. *McNeal v. Redman*, 168 P. S. 109.

121. Where, upon a conveyance to a railroad company, there is a condition in the deed that the company shall maintain a station and siding, but the deed is silent as to the character of the station, the question of how far a station of a given character is a compliance with the contract, is to be determined by the needs of the company and of those who use it. *Caldwell v. East Broad Top R. R. & Coal Co.*, 169 P. S. 99; s. c. 36 W. N. C. 405.

IX. Construction of deeds.

122. Where the premises of a deed conveyed a fee, but the *habendum* clause conveyed but an estate *durante viduitate*, it was held that the latter was the controlling clause. *Whitby v. Duffy*, 135 P. S. 620; s. c. 26 W. N. C. 245; affirming s. c. 7 Lanc. 201.

123. Where an interest granted by a deed is fully, circumstantially and precisely defined and limited in the premises, such interest will not be defeated by the provisions of a repugnant *habendum*. *Karchner v. Hoy*, 151 P. S. 383.

124. Where the land conveyed was not bounded by a navigable river but by a line drawn between certain points upon the bank of the river, which excluded the flats, parol evidence was admitted to show that the grantee had notice of the reservation of the flats, and that the conveyance was made subject to such reservation. *Palmer v. Farrell*, 129 P. S. 162.

125. A written agreement for the sale to the defendant's grantor which preceded the deed, was *held* to be competent evidence to aid in a correct understanding of the description in the deed. *Warful v. Knott*, 128 P. S. 528.

126. Where several deeds in *pari materia* are executed by the same parties at or about the same time, they will be treated as one transaction. *Nichols v. Nichols*, 149 P. S. 172.

127. In ejectment by a vendor against a vendee to enforce specific performance of an agreement to purchase land, where the defendant claims that a sufficient deed was not tendered to him, it is error for the court, after construing the agreement to the jury, to leave it to them to determine from inspection whether the deed was sufficient under the written agreement. *Beeson v. Porter*, 155 P. S. 579.

128. Where the construction of a deed is erroneously submitted to the jury but the verdict establishes the sufficiency of the deed, and the supreme court is of the opinion that the deed is sufficient, the judgment entered on the verdict will not be reversed. *Beeson v. Porter*, 155 P. S. 579.

See CONSTRUCTION.

X. Executory limitations.

129. A contingent remainder can only be conveyed by a devise; a deed purporting to convey it, unless executed and delivered after the contingency happens, operates only as an estoppel of the remainder-man. A conveyance of the most remote of several contingent remainders to a life tenant will not merge the life estate into a fee to the destruction of the intermediate remainders. *Stewart v. Neely*, 139 P. S. 309.

XI. Custody of deeds.

130. Where lands descend under the intestate law, the deeds belong to the heir, and a refusal by an executor to per-

mit their inspection, is good ground for removal. *Tompkin's Estate*, 6 Kulp 99.

DEFAULT.

See JUSTICES' COURTS: PRACTICE.

DEFAULTING PURCHASER.

See EXECUTION, XIII.

DELIVERY.

See DEED, III.: SALE, V.

DEMAND.

See DECEDENTS' ESTATES, IV.: PROMISSORY NOTES, IV.

DEMURRER.

See EQUITY, XXIX.: PLEADING, XIX.

DEPOSIT.

See BAILMENT.

DEPOSITIONS.

See CERTIORARI, II.: EVIDENCE, XXVI.: PRACTICE, X.-XII.

DERELICT PROPERTY.

1. It is the duty of the custodian of stolen money to pay it to the owner, on proof of ownership, otherwise assumpsit will lie against him; from the existence of the duty, the law raises an implied promise to pay. *Hindmarch v. Hoffman*, 127 P. S. 284.

2. The ownership of a roll of money found concealed on the premises after the death of plaintiff's decedent, was permitted to be proven by circumstantial evidence. *Warren v. Ubrich*, 130 P. S. 413.

3. Where a mortgage before delivery by the maker is lost or stolen, and the

finder pledges it with the mortgagee to secure the payment of his own pre-existing debt, the holder cannot recover from the maker. *Nolan v. King*, 11 Montg. 13.

DESCENT.

See DECEDENTS' ESTATES, VI.: DEVISE.

- I. General principles.
- II. Canons of descent.

I. General principles.

1. The ascertainment of the next of kin to a decedent for distribution, is within the general jurisdiction of the orphans' court, and this jurisdiction may be extended to include such ascertainment with reference to a fund which though not a part of the decedent's estate is, for the purpose of ascertaining who are to take, to be treated as if it were. *Clement's Estate*, 160 P. S. 391.

2. Under the French spoliation act of 1891 where an appropriation was made to pay a claim to the next of kin of the claimant, and when the act was passed all of the claimant's children were dead but there were living four grandchildren, children of a son, and thirteen great-grandchildren, who were the issue of seven deceased children of a daughter; it was held, that the four living grandchildren were each entitled to take one-eleventh in their own right as the nearest of kin, and that one-eleventh would go to the representatives of each of the deceased grandchildren *per stirpes*. *Clement's Estate*, 160 P. S. 391; overruling *Clement's Estate*, 150 P. S. 85 and in effect affirming *Clement's Estate*, 10 C. C. 481. See *Clement's Estate*, 13 C. C. 129; s. c. 2 Dist. Rep. 341; *Stokes's Estate*, 10 C. C. 527; s. c. 29 W. N. C. 162.

3. Surplus income, not being disposed of by the testator, passes under the intestate laws. *Rhodes's Estate*, 147 P. S. 227; affirming s. c. 26 W. N. C. 233; s. c. 47 L. I. 246.

4. Where a redeemable ground-rent is owned by a person who is *non compos*

mentis, the proceeds become personalty and at his death they pass to his next of kin without distinction of blood. *Hirst's Estate*, 147 P. S. 319; affirming s. c. 28 W. N. C. 212.

5. Where an intestacy occurs by reason of the failure of a contingent remainder and there is no limitation over, the heirs entitled to take the estate are to be ascertained as of the death of the testator and not at the date of the determination of the contingency; that the person to whom the prior estate was given was himself an heir does not change the result. *Bell's Estate*, 147 P. S. 389.

6. Under the laws of Connecticut where a person dies intestate without leaving husband or wife, issue, parents or brothers and sisters, the estate is distributed equally to the next of kin of the blood of the person or ancestor from whom such estate came or descended; such provision applies to both real and personal estate, and where an intestate sold inherited real estate in his lifetime; it was held, that such sale did not change the ancestral character of the estate or the direction of its descent. *Wells's Estate*, 161 P. S. 218.

7. No contestant of a will can compromise anything beyond his or her own personal interest in the contest or be entitled to any more than his or her distributive share in a sum received by way of general compromise. *Seip's Estate*, 163 P. S. 423.

8. A widow and heir are not estopped from inheriting from a deceased husband and father by reason of the fact that the widow has been convicted as accessory after the fact to his murder, and the son has been convicted of having murdered his father for the purpose of getting immediate possession of his estate. *Carpenter's Estate*, 170 P. S. 203; s. c. 36 W. N. C. 516; affirming s. c. 1 Lack. L. N. 159.

II. Canons of descent.

9. First cousins take to the exclusion of second cousins; representation does not extend beyond children of uncles and

aunts and grandchildren of brothers and sisters. *Stewart's Estate*, 147 P. S. 383.

10. Under the act 30 June 1885 (Brightly's Purdon 1071), where the only persons entitled to take are first cousins, children of deceased uncles and aunts, distribution must be made *per capita* and not *per stirpes*. *Cremer's Estate*, 156 P. S. 40.

11. Under the act 25 May 1887, sec. 1 (Brightly's Purdon 1070), where there is no living grandparent, first cousins take to the exclusion of second cousins. *Bamber's Estate*, 13 C. C. 403.

12. Second cousins, being grandchildren of deceased uncles and aunts, are not entitled to participate, as against first cousins being children of deceased uncles and aunts. *Rogers's Estate*, 131 P. S. 382.

13. Under the act 27 April 1855, sec. 2 (Brightly's Purdon 1069), children of deceased uncles take by representation equal shares with an uncle who died after the decedent. *Haines's Estate*, 12 C. C. 401.

14. Where a decedent leaves grand-nephews and great-grandnephews, the former are alone entitled as next of kin; there is no statute providing that great-grandnephews or neices shall take by representation. *Kingston's Estate*, 28 W. N. S. 284.

15. Upon the death of an intestate without issue, an adopted child is entitled, as against the widow, to two-thirds of the personal estate of the decedent. *Rowan's Estate*, 132 P. S. 299; affirming s. c. 6 C. C. 461.

16. After-born children, for whom no provision is made in the will of their father, are entitled to the same interest in his real estate as if he had actually died without a will. The widow under a power of sale contained in the will cannot divest their right. *Robeno v. Marlatt*, 136 P. S. 35; s. c. 26 W. N. C. 385.

17. A legitimate son of the same mother cannot inherit from an illegitimate brother. *Kennedy's Estate*, 47 L. I. 524; s. c. 8 Lanc. 197.

18. Under the act 27 April 1855 (Brightly's Purdon 1055), a non-resident illegitimate child is entitled to inherit from its mother. *Waesch's Estate*, 166 P. S. 204; affirming s. c. 14 C. C. 387.

19. Under the act 8 April 1833, sec. 17 (Brightly's Purdon 1072), an illegitimate child has no right to inherit from his uncle by representation through his mother. *Rees's Estate*, 166 P. S. 498.

DESERTION.

See HUSBAND AND WIFE, XI.: POOR, VII.

DETECTIVES.

1. The act 23 May 1887 (Brightly's Purdon 677), requiring the licensing of detectives, is not unconstitutional. *In re Amour*, 1 Dist. Rep. 620.

DEVISAVIT VEL NON.

See COSTS, I.: ORPHANS' COURT, III.: WILLS.

DEVISE.

See DAMAGES, V.: DECEDENTS' ESTATES: DEED: LEGACY: WILLS.

- I. What passes by a devise.
- II. What words will create a life estate.
- III. What words will create an estate tail.
- IV. What words will create a fee.
- V. Remainders.
 - (a) Vested remainders.
 - (b) Contingent remainders.
 - (c) Cross-remainders.
- VI. Executory devise.
- VII. Conditional limitations.
- VIII. Estate *durante viduitate*.
- IX. Vested devises.
 - (a) When a devise vests.
 - (b) Effect of acceptance.
- X. Equitable conversion.
- XI. Construction of particular devises.

I. What passes by a devise.

1. A devise of a house extending over an alley and its cellar extending under the same, with the appurtenances, is a devise of the soil of the alley. *Cheetham v. Muhlenberg*, 133 P. S. 309; s. c. 26 W. N. C. 198.

2. The operation of the act of 8 April 1833 sec. 9 (Brightly's Purdon 2103), that a devise shall pass the whole estate without words of inheritance, is not affected by the fact that a devise immediately preceding the one in question, contains words of inheritance. *Hartman v. Herbine*, 7 C. C. 630.

3. The residuary clause in a will, bequeathing "money, stock and farming utensils," will not be construed to include land not mentioned in the will. *Bonsall v. Bonsall*, 4 Del. 31.

4. A bequest of "nine-tenths of my available stock" was held to include stock, bonds, notes, cash and other personal property. *Sweitzer's Estate*, 142 P. S. 541; affirming s. c. 9 C. C. 49.

5. The word "effects" will carry real estate where that is the manifest intention. *Butler's Estate*, 37 P. L. J. 122.

6. A devise of "all my estate, both real and personal, that I shall inherit as my portion after my father's death," is not limited to such estate as the testator might inherit from her father; it passes land inherited from the testatrix's mother, but of which her father was in possession as tenant by the curtesy. *Graham v. Grugan*, 132 P. S. 79; s. c. 25 W. N. C. 314. See *Graham v. Knowles*, 140 P. S. 325; reversing s. c. 8 C. C. 250.

7. A codicil making a different disposition of the "shares" of two devisees under the original will was held to pass every possible interest or share of such devisees. *Eisiminger v. Eisiminger*, 129 P. S. 564.

8. Upon a bequest to a son for life with remainder to his children, he to receive and enjoy with his children the income, the children are not entitled to any of the income during their father's

life. *Mazurie's Estate*, 132 P. S. 157; affirming s. c. 46 L. I. 128.

9. Upon a bequest of income to two, to be paid "to them equally during their natural lives" and upon their death the principal to be divided; held, that upon the death of one, the survivor was entitled to the entire income for life. *Erwin's Estate*, 5 Montg. 18.

10. A bequest of the "remainder of my money" will pass realty purchased after the making of the will. *Jacobs's Estate*, 140 P. S. 268; s. c. 27 W. N. C. 365; affirming s. c. 9 C. C. 40.

11. The word "money" may, when so intended by the testator, include any kind of property, even land; but it cannot have that effect when the text of the instrument clearly shows that it was not so intended. *Levy's Estate*, 161 P. S. 189; affirming s. c. 14 C. C. 129.

12. The word "moneys" used in a will will be construed as meaning cash or ready money; such a word can only be used to pass the entire personal estate when the purpose of the testator is unmistakable. *Carr's Estate*, 13 C. C. 643.

13. Where a testator devised to his daughter all the cleared land on the west side of a road now enclosed and strip of woodland fenced in with the same; it was held, that the devise applied to an enclosed tract of thirty-four acres containing a small strip of woodland, but did not embrace an unenclosed tract of thirteen acres of woodland adjoining, but separated from the former tract by a fence. *McClelland v. Brownfield*, 142 P. S. 533.

14. Where a description of land in a devise calls for a certain distance along a street to another street, not opened or located at the time of the testator's death, the call for the point on the unopened street will control the distance named in the will; and this, though the excess be over one hundred feet. *St. Margaret Memorial Hospital v. Pennsylvania Co. for Ins. on Lives & Granting Annuities*, 158 P. S. 441.

15. Where a testator directed his es-

tate to be kept intact and undistributed for five years, and empowered his executors to sell and convey his real estate within that period for the purpose of raising money and to encumber either his personal or real estate for the same purpose, and at any time before final settlement to sell and convey his real estate for the payment of debts, and he directed that at the end of five years his estate should be divided among his widow and children as under the intestate laws; it was *held*, that the latter were not entitled to the income of the real estate during the five years. *Searight's Estate*, 163 P. S. 218.

16. Where a testator gave a share of his estate in trust for his son Charles for life, and after his death then to the use of the latter's children and issue, in such shares as he shall by last will appoint, and in default of such appointment then to the use of all his children who might be living at his death, and in the event of his death without issue then to the testator's children and the issue of any deceased children, and such son had one child, Charles R., who, in the lifetime of his father, executed a deed of trust of such estate as he might become entitled to in case he survived his father, and the son died without validly exercising his power of appointment, and subsequently the grandson died unmarried and without issue but leaving a will, by which he gave his estate to a stranger; it was *held*, that upon the death of the grandson, his share covered by the deed of trust passed under the will of the original testator to the latter's surviving children and the issue of deceased children; and where, after the death of the said Charles R., one of the sons of the original testator died, leaving a will in which he stated that it was his intention to devise only his individual estate composed of accumulations of income; it was *held*, that the latter's will passed to his residuary legatees his interest in the share left to his brother Charles and which

passed to him on the death of Charles R. *Pepper's Estate*, 166 P. S. 304.

17. An award arising out of a French Spoliation claim passes under the will of the original owner; it is not such a special and peculiar fund as must be distributed among those whom the court shall ascertain were the next of kin. *Leffingwell's Estate*, 1 Dist. Rep. 225; contra, *Carey v. Morris*, 1 Dist. Rep. 229.

18. Where a separate use trust is created for a married daughter and no power of alienation is given, she cannot pass an estate by will, and a devise to her husband is invalid. *Steinmetz's Estate*, 168 P. S. 175; affirming s. c. 15 C. C. 259.

II. What words will create a life estate.

19. A devise to trustees to pay interest to two married daughters during their lives, and, after their decease, the whole to descend to their issue, was *held* to create an estate for their natural lives with right of survivorship, with remainder to their lawful issue. *Hart's Estate*, 7 C. C. 369; s. c. 46 L. I. 454.

20. A devise in trust to permit a married woman to occupy and enjoy for her separate use, free from the control and debts of her husband, during her natural life, and at her death the land to descend to the issue of her body, with power of extinguishment in the trustee, creates a separate use trust in her favor, with remainder to the issue of her body. *People's Savings Bank v. Denig*, 131 P. S. 241.

21. A devise to the separate use of a married woman to the exclusion of her husband, and after her death to her "issue," excepting a right of curtesy in one-third to the surviving husband, vests but a life estate in the wife. The word "issue" must be read as a word of purchase. *Shalters v. Ladd*, 141 P. S. 349; affirming s. c. 8 C. C. 528. See *Shalters v. Ladd*, 163 P. S. 509.

22. If a limitation over be to some only of those who would take under the intestate laws, the remainder-men take as purchasers, and a trust in favor of a single daughter for life is not executed in her under the Rule in Shelley's Case. *Kuntzleman's Estate*, 135 P. S. 578; s. c. 136 Ibid. 142; 26 W. N. C. 445.

23. Upon a devise to a trustee to collect and pay over for life, and remainder in "fee to children" of the first taker, the Rule in Shelley's Case does not apply. *Mannerback's Estate*, 133 P. S. 342; s. c. 26 W. N. C. 9. See *Harbster's Estate* 133 P. S. 351; s. c. 26 W. N. C. 11.

24. A devise to R., "and at her decease the same to go to her children and their descendants," vests but a life estate in the first taker. The Rule in Shelley's Case does not apply. *Giffn's Estate*, 37 P. L. J. 422.

25. Upon a bequest of personalty to a widow for life, and the residue to the decedent's children, the widow takes a life estate with power to consume, and the bequest over applies only to such property as is unconsumed. *Markley's Estate*, 132 P. S. 352; affirming s. c. 5 Montg. 93.

26. A devise to a trustee to invest for the widow for life, and pay the principal to daughters after her death, is not rendered an absolute estate in the widow, by a proviso that if the income be not sufficient for her support, the trustee is authorized to sell such portion of the investment as may be necessary, and apply the proceeds to that purpose. *Winter's Estate*, 6 C. C. 635; s. c. 46 L. I. 140.

27. A deed to a son during his natural life, and at his decease "to descend to and the title thereof to vest in the children of the said party of the second part by him lawfully begotten," conveys but a life estate to the son with remainder to his children. *Moore v. Tyler*, 1 Mona. 529; s. c. 17 Atlan. 216.

28. A devise to a widow with full power to sell, and "in case any of my estate be left after the death of my wife," then to be divided among his children, vests but a life estate in the widow in

the realty. *Brockley's Appeal*, 4 Atlan. 210.

29. Upon a devise to a daughter of income for life only, and on her decease to her children in fee simple, the word "children" is a word of purchase and the first taker took but a life estate. *Foster v. McKenna*, 11 Atlan. 674.

30. Upon a bequest of a sum of money to a son, "to be placed on interest by my executors," and the interest paid annually during his natural life, and, in case he should die leaving no legitimate heirs of his own body, then the same to revert to other heirs; *held*, that the son took but a life estate. *Eichelberger's Estate*, 135 P. S. 160; s. c. 26 W. N. C. 209.

31. Upon a bequest of the income of a certain sum for life, with a proviso that if the legatee marries or has natural heirs he may dispose of the principal by will, he takes but a life estate. *Towne's Estate*, 5 Montg. 103.

32. Upon a devise of a farm to a son for his support, the estate "to go to the use of his children," the word "children" was *held* to be a word of purchase, and the devisee took but a life estate. *Oyster v. Knull*, 137 P. S. 448; s. c. 26 W. N. C. 449. See *High's Estate*, 136 P. S. 222; s. c. 26 W. N. C. 450, 453.

33. Upon a devise to nephews for life, and "immediately after their decease the same shall descend to their children," the nephews took for life, with a contingent remainder to children. *High's Estate*, 26 W. N. C. 450, 453.

34. If, after an absolute gift, there be a limitation over in case of the death of the life tenant without children either "during my life or after my decease," the first taker does not take an absolute estate. *Scully's Estate*, 9 C. C. 347; s. c. 27 W. N. C. 347; 48 L. I. 5.

35. Upon a devise to a son during the period of his natural life, with remainder to his issue, if there be any at the time of his decease, in fee simple, the issue of any deceased child of the said son to take the same share as the parent would have been entitled to, if living at the death of

said son; but on failure of issue of said son or of his deceased child or children at the time of his death, then to the heirs at law of the testator; it was *held*, that the word "issue" did not mean "heirs of the body" as a word of limitation, and that the devise to the son was but a life estate. *Parkhurst v. Harrower*, 142 P. S. 432.

36. Where a farm was devised to be used by the devisee for her own personal benefit and there was a subsequent clause, that after the decease of the devisee "I desire that my interest in the said above-mentioned farm together with all interest accruing therefrom shall be appropriated to foreign missionary work"; it was *held*, that the latter clause was testamentary and that the will only gave a life estate to the devisee. *Presbyterian Board of Foreign Missions v. Culp*, 151 P. S. 467.

37. Where a testator directed that certain of his real estate should be sold and the proceeds invested in mortgages, the interest to be regularly paid to his daughter free from the control, liabilities and debts of her husband, and in case of her death without issue or issues of her children, then to the testator's right heirs; it was *held*, that the daughter took a life estate only; that the word "issue" was equivalent to children. *Peirce v. Hubbard*, 152 P. S. 18; affirming s. c. 10 C. C. 63.

38. Where real estate is devised to a grandson "for his life and after his decease to his issue, should he die leaving issue to survive him. In case he should die leaving no issue to survive him" then to be sold and distributed among other persons living at the date of the making of the will; it was *held*, that the grandson took a life estate and not an estate in fee. *Nes v. Ramsay*, 155 P. S. 628.

39. Where real estate was devised to a son for and during the term of his natural life, in such a manner that he shall not dispose of the same in his lifetime nor be in any manner liable for his debts, and after his decease "I give and devise the

said tract of land to such person or persons as he by his last will and testament shall direct and in the event of his dying intestate leaving issue him surviving, then to his issue in fee, and in the event of his dying intestate leaving no issue surviving him then to my daughter"; it was *held*, that the intention was to devise the property over upon a definite failure of issue, and that the son took a life estate. *Nes v. Ramsay*, 155 P. S. 628.

40. Under a devise "to my beloved wife, I allow the use, as she may deem best, of the residue of my estate for her own advantage, and at her death if any of it remain, to be equally divided between my three children, Alexander, John and Alice. If it be necessary to pay my debts and the amount devised to my mother that my real estate will need to be sold, that that is devised to Alice shall be reserved for her"; it was *held*, that the wife took a life estate in the realty. *Taylor v. Bell*, 158 P. S. 651.

41. Upon a devise to a wife of all of the testator's property "to have and to hold the same absolutely to her own right for and during her lifetime with power to dispose of the same at her own pleasure, but, in the event of her remarrying then one-half to my children, share and share alike, and at the death of my wife, then all the property that she may have inherited from me by this, my will, shall be divided among my children, share and share alike"; it was *held*, that the wife took only a life estate. *Kennedy v. Kennedy*, 159 P. S. 327.

42. Where a certain sum of money was charged upon land devised, and the devisees were directed to pay the annual interest at the rate of five per cent "to my said daughter during her natural life and upon her decease said principal sum shall be paid to her bodily heirs in equal shares and in case my said daughter shall die without leaving bodily heirs," then the said principal sum to fall back into the testator's estate; it was *held*, that the daughter took no interest in the *corpus* of the fund but only the income thereof dur-

ing her life. *Gerhard's Estate*, 160 P. S. 253.

43. Where a sum of money was directed to be invested and the interest paid to a son, and it was further provided that portions of the principal might be paid to him if the trustee deemed it necessary, and upon his death the money or the balance thereof was directed to be divided equally among the testator's brothers and sisters; it was *held*, that the legatee took a life estate only in the fund. *Yetter's Estate*, 160 P. S. 506.

44. Where a testator devised his real estate to his three sons for their support and maintenance, without any power to sell, and with provision that the property should not be subject to their debts, and should they die without issue, then their interest to be vested in the survivor or survivors during their natural life, and it was further provided that should either leave lawful issue, then such lawful issue should enjoy the absolute title to their father's share, and should either die without issue, then his right should descend to the testator's lawful heirs; it was *held*, that the three sons took a life estate only in the land. *Anderson v. Anderson*, 164 P. S. 338.

45. Where a testator devised all his real and personal estate to his wife for life and at her death to his children, "their heirs and assigns," and by a codicil he provided that in case a certain daughter should marry and have heirs the property which she should receive at the death of his wife should descend to said heirs, but if she should have no children, or if the children should die, then over, and there was a further proviso that her share should be invested during her life and that her interest should be paid semi-annually; it was *held*, that there was a good executory devise to the daughter in whom a life estate vested with remainder to her children or, failing children, to the persons named in the codicil. *Porter v. Porter*, 6 Del. 158.

46. Where a wife died leaving a husband and three children, and she devised

all her property real and personal to her husband "and after his decease to our heirs, share and share alike after all expenses are fully paid"; it was *held*, that the husband only took a life estate in the real estate. *Mowery v. Mowery*, 3 Northam. 36.

47. Upon a devise to a widow who was also executrix, directing that she shall have full power "to dispose of my real estate during her natural life or to have and to hold the same until after her decease," followed by a devise to certain charities; it was *held*, that the widow took a life estate in the proceeds of the real estate with remainder to the charities. *Shearer's Estate*, 5 York 119.

48. Upon a bequest for life with remainder to a grandson "and his children"; it was *held*, that the word "children" was a word of purchase and that the grandson took for life with remainder to his children, born and to be born. *Peale's Estate*, 31 W. N. C. 551.

49. Where a testator gave to his widow for life or widowhood all the rents, issues and income of his estate; it was *held*, that such a clear gift was not cut down by a subsequent power to his executors to change investments, and that under such power they had no authority to collect the rents given to the wife. *Lare's Estate*, 15 C. C. 355; s. c. 35 W. N. C. 447.

III. What words will create an estate tail.

50. A devise "to my lawful children and their heirs," naming them, is a devise in fee-tail at common law, which under the act of 27 April 1855 (Brightly's Purdon 810) is a fee simple in this state. *Knoderer v. Merriman*, 7 Atlan. 152.

51. A devise of a farm to a son, and "if he should die leaving no lawful heirs," then to his brothers and sisters, created a fee-tail in the first taker. *Titzell v. Cochran*, 10 Atlan. 9; *Cochran v. Cochran*, 127 P. S. 486.

52. A devise "to my daughter R. but in case she should die without issue,"

then over, conveys an estate tail converted by the act of 27 April 1855 (Brightly's Purdon 810) into a fee simple. *Hackney v. Tracy*, 137 P. S. 53; s. c. 26 W. N. C. 464.

53. Upon a devise to a daughter in fee simple "provided, nevertheless, that in case she should die without leaving lawful issue, then to be divided equally among the children of testator's brother"; it was *held*, that the devise imported an indefinite failure of issue and created an estate tail, enlarged to a fee simple. *Ray v. Alexander*, 146 P. S. 242.

54. Where a will bequeathed to A the income of an estate for life, with a limitation over to B of the whole fund in case A should die without issue; it was *held*, that A as first taker took absolutely and the complete ownership of the income made him the owner of the fund; words in a will which, if applied to realty create an estate tail, will, when applied to personalty, pass the property absolutely. *Paff v. Smith*, 3 Lack. Jur. 393.

IV. What words will create a fee.

55. A devise to three daughters in fee, with a proviso that upon the death of any of them, their portion should go to the survivors during their life or lives; *held*, that upon the death of the last sister her heirs took a fee in one-third and their proportionate interest in the other two-thirds, as heirs of the other sisters. *Reynolds v. Crispin*, 11 Atlan. 236.

56. Upon a purchase of real estate by a married woman with her own funds, and a deed in trust for her during life, and to her children at her death, with a provision that the trustee should sell at any time at her request; upon such sale the purchase money became the sole property of the *cestui que trust*. *Weber v. Ueberroth*, 13 Atlan. 194.

57. A power of absolute disposal, coupled with the grant of a life estate only, is sufficient to vest a fee, where there is a manifest intent of the testatrix

to dispose of all her property. *Myers v. Bentz*, 127 P. S. 222.

58. A devise to a wife of real estate in lieu of dower, there being no devise over, vests a fee simple in the devisee. *Dilworth v. Gusky*, 131 P. S. 343.

59. Where the testator intended to divide the estate between his own and his wife's heirs generally, final settlement not to be made until after her death; it was *held*, that she took a fee. *Anders v. Gerhard*, 140 P. S. 153; affirming s. c. 6 Montg. 193.

60. Upon a devise by a childless testator "my beloved wife Anna shall have and hold the property in Bottstown, where I now reside, said Anna to have the sole control of the same during her lifetime; and at her discretion she shall order my executor to sell the real estate, and the moneys realized, my executors shall pay over to my beloved wife Anna, and she shall have power to dispose of the same by bequeath as she directs"; it was *held*, that under sec. 9 of the act 8 April 1833 (Brightly's Purdon 2103), the widow took a fee. *Snyder v. Baer*, 144 P. S. 278.

61. A gift to a widow for her sole use and benefit during the term of her natural life, to use, expend, sell and convey as she may desire and think proper, with a gift of the residue over upon her decease, vests an absolute power in her of disposition over the estate. *Mercur's Estate*, 151 P. S. 49.

62. Where a testator devised to his wife "all my property real and personal for her support during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children"; it was *held*, that the widow took a fee including the power to sell and the power to devise; the words referring to the remainder were merely precatory and did not limit the estate. *Boyle v. Boyle*, 152 P. S. 108.

63. Where there is a devise to a widow for life, with an absolute power of testamentary disposition, and this power is exercised, the title made by the widow is in fee. *Dillon v. Faloon*, 158 P. S. 468.

64. Where a testator died prior to the wills act of 8 April 1833, and he stated in the preamble of his will that he was desirous of making a distribution of his property and in the body of his will he devised land without words of inheritance; it was *held*, that the devisee took an estate in fee. *Mitchell v. Pittsburgh, Fort Wayne & Chicago Ry. Co.*, 165 P. S. 645.

65. Where a testator gave his wife all his estate, real, personal and mixed in fee simple, to own, use, enjoy and dispose of the same as she might deem proper, and he further directed that whatever real estate might not be sold or disposed of by his wife in her lifetime should be sold and converted into money after her death, and gave and bequeathed to his three children the residue of his estate after the death of his wife; it was *held*, that the widow took an absolute estate in fee simple in the testator's lands. *Evans v. Smith*, 166 P. S. 625.

66. A trust for an unmarried daughter, with remainder to her heirs, vests the estate in her absolutely; the trust falls. *Baker's Estate*, 6 C. C. 672.

67. Where a testator devised property to his third son "in trust for his heirs, he to have the income arising from the said property for his support and maintenance and the support and education of his heirs until they are twenty-one years old," and the son at the time of his father's death was a minor and unmarried and without issue; it was *held*, that the son took an absolute estate in fee. *Barcus's Petition*, 15 C. C. 191.

68. Where a testator directed that his real estate should remain undivided and that the net income during his wife's life should be distributed, one-third to her and the balance between his sons and daughters, and it was further provided that at his wife's death his children should do as they thought best, "it is, however, my will should my children agree to a division of my estate after the death of my wife, that the separate portions of my daughters shall be separately secured to them and to their use beyond the dicta-

tion of the husband of either of them," and the daughters were all married at the date of the will; it was *held*, that a valid separate use as to the daughters was created which took effect at the death of the widow, and that the daughters as well as the sons took estates in fee as tenants in common. *Steinmetz's Estate*, 168 P. S. 171, 175; affirming s. c. 15 C. C. 259.

69. A devise to a wife of all the testator's personal property and real estate and all moneys coming from investments "granting her the privilege of disposing of any and all as may be best for her use," was *held* to vest a fee simple to the real estate in the devisee. *Hendricks v. Burkert*, 8 Montg. 176.

70. Where a testator devised all the residue and remainder of his estate to his wife "to have, use and enjoy the same in like manner as I myself might do if living," and this was followed by a direction that "whatever of my estate may remain unexpended after the decease of my said wife," should be divided equally among his children; it was *held*, that the wife took an absolute title to the real estate in fee. *Veile v. Veile*, 3 Northam. 306; s. c. 5 Del. 169.

71. Where a testator bequeathed his real estate to his daughters Sophia and Mary in fee and provided that if either should die unmarried and without issue, her share should go to his son Jacob and his survivor, and if both should die unmarried and without issue, then both shares should go to his son or his heirs, and the son died before either of the daughters and afterwards Mary died without lawful issue; it was *held*, that Sophia became entitled to the whole of the real estate in fee simple, and that the heirs of Jacob took no part thereof. *Esig's Estate*, 1 York 27.

72. Where a testator devised his real estate to his children "share and share alike," and further provided that "all of what is left" of one daughter's legacy, after her death, should fall back to her brothers and sisters or their heirs; it was *held*, that the daughter took an

estate in fee simple. *Brougher's Estate*, 2 York 149.

73. A remainder in fee cannot be reduced to a life estate, if the condition, upon which such change is to take place, does not happen. *Homet v. Bacon*, 126 P. S. 176.

74. An absolute devise in fee is not affected by a subsequent declared trust as to the residuum of the estate. *Lloyd v. Mitchell*, 130 P. S. 205.

75. A devise in fee is not cut down by precatory words concerning division, appraisement or alienation. *Hoeverler v. Hune*, 138 P. S. 442; s. c. 27 W. N. C. 161.

76. Where a will provided "I give and bequeath to my son all my real and personal estate," it was *held*, that the son took a fee simple in the real estate, which could not be taken away by such doubtful words in the second sentence, which were as follows: "should he die without leaving to any person, then to my brother during his life; after his death, to all the children and grandchildren of my sister-in-law." *Gillmer v. Daix*, 141 P. S. 505.

77. Where a testator gives an estate in fee simple, such estate will not be restricted by subsequent words which do not unequivocally show that he means the devisee to take a less estate only, but which import merely an intent or desire of the testator to withhold legal incidents of the estate already given. *Good v. Fichthorn*, 144 P. S. 287.

78. Where real estate was devised to a son in fee simple "with full power at any time during his life to convey the same in fee simple" to another son and in case of his failure so to convey, then after his death, over; it was *held*, that the first devisee took an estate in fee simple which was not cut down by the provisions following. *Rea v. Bell*, 147 P. S. 118.

79. Where property was devised to sons in fee by the body of the will, it was *held*, that the fee was not cut down by a direction in a codicil that each should "have and possess one-half and said Daniel Seitz's share to be equally divided among his, the said Daniel's, children

and the other, or George Seitz's share to be equally divided between them, his, the said George's, children." *Seitz v. Pier*, 154 P. S. 467.

80. A devise to "J. and to his heirs during his natural life and to him and his heirs forever after his decease," vests a fee simple in J. under the Rule in Shelley's Case. *Henderson v. Walthour*, 15 Atlan. 893.

81. A conveyance by husband and wife to a trustee for the use of the wife "during her natural life, and at her decease then to her heirs in fee, share and share alike, and in the meantime to allow and permit her to receive for her own use the rents, etc.," does not create a separate use trust. The trust is executed by the statute, and the fee, under the Rule in Shelley's Case, passes to the wife. *Carson v. Fuhs*, 131 P. S. 256.

82. Upon a devise of a farm to a son for life and "at his death the use and occupancy to be continued to his issue if he shall so have, and if none, then to the next of kin and so on as long as the laws of this commonwealth will permit"; it was *held*, that the son took a life estate, with remainder to his issue in fee, and in default of such issue to the next of kin, and that by the Rule in Shelley's Case and the act 27 April 1855 (Brightly's Purdon 810), the son took an estate in fee. *Armstrong v. Michiner*, 160 P. S. 21; affirming s. c. 10 Montg. 13.

83. Where a testator by the use of the word "heirs" means an unbroken line of descendants, the word will be construed in its technical sense, and in such case, no matter how carefully he define the life estate, it will be *held*, that he gave the first taker a fee. *Moyer's Estate*, 12 C. C. 137; s. c. 30 W. N. C. 477.

84. Upon a devise for life with remainder to lawful issue, their heirs and assigns forever, and in case of death without lawful issue, then to the heirs of the testator under the intestate laws; it was *held*, that the first devisee took a fee simple. *Grimes v. Shirk*, 169 P. S. 74; s. c. 12 Lanc. 228.

85. A devise to A for life and after his

death to his "then surviving heirs," vests an estate in fee simple in the first taker. *Hiester v. Yerger*, 166 P. S. 445; affirming s. c. 10 Montg. 166.

86. A devise to one in fee, followed by a provision that, if he die without surviving issue, then over, vests a fee simple in the first taker, if he survive the testator; it means, death without issue before the testator. *Stevenson v. Fox*, 125 P. S. 568; affirming s. c. 45 L. I. 379.

87. An absolute devise followed by a proviso that if the devisee "should die without children, grandchildren or wife living," then over, conveys an unrestricted estate in fee to the first taker. The words quoted refer to death in the lifetime of the testator. *King v. Frick*, 135 P. S. 575.

88. Upon a devise to children and grandchildren by name in equal shares *per stirpes*, the share of each child to go, in case of his death, to other persons, and in case of the death without issue of any of the grandchildren, his share to be divided among the other grandchildren; it was *held*, that the devisees having survived the testator, took an absolute estate in fee simple. *Sugden v. McKenna*, 147 P. S. 55.

89. Where a testator provided that in case either of his daughters should "die without issue," either before or after the decease of his wife, then their share or shares should revert back to the remainder of his children, share and share alike; it was *held*, that the words "die without issue," must be construed to be an indefinite failure of issue and hence that the devisee took an absolute estate in fee. *Hoff's Estate*, 147 P. S. 636.

90. Where a will gives the first taker a fee simple, and afterwards contains a devise over in case of his death without issue, the first taker takes an absolute estate. *Robinson's Estate*, 149 P. S. 418.

91. Upon a devise to children, and if they should die without heirs, then over to nephews and nieces, the word "heirs" means issue, and where the words "die without issue" are used as the contingency upon which a new devisee is

to take, after a previous devise in fee, they mean, die in the lifetime of the testator, and if the devisee survives, the estate he takes is absolute. *Coles v. Ayres*, 156 P. S. 197.

92. Where a testator devised to his daughter one-half of his plantation for the support of herself and children, and he further directed that so long as his real estate should be undivided, his executors should pay one-half of the clear yearly proceeds to his daughter, "or in the event of her death to the use of her children," and he further authorized his executors, if they deemed it advisable, to dispose of his daughter's share with the other moiety or separately; it was *held*, that the daughter took a vested estate in fee in one-half the real estate. *Cressler's Estate*, 161 P. S. 427.

93. Where a testator gave certain lots to Amanda Stephens and directed that "in the event of Amanda dying unmarried or if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided, etc."; it was *held*, that the word "offspring" was synonymous with issue, and that the testator contemplated a definite failure of issue at his own death and that Amanda took a fee. *Mitchell v. Pittsburgh, Fort Wayne & Chicago Ry. Co.*, 165 P. S. 645.

94. Where a testatrix devised the residue of her estate to her daughter, "her heirs, executors, administrators and assigns forever," and by a codicil she further provided that in case of the death of any of her children without having lawful issue, it was her will that such child's share should go to her surviving children and the lawful issue of such other children as might be deceased, their heirs, executors, administrators and assigns, and the testatrix died prior to the act 27 April 1855 (Brightly's Purdon 810), and the daughter died unmarried and without issue after her mother's death; it was *held*, that the daughter took a fee simple under the will. *Martin's Estate*, 11 C. C. 245; s. c. 30 W. N. C. 461.

95. A legacy, being absolute in the first instance, does not become limited for life by a gift to issue in case of her death; that means her death in the lifetime of testator. *Rittenhouse's Estate*, 46 L. I. 220.

V. Remainders.

(a) Vested remainders.

96. A devise to a tenant for life and upon the death of the tenant for life, over to the testator's children then living, means children living at the testator's death; such remainders are vested. *Barker's Appeal*, 2 Cent. 282.

97. In a devise over to "other surviving children" of the testator, the survivorship referred to the death of the testator, and the remainder was vested in such other children as survived him. *Sterling's Estate*, 7 C. C. 223; s. c. 24 W. N. C. 495.

98. A remainder, upon the extinction of the widow's life estate, to children of the testator and the issue of such as may then be dead, is a vested remainder, and the widow of a son, who dies before the mother, is entitled to her interest under the intestate law. *Bloodgood's Estate*, 8 C. C. 546; s. c. 26 W. N. C. 335.

99. Under a direction that upon the death of the wife, a grandson shall receive the entire interest of the estate until he attains the age of thirty years, and then the estate absolutely, the grandson takes a vested estate, and it is not made contingent by a devise over, in case he should die leaving no issue, the wife being also dead. *Shepherd's Estate*, 8 C. C. 520; s. c. 47 L. I. 299.

100. Where a testator gave his real estate to his wife during widowhood, and further directed that the remainders and reversions of all his property should become the property of his son provided the latter should remain with the testator and his wife until after her decease, and provided that two years after the

decease of testator's wife, his said son should pay certain amounts to the testator's other children, and at the time the will was written the said son was living with his parents and was the only child at home; it was *held*, that the son took a vested remainder in the real estate. *McCall v. McCull*, 161 P. S. 412.

101. Where a testator directed that his farm should not be sold during the life of his wife, but if she should survive him, it should be sold at public sale and the proceeds equally divided between his children; it was *held*, that there was a conversion at testator's death and that the children took a vested interest at the testator's death. *Thomman's Estate*, 161 P. S. 444.

102. Where a life estate was given to a nephew with the direction that if he abstain from intoxicating liquors for a certain period he should take a fee, and the will further provided that upon the expiration of the life estate "if the aggregate sum shall then amount to fifty thousand dollars, without which no further disposition can be made," it should go to the erection of a house of refuge; it was *held*, that the gift to the charity was absolute and not merely contingent upon the estate amounting to fifty thousand dollars at the time of the death of the nephew, and that if the estate did not amount to fifty thousand dollars at that time, the trustees were to wait until it reached that amount. *Stevens's Estate*, 164 P. S. 209; affirming s. c. 11 Lanc. 129, 137.

103. Where a testator devised land to his daughter for life and upon her death the same to be divided among all his children living at the time of her decease; it was *held*, that the other children took vested interests in the remainder immediately upon the testator's death, which were subject to be divested by death in the lifetime of the tenant for life. *Stallman's Estate*, 13 C. C. 111.

104. Where there is a gift for life and then over, or, in case of the death of the remainder-men, then to testator's surviving

children, such children living at the death of the testator take vested interests subject only to be divested in case the remainder-men survive the life tenant. *Breese's Estate*, 13 C. C. 184; s. c. 32 W. N. C. 166.

105. Where a will gives a life estate, with vested interests to take effect at the termination thereof, and a codicil contains a general bequest of the whole estate to the life tenant with the power of appointment, the two instruments will be construed together as creating a life estate with the power of appointment, and leaving the future vested interests standing unless divested by the exercise of the power. *Lyndall's Estate*, 13 C. C. 449; s. c. 32 W. N. C. 325.

106. Where a testator devised a dwelling-house and lot to his wife during her natural life, with the privilege of purchasing the fee by paying to his heirs or executors a certain sum of money, and he further directed that should the house continue to be enjoyed by his wife as a life estate until her decease, then, or at whatever time thereafter within ten years, the said lot should be sold, and whether sold to his wife or after her decease, the proceeds should be equally divided between his three children or their legal representatives, and the widow never elected to purchase; it was *held*, that a son who survived the testator but died before the widow had a vested interest in the property; that there was an equitable conversion of the realty and therefore partition would not lie and that the words "legal representatives" in the will included real as well as personal representatives. *Rankin's Estate*, 13 C. C. 617.

107. Where a testator gave a life estate in all his property to his sister, and upon her death one-third of it to his brother, and in case he should be deceased then his portion should descend to his heirs, and the brother died after the testator but in the lifetime of the sister; it was *held*, that the brother took a vested remainder in one-third of the property, which would be awarded to his executor

for distribution under his will. *Bowlby's Estate*, 4 Dist. Rep. 108.

108. Upon a devise to the testator's wife for life and after her death "in trust for my two nieces, share and share alike, to be held in trust until both are of legal age"; it was *held*, that this was an absolute devise to the nieces of all the testator's estate after the death of his wife. *Jeremy's Estate*, 42 P. L. J. 197.

109. Where a testator devised a tract of land to his daughter for life, and after her decease the profits were to go to the use of her children until the youngest came of age, and then, if it could not be divided to good advantage, it was to be sold and divided among her children, share and share alike, and her six children were all living when the will was made and when the testator died and when the youngest came of age, which was before their mother's death, but subsequently and before the mother's death, two of the children died leaving children; it was *held*, that the fee vested in all the children on the death of the testator, and that the grandchildren succeeded to the interests of their parents on the latter's death. *Moore v. Wicks*, 9 Lanc. 268.

110. Upon a gift to one person for life, and, after her death, to another for life, and then over to a third person absolutely, with a provision that in case of the death of both the second and third takers, then to the residue; it was *held*, that all the interests vested at the death of the testator, subject to being divested upon the happening of the condition subsequent, to wit, the death of both the second and third takers during the lifetime of the first, but that the death of the third taker only during the lifetime of the first would not divest her interest. *Macalester's Estate*, 14 C. C. 385.

111. Where an intestacy occurs by reason of the failure of a contingent remainder, and there is no limitation over, the heirs entitled to take the estate are to be ascertained as of the death of the testator and not at the date of the determination of the contingency; that the

person to whom the prior estate was given was himself an heir does not change the result. *Bell's Estate*, 147 P. S. 389.

112. Where a testator directs that after the expiration of a particular interest his estate shall go to his right heirs, he must be understood as meaning the persons who would have taken at the time of his death and not at the time of their taking; that the person to whom the prior estate is given is himself an heir does not change the result. *Stewart's Estate*, 147 P. S. 383. See *Bell's Estate*, 147 P. S. 389.

113. Where the owner of a vested remainder in fee devised the estate absolutely to his wife, and after his death a posthumous child was born which died prior to the death of the life tenant; it was *held*, that the will was revoked by the birth of the child, who took a fee in the real estate subject to the dower interest of the remainder-man's widow, and that the widow, although not entitled to the enjoyment of the estate until the death of the life tenant, had an interest which she could convey. *Wilson v. Ott*, 160 P. S. 433; reversing s. c. 5 Del. 393. See s. c. 5 Del. 185, 231.

(b) Contingent remainders.

114. A remainder to the child or children living, of the tenant for life, and, in default, to the "surviving children" of the testator, is contingent upon the children of the testator surviving the tenant for life. *Reiff's Appeal*, 124 P. S. 145; affirming *Reiff's Estate*, 22 W. N. C. 62.

115. In a devise to daughters for life, and after their decease in turn, to the survivors and the lawful issue of such as may be dead, the word "surviving" was *held* to refer to the death of the daughters, such plainly being the intention of the testator. *Woelpper's Appeal*, 126 P. S. 562; affirming *Chandler v. Woelpper*, 23 W. N. C. 469.

116. Upon a bequest of income to a daughter, and, at her death, the principal to her children living at the time of her

death, and a subsequent revocation of the bequest to the daughter, it was *held*, that the testator died intestate as to the income during the daughter's life, the trust in favor of her children being contingent on their surviving her. *Holmes's Appeal*, 9 Atl. 341.

117. Upon a devise to pastors to collect rents and pay over to certain societies to be distributed in charity, and upon failure to so apply the trust was revoked and the property devised to the testator's four sons; it was *held*, that upon the failure of the pastors and societies to act the property vested in the four sons. The act of 26 April 1855, sec. 10 (Brightly's Purdon 298) to prevent the failure of a charity for want of a trustee did not apply. *Seitz v. Seitz*, 1 Mona. 626; s. c. 17 Atl. 229.

118. If a remainder is not vested and there is no limitation over, it passes under the residuary clause. *High's Estate*, 136 P. S. 222; s. c. 26 W. N. C. 453.

119. A contingent remainder can only be conveyed by a devise; a deed purporting to convey it, unless executed and delivered after the contingent happens, operates only as an estoppel of the remainder-man. A conveyance of the most remote of several contingent remainders to a life tenant will not merge the life estate into a fee to the destruction of the intermediate remainders. *Stewart v. Neely*, 139 P. S. 309.

120. Upon an absolute devise or bequest in the first instance, where it is further provided that in the event of the death, or death without issue, of the legatee, another legatee or legatees shall be substituted, such provision shall be taken to mean death or death without issue in the testator's lifetime. *Morrison v. Truby*, 145 P. S. 540. See *Miller's Estate*, 145 P. S. 561.

121. Where a testator gave to his grandson an equal share of his estate, and provided that if he should die before he had any heirs then his share should revert back "among my other heirs," and the grandson died intestate, unmarried

and without issue, after the testator's death; it was *held*, that the word "heirs" was used in the sense of children, and that the contingency was to happen by the very terms of the will before the death of Albert, that a definite failure of issue was therefore intended and the limitation over was effective to carry the gift to the testator's other heirs. *Miller's Estate*, 145 P. S. 561. *Wallace v. Denig*, 152 P. S. 251.

122. Upon a devise to children and grandchildren by name in equal shares *per stirpes*, the share of each child to go, in case of his death, to other persons, and in case of the death without issue of any of the grandchildren, his share to be divided among the other grandchildren; it was *held*, that the devisees having survived the testator, took an absolute estate in fee simple. *Sugden v. McKenna*, 147 P. S. 55.

123. Where the will gives the first taker a fee simple and afterwards contains a devise over in case of his death without issue, the first taker takes an absolute estate. *Robinson's Estate*, 149 P. S. 418.

124. Upon a devise of a life estate in the mansion house and curtilage to the testator's wife, and on her death such mansion house and curtilage to be divided among testator's children, and a further provision that they should be appraised at the death of the wife, and taken by such devisee as shall take the farm attached to the same, securing the respective portions of those interested by a bond and mortgage; it was *held*, that the estate was contingent upon the partition, but that the remainder vested unconditionally in one of the heirs upon the consummation of the partition by his election to take the farm mentioned. *Dean v. Winton*, 150 P. S. 227.

125. Where real estate was devised to a trustee for the separate use of a married daughter during her natural life and at her death to descend to the issue of her body, but if she should die leaving no issue, then to revert back to his re-

siduary estate, and by a subsequent clause the trustee was authorized to surrender the entire trust to the daughter if he should deem it advisable; it was *held*, that the trust was an active one, and a definite failure of issue was contemplated, and that the husband of the daughter was not entitled to any interest in the estate as an heir of a child who had died during the lifetime of his wife. *Wallace v. Denig*, 152 P. S. 251. See *Wilson v. Denig*, 166 P. S. 29.

126. Where a testator directed the residue to be invested until his youngest child should arrive at the age of twenty-one years, when he directed the same to be converted into money and after giving a portion to his wife he directed the balance to be divided among his children, and "should any of my said children die before the youngest child arrives at the age of twenty-one years, leaving children, then the said share shall be divided among said children, share and share alike, or if he or she shall die without leaving children, then his or her share shall be divided among the remaining children, share and share alike," and one of the testator's daughters married and died and left a husband and one child, the latter of whom died before the youngest of testator's children arrived at twenty-one years; it was *held*, that the gift being to testator's children as a class, it was contingent upon a child living to the period of distribution or leaving a child who should live until such period; and therefore the father of the grandchild took nothing as the heir or next of kin of his child. *Cascaden's Estate*, 153 P. S. 170.

127. Where property was devised to a daughter, to be used and controlled by her and her husband during her lifetime for their own benefit and advantage, and in case she died without children, her husband if he survived her was to have the use of it during his lifetime and at his death, over to certain grandchildren in fee, and by a codicil, it was provided that the son-in-law instead of having a

life estate should possess it as his own without let or hindrance; it was *held*, that no change was effected by the codicil as to the contingency upon which the son-in-law should take, and he would only be entitled to take in case he survived his wife or she died without children and that he and his wife could not, together, make a marketable title to the land. *Fife v. Miller*, 165 P. S. 612.

128. Where a testator gave a share of his estate in trust for his son Charles for life and after his death then to the use of the latter's children and issue in such shares as he should by last will appoint, and in default of such appointment then to the use of all his children who might be living at his death, and in the event of his death without issue, then to the testator's children and the issue of any deceased children, and such son had one child, Charles R., who, in the lifetime of his father, executed a deed of trust of such estate as he might become entitled to in case he survived his father, and the son died without validly exercising his power of appointment and subsequently the grandson died unmarried and without issue, but leaving a will by which he gave his estate to a stranger; it was *held*, that upon the death of the grandson, his share covered by the deed of trust passed under the will of the original testator to the latter's surviving children and the issue of deceased children; and where after the death of the said Charles R., one of the sons of the original testator died leaving a will in which he stated that it was his intention to devise only his individual estate composed of accumulations of income; it was *held*, that the latter's will passed to his residuary legatees his interest in the share left to his brother Charles and which passed to him on the death of Charles R. *Pepper's Estate*, 166 P. S. 304.

129. Where an absolute estate is given to a legatee, a bequest over to take effect in case of the death of the legatee, operates only in case of such death in the

lifetime of the testator. *Budd's Estate*, 12 C. C. 476; s. c. 32 W. N. C. 218.

130. Where there is a gift for life and then over or in case of the death of the remainder-man then to his surviving children, such children living at the death of the testator take vested interests, subject only to be divested in case the remainder-man survives the life tenant. *Breese's Estate*, 13 C. C. 184; s. c. 32 W. N. C. 166.

131. The rule that a gift over in case of the death of the first taker, means such death during the lifetime of the testator, does not apply where there is an intervention of a particular estate; a gift for life and then over, or in case of the death of the remainder-man, then to others, will be construed to mean the death of the remainder-man during the life tenancy. *Breese's Estate*, 13 C. C. 184; s. c. 32 W. N. C. 166.

132. Where a testator devised her real estate in trust to pay four-fifths of the income to four children, and, after the death of a certain child, to pay one half of her share to her daughter for life and the other half to the three surviving children for life, and it was further provided that "the remainder after the decease of one or more of them to be paid as aforesaid to the survivor or survivors of them as aforesaid" and the grandchild and all of the children except one died; it was *held*, that the last surviving child was entitled for life to all of the said four-fifths of the income. *Adams's Estate*, 13 C. C. 417.

133. Upon a gift in trust to pay the income to a child for life and at his death the principal to be paid to his heirs, the remainder does not vest in the children of the life tenant until the latter's death, and the personal representative of the child of the life tenant who died during the lifetime of the latter, takes nothing. *Gibson's Estate*, 14 C. C. 244; s. c. 34 W. N. C. 360.

134. Where a testator bequeathed his real estate to his daughters Sophia and Mary in fee and provided that if either

of them should die unmarried and without issue, her share should go to his son Jacob and the survivor, and if both should die unmarried and without issue, then both shares should go to his son or his heirs, and the son died before either of the daughters and afterwards Mary died without lawful issue; it was *held*, that Sophia became entitled to the whole of the real estate in fee simple, and that the heirs of Jacob took no part thereof. *Eisig's Estate*, 1 York 27.

135. When the object of the petition under the act 18 April 1853 (Brightly's Purdon 1831) is to defeat a contingent remainder, and the petition to sell fails to set forth such purpose, the decree of sale will not give the purchaser such a title as he would be compelled to accept. *Westhafer v. Koons*, 144 P. S. 26.

(c) Cross-remainders.

136. Upon a remainder to children and cross-remainders amongst them, on their dying unmarried and without children, and a proviso that one son should not be paid his share until he reached thirty-five years, the orphans' court has no jurisdiction to grant him an advancement to go into business. *Gould's Estate*, 6 C. C. 639; s. c. 46 L. I. 179.

137. Where a testator left two sons and a married daughter and devised to one son a farm "at \$2650" and to the other a farm "at \$5000," with cross-remainders on the death of either without issue, and he bequeathed the sum of five dollars to his daughter and her husband, each, for their full share; it was *held*, that there was no personal obligation on the devisee to pay the sums at which their farms were valued, nor were said sums charged upon the devisees, so as to raise a fund undisposed of by the will, in which the daughter could share. *Knaub's Estate*, 144 P. S. 322.

VI. Executory devise.

138. Where a testator devised all his real and personal estate to his wife for

life and at her death to his children, "their heirs and assigns," and by a codicil he provided that in case a certain daughter should marry and have heirs, the property which she should receive at the death of his wife should descend to said heirs, but if she should have no children or if the children should die, then over, and there was a further proviso that her share should be invested during her life and that her interest should be paid semiannually; it was *held*, that there was a good executory devise to the daughter, in whom a life estate vested, with remainder to her children, or, failing children, to the persons named in the codicil. *Porter v. Porter*, 6 Del. 158.

139. As to the validity of executory devises, see note to *Nash v. Simpson*, 3 Atlan. 59.

VII. Conditional limitations.

140. An estate to daughters in fee was *held* not to be limited by a subsequent proviso, that any of the testator's children, on becoming destitute, might make the house her home. *Reynolds v. Crispin*, 11 Atlan. 236.

141. Upon a bequest to a wife for life, with a limitation over to nephews and nieces if the wife should die before the testator, the nephews and nieces take nothing upon the wife surviving the husband; and this, though such reading makes the testator die intestate as to the residue. *Geisinger's Appeal*, 1 Mona. 600; s. c. 17 Atlan. 222; affirming *Mesner's Estate*, 1 Northam. 301.

142. A restraint of alienation so long as another and his heirs shall be in possession of another tract, is indefinite, uncertain and void, and the devisee takes a fee without restriction. *Hartman v. Herbine*, 7 C. C. 630.

143. Under the intestate act of 8 April 1883 (Brightly's Purdon 1067), the birth of issue is not essential to an estate by curtesy in Pennsylvania; but where real estate was devised to a

daughter, with the provision that if she should die before attaining the age of twenty-five years without leaving any children, her share should revert and become part of the testator's residuary estate, and the daughter married and died intestate under the age of twenty-five years and without ever having had issue; it was *held*, that the daughter had no descendible estate in the land and her husband was not entitled to curtesy. *McMasters v. Negley*, 152 P. S. 303.

144. An attempt at an executory limitation in case of the death of the devisees without direct heirs, was *held* to transgress the rule that it must not be within the power of the first taker to defeat the devise over either by the execution of a deed or a will. *Fisher v. Wister*, 154 P. S. 65.

145. Where a testator, after an absolute devise to his two daughters, directed that the same should be for their sole and separate use, free from any and all control of their respective husbands, and if either should die before her husband, that the property should vest in her children, and that the husband should have no interest therein, and one of the daughters died prior to her husband; it was *held*, that the limitation over took effect at her death, and that her contingent bequest vested in her children. *Gormley's Estate*, 154 P. S. 378.

146. The words "die without leaving issue" refer presumably to an indefinite failure of issue, but this presumption will yield to a contrary apparent intent; where a testator devised land to his son Hugh and further declared that "if either Hugh or Martha should die leaving no issue, then their estate shall descend equal shares alike to the two sisters and Hugh or Martha or survivors, that is, the three survivors of the four shall have equal shares"; it was *held*, that the testator had in mind a definite failure of issue at the time of Hugh's or Martha's death and that upon the happening of such contingency by the death of Hugh,

his estate was defeated by the coming into existence of the devise over to the three surviving sisters. *Cameron v. Coy*, 165 P. S. 290.

See DEVISE, V. (b).

VIII. Estate durante viduitate.

147. A devise to a son's widow "while she remains the widow, in fee simple" vests a life estate in the devisee terminable on her marriage. *McGuire's Appeal*, 11 Atlan. 72.

148. A devise of land to a widow as long as she shall remain unmarried, means no more than during widowhood; a power of sale will not enlarge the devise into a fee. *Long v. Paul*, 127 P. S. 456; affirming *Paul v. Long*, 1 Northam. 195.

149. The estate of the devisees was held to be an estate for their joint lives, subject to be divested as to either one marrying, with alternative remainder in fee to the survivor. *Myers v. Bentz*, 127 P. S. 222.

150. Where the premises of a deed conveyed a fee, but the *habendum* clause conveyed but an estate *durante viduitate*, it was *held* that the latter was the controlling clause. *Whitby v. Duffy*, 135 P. S. 620; s. c. 26 W. N. C. 245; affirming s. c. 7 Lanc. 201.

151. Upon a devise of all the real and personal property to a wife during her natural life or so long as she remains my widow, to be applied by her for her own proper use and for the maintenance and education of the minor children, with power in the executors to sell, if necessary for that purpose, and a further provision that after death or remarriage all the remaining part be sold and disposed of, and the proceeds divided among the children; where the widow was one of the executors; it was *held*, that she took the right of possession and use of the personal estate as widow and legatee and not as executrix, that she was not confined to the income, nor could she have been required to give security, and on her

death, the surviving executor was chargeable only with such personal estate as was then remaining. *Heppenstall's Estate*, 144 P. S. 259.

152. Upon a provision in restraint of marriage operating by way of limitation, the widow takes merely a life estate; her interest ends either at her death or upon her remarriage. *Schaeffer v. Messersmith*, 10 C. C. 366.

153. Where a testator devised all his real and personal property to his widow during widowhood, and after such time to his daughter for her use and heirs forever, and the daughter died before the testator without issue and the widow survived the testator; it was *held*, that the devise and bequest to the daughter lapsed and there being no devise or bequest over after the bequest to the widow during widowhood, the widow's interest in the personalty was absolute. *Markey's Estate*, 8 York 95.

154. Upon a devise of real and personal property to a widow "to be occupied and used by her as and for a family home during her widowhood"; it was *held*, that the wife took an estate during widowhood and not in fee. *Patton v. Church*, 168 P. S. 321.

155. Where a widow who was executrix and sole devisee *durante viduitate* collected rents as executrix even after her subsequent marriage; it was *held*, that she was not liable for the same as executrix and that the question of her liability could not be determined in the orphans' court and a petition for an account was dismissed. *Miller's Estate*, 4 Dist. Rep. 408.

IX. Vested devises.

(a) When a devise vests.

156. A devise of income to three children, naming them, vests in each of the children. The incident of survivorship is taken from the joint tenancy, by the act of 31 March 1812 (*Brightly's Purdon* 1089). *Kollock's v. Estate*, 7 C. C. 348; s. c. 46 L. I. 281.

157. Upon a devise to the children of

testator's son, "to be divided between them when the youngest shall arrive at the age of twenty-one years," the rent to be appropriated to their education until the youngest arrives at legal age; the estate was vested in the children subject to open and let in after-born children. Such devise was not in violation of the rules against perpetuities or accumulation. So, there can be no partition during the minority of any. *Larkin's Estate*, 4 Del. 340.

158. Upon a devise of a house and lot in trust to hold, use and sell the same in the discretion of the trustee for the benefit of the testatrix's son "and his children now born, and when the youngest of said children shall arrive at full age" then to distribute the same; it was *held*, that the "children now born" of the son were intended to take a vested beneficial interest. *Arthurs's Estate*, 41 P. L. J. 28.

159. Upon a devise to a wife during her natural life of the use and occupancy, rents, issues and profits of the testator's real estate with power "to divide and parcel out the same amongst my five sons upon such conditions and terms as she shall deem just and right; it was *held*, that the five sons took a vested remainder and that upon the death of one of them, it passed to his heirs. *Schwartz's Estate*, 36 W. N. C. 337.

See DEVISE, V. (a).

LEGACY, X.

(b) Effect of acceptance.

160. The acceptance of a devise, coupled with a direction to pay a certain sum to a third party, creates a personal liability which the latter may enforce by an action of debt. *Headley v. Renner*, 129 P. S. 542.

161. If a devisee accept a devise at a price to be paid by him, the land in his hands is changed with a lien for such price, which is superior to subsequent judgments entered against him. A release by a trustee for the person entitled to the valuation money, though duly recorded, will not, as against subsequent

judgment creditors, relieve the land from the charge, if it appears that the release was without consideration. *Lancaster County National Bank's Appeal*, 127 P. S. 214.

162. If a devisee accepts property at a valuation, he is not liable for interest on the valuation from decedent's death to the time when the title was made over to him. *Daisz's Estate*, 6 Lanc. 177; affirmed in *Daisz's Appeal*, 128 P. S. 572.

163. That a devisee of land took possession, retained possession for years, paid taxes, etc., is evidence of an acceptance of the devise. *Rape v. Smith*, 3 Cent. 385.

X. Equitable conversion.

164. An absolute necessity to sell in order to execute the will, operates as an equitable conversion from the time of testator's death. *Paist's Appeal*, 1 Mona. 523; s. c. 17 Atlan. 6.

165. A devise of land to an executor, to be divided and distributed among children, implies an intended absolute conversion into personalty. *Laughlin's Estate*, 131 P. S. 333; affirming s. c. 36 P. L. J. 189.

166. A power given to executors to sell any portion of the real or personal property, if unnecessary to make a fair and equitable division of the estate, does not work an equitable conversion of the real estate. *Sheridan v. Sheridan*, 136 P. S. 14; s. c. 25 W. N. C. 254.

167. A naked power of sale does not convert the real estate into personalty so as to bar a devisee from bringing suit for partition. *Ibid.*

168. If the power of the executors to sell, depend on the contingency that co-tenants should sell and that they should receive the same price as the co-tenants, there is no conversion. *Comm'th v. Gordon*, 5 Cent. 276.

169. Where the will works a conversion, and the heirs subsequently agree to divide the realty and take in lieu of money, they take as purchasers. *Patterson's Appeal*, 5 Cent. 457.

170. Upon a conversion of real estate by a direction to executors to sell, the proceeds should be distributed as required by the character of personalty. *Lomeson's Estate*, 5 Kulp 405.

171. Notwithstanding an intention to convert and divide amongst charities, yet, if the devise to the charities fail, there being no necessity for the conversion, the land will descend to the heir as if the testator had died intestate. *Luffberry's Appeal*, 125 P. S. 513; affirming *Hodges's Estate*, 45 L. I. 282.

172. A condition annexed to a devise, that the devisee pay one thousand dollars, a deed for the land being already executed and left in escrow by the testator, does not work an equitable conversion; the devisee took under the deed, and the grant became void when the grantee refused to pay. *Smith's Estate*, 6 Kulp 76.

173. An equitable conversion is not effected by a direction to sell which is contingent. *Machemer's Estate*, 140 P. S. 544.

174. Where a testator blends his real and personal estate so as to show that he intends to create a common fund and to bequeath the fund as money, a conversion of the real estate will be implied. *Marshall's Estate*, 147 P. S. 77.

175. Where a testatrix bequeathed the balance of her personal property, after the payment of debts and legacies, to her two sisters, and authorized, empowered and directed her executors to sell a certain house in order to pay such debts and legacies; it was held, that the power of sale was absolute and worked a conversion of the real estate, and that one of the heirs at law could not abate a certain amount of his claim so as to prevent a deficit, and thereupon claim that the sale of the house was unnecessary and no conversion was effected. *Adams's Estate*, 148 P. S. 394; reversing s. c. 9 C. C. 664.

176. Where real estate was conveyed to trustees to hold for one person for life, and upon her death in trust for two others in equal moieties as tenants in common, and with power of sale and reinvestment,

and the trustees sold the real estate during the life tenancy and invested it in mortgages, which investment continued until the death of the life tenant; it was held, that the sale worked a conversion. *Lackey's Estate*, 149 P. S. 7.

177. A direction in a will, to produce an equitable conversion, must be positive and explicit, irrespective of all contingencies and independent of all discretion. *Becker's Estate*, 150 P. S. 524; affirming s. c. 9 Lanc. 225.

178. A mere naked power of sale will work a conversion where it is clear from the face of the will that it was the testator's intention that the power should be exercised. *Fahnestock v. Fahnestock*, 152 P. S. 56.

179. Where it is agreed that trustees shall purchase land for the use of the *cestui que trusts*, and sell the same for the purpose of converting it into money and distributing the proceeds to the *cestui que trusts* in proportion to their interests, such an agreement works a conversion, and a purchaser from the trustees takes free from liens against the *cestui que trusts* and unaffected by the dower of their wives. *Hunter v. Anderson*, 152 P. S. 386.

180. The real estate of a testator lying in other states, which he has directed to be sold, and the proceeds from which he has given to persons and objects in this state, are converted by the direction to sell, and are subject to the collateral inheritance tax. *Williamson's Estate*, 153 P. S. 508; reversing s. c. 11 C. C. 235.

181. Where land was devised to tenants for life, and after their death it was directed to be sold and the proceeds distributed among their children; it was held, that the direction of the testator to sell the land worked a conversion, and the children had no title which was subject to lien, and a sale of the land on a *feri facias* against the children issued upon a bond accompanying a mortgage executed by the life tenants and their children, would pass no title to the purchaser. *McClellan's Estate*, 158 P. S. 639. See *Henry v. McClellan*, 146 P. S. 34.

182. Where the question of equitable conversion concerns the parties, and not a stranger, it cannot be raised as a bar to a right to partition. *Sill v. Blaney*, 159 P. S. 264.

183. Where there is no absolute direction to sell land, there is no equitable conversion of it. *Sill v. Blaney*, 159 P. S. 264.

184. A sale of land to establish a conversion cannot be proven by a verbal agreement of the executors to sell the same. *Darlington v. Darlington*, 160 P. S. 65.

185. A bare power of sale, for the payment of debts and funeral expenses, does not work a conversion where the power is not exercised by reason of the sufficiency of the personal assets. *Darlington v. Darlington*, 160 P. S. 65.

186. Where a testator authorizes land devised to his wife for life to be sold by a trustee appointed by the orphans' court if the wife deems it to her advantage, and such a sale is made; the proceeds are not personal property applicable to the payment of the testator's debts in preference to real estate devised in the residuary clause to the wife in fee. *Pyott's Estate*, 160 P. S. 441.

187. Where a testator directed that his farm should not be sold during the life of his wife, but if she should survive him, it should be sold at public sale and the proceeds equally divided between his children; it was held, that there was a conversion at testator's death, and that the children took a vested interest at the testator's death. *Thomman's Estate*, 161 P. S. 444.

188. Where a testator in his lifetime enters into an article of agreement to sell a house and lot, such agreement works an equitable conversion, and the vendor's interest becomes a *chose in action*, which goes to his executors, who are alone the only persons who have the right to use the legal title of the land to enforce the collection of the purchase money. Where such a suit was brought by other devisees, it was held, that the executor was entitled

to be substituted as a plaintiff in the suit. *Bender v. Luckenbach*, 162 P. S. 18.

189. In order to work a conversion, there must be either a positive direction to sell, an absolute necessity to sell or such a blending of the realty and personalty as to clearly show that the testator intended to create a fund out of both and to bequeath the fund as money. *Irwin v. Patchen*, 164 P. S. 51.

190. Where the tenant of a base fee released her interest to a similar co-tenant and when the latter died defeating his estate, the orphans' court sold his land as a fee simple and two remaindermen accepted their shares of the purchase money as if the estate was a fee simple; it was *held*, that the latter were estopped from disputing the title of the purchaser at the orphans' court sale to a fee in the land. *Cameron v. Coy*, 165 P. S. 290.

191. Where real estate is converted into personal estate by trustees, in pursuance of a power granted to them by will, such conversion is actual and legal, and upon the death of the *cestui que trust*, the property passes according to its actual status at that time. *Ingersoll's Estate*, 36 W. N. C. 249; modifying s. c. 15 C. C. 19. Such is not the case, however, where the conversion is effected by the act of a stranger under some legal right, as where a ground-rent in the hands of trustees is paid off and extinguished. *Ingersoll's Estate*, 167 P. S. 536; s. c. 36 W. N. C. 253.

192. An agreement that land of equal value be substituted for "personal securities," directed by the will to be held for the benefit of the wife for life, does not operate as a conversion of the land into personalty. *Wood's Estate*, 9 C. C. 429; s. c. 27 W. N. C. 515; 48 L. I. 57.

193. Where a testator gave his widow the use of his farm during her life, and provided that should she choose to sell it, then she was to have a certain amount of the proceeds and the balance was to go to his children; and it was further provided that after her death his children should sell the farm and divide the proceeds; it

was *held*, that a transfer by one of the sons of his interest in the estate, stated to be a one-fourth interest in certain real estate therein described, constituted an election to take as realty and passed a good title. *Major's Estate*, 11 C. C. 359.

194. Where it appeared to be the intention of the testator that the residue of his real estate should be converted into money and distributed as such; it was *held*, that there was an equitable conversion, and a distributive share was awarded to the assignee of the distributee in preference to prior judgment creditors. *Stallman's Estate*, 13 C. C. 111. See *Espen-ship's Estate*, 13 C. C. 294.

195. Where a testator devised a dwelling-house and lot to his wife during her natural life, with the privilege of purchasing the fee by paying to his heirs or executors a certain sum of money, and he further directed that should the house continue to be enjoyed by his wife as a life estate until her decease, then or at whatever time thereafter, within ten years, the said lot should be sold and whether sold to his wife or after her decease the proceeds should be equally divided between his three children or their legal representatives, and the widow never elected to purchase; it was *held*, that a son who survived the testator, but died before the widow, had a vested interest in the property; that there was an equitable conversion of the realty and therefore partition would not lie and that the words "legal representatives" in the will included real as well as personal representatives. *Ran-kin's Estate*, 13 C. C. 617.

196. Where a power of sale is given to executors to sell the realty no conversion is worked thereby, and until the realty is actually subjected to the payment of legacies charged thereon, the devisee is entitled to the rents, and not the legatees. *Watts's Estate*, 168 P. S. 430; s. c. 36 W. N. C. 372; affirming s. c. 14 C. C. 625.

197. Where money is applied by trustees under a power to the purchase of real estate, it is not thereby converted into realty for the purposes of distribu-

tion; realty will be distributed to the same persons and in the same proportions as if the money had been invested in personalty. *Ingersoll's Estate*, 15 C. C. 19; s. c. 36 W. N. C. 249, 251.

198. Where the owner of an annuity, which was charged by will on certain real estate, which was vested in her two sons, released the real estate and accepted a bond and mortgage on the same lands, and she subsequently assigned the bond and mortgage to a trustee in trust to pay her the interest during her life and upon her death to assign them to her said sons, their heirs, executors, administrators or assigns, and the deed of assignment further set forth that it was her wish that her sons after her decease should be entitled to the principal and that they should be placed in the same position as if the premises had never been released from the yearly charge; it was *held*, upon the payment of the mortgage after the death of the assignor, that the fund must be treated as real estate and be distributed to the persons who would be entitled to the real estate if the release had not been executed. *Pechin v. Brooke*, 5 Del. 93.

199. Where a will directed that after the death of the testator's wife, the real estate and personal property be sold or, if it can, that it be divided to the satisfaction of the heirs and it was further provided that after certain legacies are deducted "let the real estate and personal property be divided into seven equal shares"; it was *held*, that there was an equitable conversion of the real estate into personalty. *McConomy's Estate*, 170 P. S. 140; affirming s. c. 12 Lanc. 113.

200. Where a testator devised his estate to be kept intact for a number of years and then to be sold; it was *held*, that there was a conversion of the realty into personalty and a claim against the estate would attach upon the fund and would not be barred by the statute of limitations, although the creditor waited for more than six years until the final purpose of the testator was accomplished. *Young's Estate*, 2 Northam. 365.

201. Where a testatrix gave her real estate to her husband for life and directed that upon his death it be sold and divided among three legatees, one of whom died before the testatrix; it was *held*, that the purpose of the conversion of the real estate had failed as to the lapsed legacy, which remained unconverted real estate which went to the heirs at law and not to the next of kin. *Worsley's Estate*, 36 W. N. C. 247; s. c. 4 Dist. Rep. 177.

202. Where a testator directed all his estate, real and personal, to be sold by his executors and then disposed of the proceeds; it was *held*, that such positive and unequivocal directions operated as an equitable conversion. *Wolf v. Porter*, 7 York 194. See *Schue's Estate*, 7 York 178.

203. Where land was equitably converted by will and a plaintiff levied, condemned and sold a legatee's interest as land; it was *held*, upon a distribution of the proceeds, that the plaintiff was estopped from denying that it was land and the proceeds were awarded to a prior lien creditor. *Wolf v. Porter*, 7 York 194.

XI. Construction of particular devises.

204. Devisees of a life estate, with a power of disposition in the survivor, with no devise over, can consent to the exercise of the power at any time, and all joining in the deed, the survivor would be estopped from asserting a right contrary to it. *Myers v. Bentz*, 127 P. S. 222.

205. Upon a devise of a residue to the widow for life, and, if she should die before the testator then over, and the widow surviving the testator and electing to take against the will; it was *held*, that the testator died intestate as to such residue and that the same went to his heirs-at-law. *Geisinger's Appeal*, 1 Mona. 600; s. c. 17 Atlan. 222; affirming *Mesner's Estate*, 1 Northam. 301.

206. Where a testator left to each of

his children an undivided interest for life, to be forfeited on withdrawal from the family, a child by so withdrawing forfeits her life estate only. The fee, being undisposed of, passes under the intestate laws. *Bell v. Fulton*, 1 Atl. 579.

207. Where, after a specific bequest, it is provided by codicil that the legatee shall receive "only the sum of one dollar as the full amount of his share," this does not exclude him from sharing in that part of the estate of which the deceased died intestate. *Bell's Estate*, 8 C. C. 454.

208. Upon a devise to a widow of the interest on six thousand dollars during life, with a further provision that until the estate should be settled she should be entitled to half the proceeds of the farm, it was held, that the annual interest on the six thousand dollars did not begin to run until the farm was sold. *Good's Appeal*, 13 Atl. 773; s. c. 12 Cent. 418.

209. Upon a devise of the whole estate to "be settled and divided by law" to widow and children, distribution should follow the intestate laws. *Cleaver's Estate*, 38 P. L. J. 94.

210. Upon a devise to "nearest relatives," the testator leaving two sisters and children of a deceased sister, the sister takes to the exclusion of the nephews and nieces. *White's Estate*, 48 L. I. 5.

211. Upon a devise to a husband for life of the net income, charged with the payment to two daughters of a weekly sum until final settlement, and the husband dying first, the daughters were simply entitled to share equally in the final distribution. *Smith's Estate*, 48 L. I. 46.

212. Where a testator devised his property to trustees directing that certain sums be paid out of the income annually during life, the net balance of income to be divided annually *per stirpes* among his five living children, the issue of two deceased children and the issue of any other of his children who might die leaving issue, and upon the death of the last

survivor of testator's children, it was directed that the principal was to be divided equally *per stirpes* among the issue then living of the seven children; it was held, that the distributees of the income at each annual distribution were the living children of the testator and the living issue of deceased children, and that each child living at the death of the testator took a vested interest in the income but for his own life only and not for the life of the last survivor, and that therefore, on the death of a son without issue, his share fell in, and his administrator was not entitled to any income subsequently accruing. *Rowland's Estate*, 141 P. S. 553; reversing s. c. 7 C. C. 327. See *Rowland's Estate*, 151 P. S. 25.

213. Upon a devise to three children of a son, naming them, "and such other children lawful issue which he may have, the said sum to accumulate until the youngest surviving of these children shall have attained the age of twenty-one years"; it was held, that the words "youngest surviving" referred to the children named and that the persons entitled to the fund at the time of distribution were the children of the son, or their issue living when the youngest survivor of the three children named attained the age of twenty-one years; such a construction saved the will from transgressing the act 18 April 1853, sec. 9 (Brightly's Purdon 1833), limiting the period of a trust for accumulation to twenty-one years after the death of the testator. *McBride's Estate*, 152 P. S. 192.

214. Where a father and son entered into a contract by which the father agreed to devise certain real estate to his son in consideration of the latter supporting his father and mother during life; the father, however, to furnish all the grain and provisions for both families, and the father died and devised the real estate to his son; it was held, that the son was entitled to be furnished the grain and provisions by his father's executors during the widow's lifetime or their equivalent in money. *Zorger's Estate*, 3 York 1.

DISABILITIES.

See LIMITATION.

DISCONTINUANCE.

See HUSBAND AND WIFE, XI.: PRACTICE, XVI.

DISCOVERY.

See EQUITY, XIX.

DISQUALIFYING INTEREST.

See EVIDENCE, XXXVIII.

DISTRESS.

See LANDLORD AND TENANT.

DISTRIBUTION.

See ASSIGNMENT FOR CREDITORS: DECEDENTS' ESTATES, VI.: EXECUTION, XVI.

DISTRICT ATTORNEY.

See CRIMINAL LAW.

1. It is as much the duty of the district attorney (or of private counsel employed to assist him) to see that no innocent man suffers, as to see that no guilty man escapes. *Comm'th v. Nicely*, 130 P. S. 261.

2. Where, on the removal of a criminal case to the supreme court, an application is made under the act 19 May 1887 (Brightly's Purdon 565) for the payment by the county of the district attorney's expenses and compensation; it is the duty of the court below to fix the amount of the same. *Comm'th v. Morningstar*, 144 P. S. 103. See s. c. 12 C. C. 34.

3. The district attorney of Allegheny county with the sanction of the court and the county commissioners has authority to appoint a deputy to assist in the trial of causes and the salary board has authority to authorize such employment and fix the

salary. *Comm'th v. Grier*, 39 P. L. J. 243.

4. The act 31 March 1876 (Brightly's Purdon 455) applies to Allegheny county and repeals all local acts relating to the fees of the district attorney's office; the entire fees earned by the office are to be credited to the district attorney so far as necessary for the payment of his deputy and clerks, and this includes such fees as may be allowed by the court on forfeited recognizances collected. The assistant district attorney of Allegheny county is an independent officer without fees but with a salary to be paid by the county. *Comm'th v. Grier*, 152 P. S. 176; affirming s. c. 40 P. L. J. 16.

5. The expediency of jointly indicting prisoners is for the district attorney to determine and not for the judge. *Franklin's Appeal*, 163 P. S. 1.

6. Where the district attorney upon the trial of an indictment for murder makes statements as to the defendant's character, which are not warranted by the evidence and which tend to prejudice the jury, the defendant will be granted a new trial. *Comm'th v. Brunner*, 11 C. C. 428.

7. Under the act 3 May 1850 (Brightly's Purdon 679), the district attorney has conferred upon him the power to make suggestions for writs of *quo warranto* as to county officers, originally conferred upon the deputy attorney-general by the act 14 June 1836 (Brightly's Purdon 1773). *Comm'th v. Allen*, 15 C. C. 257.

8. Indictments for receiving stolen goods being triable in the oyer and terminer while indictments for larceny are triable in the quarter sessions, the district attorney may try a single offender upon both indictments in the higher court; and this, although his fees thereby are largely increased. And in such case the clerk is entitled to the fees provided by law for the court in which the record is found. *Comm'th v. Moore*, 4 Del. 617.

9. The court will not interfere with the discretion of the district attorney in press-

ing prosecutions or using leniency when the circumstances of the case show that such discretion is being properly exercised; the act 12 March 1866 (Brightly's Purdon 680) authorizing the court to direct private counsel to prosecute is not mandatory. *Comm'th v. Dawson*, 3 Dist. Rep. 603.

10. A *quo warranto* to try the validity of a city charter will not issue on the suggestion of the district attorney. *Comm'th v. Chidsey*, 1 Northam. 345.

DIVORCE.

See CONFLICT OF LAWS: HUSBAND AND WIFE, XI.

DOCKS.

See PHILADELPHIA, III.

DOMESTIC ATTACHMENT.

See ATTACHMENT, II.

DOMICIL.

See ATTACHMENT, I.: CONFLICT OF LAWS.

1. Upon an issue to determine the domicile of a testator, where it appeared that testator's domicile of origin was West Chester, Pennsylvania, that his domicile of choice was Brooklyn, New York, and that having purchased a farm near West Chester, he returned from Brooklyn to West Chester, where he died; it was *held*, that the burden of proof was upon the plaintiff to establish that the testator was a resident of Pennsylvania, and it was not error to charge that if the jury concluded that the testator abandoned his residence in Brooklyn with the intention of residing on his farm or in Philadelphia, but died before consummating that intention, Brooklyn continued to be his legal place of residence. *Price v. Price*, 156 P. S. 617.

2. Domicil is a question of intention; it does not conclusively follow that the

place where a person votes and where for business reasons he rents a house in which he lives for sixteen months prior to his death, is his legal domicile, if there be sufficient evidence to show that he never intended to abandon his original place of domicile. The casual character of a person's residence may be shown by his declarations where the latter are untainted with any motive of self-interest. *Mintzer's Estate*, 13 C. C. 465; s. c. 2 Dist. Rep. 584.

3. Where a corporation is incorporated by this commonwealth and its principal office is located out of the state, and none of the officers upon whom process can be served reside in this state, the domicile of such corporation remains in this state and service of a bill in equity upon such a corporation must be made by publication as prescribed by the act 11 April 1862, sec. 2 (Brightly's Purdon 429). *Newton v. Pittston Coal Co.*, 7 Kulp 11.

DOWER.

See EQUITY, XV.: HUSBAND AND WIFE, IX.

DUPLICITY.

See CRIMINAL LAW, IX.: PLEADING.

DURESS.

1. A judgment on a bond given in settlement of a prosecution for fornication and bastardy, will not be opened on an averment that it was executed while the defendant was in prison, that he was innocent, that no living child had been born of the obligee, who had died unmarried and without issue. The duress was one of law. *Pflaum v. McClintock*, 130 P. S. 369.

2. The payment of a bonus on new stock by a stockholder under protest, though illegally demanded, cannot be recovered back, where the facts show no duress, but simply the denial of a right.

De la Cuesta v. Insurance Co. of North America, 136 P. S. 62, 658; s. c. 26 W. N. C. 377.

3. Where articles of separation were accompanied by a bond for the wife's support which was signed by the obligor's mother; it was *held*, that an affidavit of defence to the bond, that the defendants were induced to sign it by the threat of the arrest of the husband for adultery, was insufficient to prevent judgment, where there was no averment that there was an agreement not to prosecute, or that the obligors would not have signed without such an agreement. *Hamilton v. Lockhart*, 158 P. S. 452.

4. An assignment by a debtor to a creditor will not be set aside on the ground of duress though the assignment was the result of a threat by the creditor to arrest the assignor, where the evidence does not show that there was any arrest or process of arrest or prosecution, or that there was any officer ready to arrest, and the evidence did show that the threat was not made directly to the debtor, but to a friend who communicated it to him. *Phillips v. Henry*, 160 P. S. 24; affirming s. c. 10 Montg. 9.

5. An assignee for creditors has no standing to plead duress of his assignor for the purpose of setting aside an otherwise legitimate transfer of property made by the assignor to pay an honest debt. *Phillips v. Henry*, 160 P. S. 24; affirming s. c. 10 Montg. 9.

6. Where a defendant was improperly convicted of peddling before a justice who refused to take bail, and the defendant then paid the fine under protest and in order to save himself from going to jail; it was *held*, that such payment was under duress and did not estop the defendant from contesting the proceedings on *certiorari*. *Comm'th v. Horn*, 12 C. C. 284.

7. Money paid under a claim of right cannot be recovered back unless the payment was made under compulsion, actual, present and potential, under process available for instant seizure of person or property, when the party so paying gave notice

of the illegality of the demand and of his involuntary payment; the threat of legal process is not such a duress. *Peters v. Kraft*, 7 Montg. 201; s. c. 4 Del. 577.

8. Where the original judgment was upon a note given by a weak and ignorant man threatened with arrest for felony, though no felony had been committed, and the judgment had been revived by default, the court opened the judgment even after the lapse of thirteen years and the making of two payments on account. *Brumbaugh v. Fink*, 5 York 98.

9. To constitute duress by imprisonment, it must be unlawful; an imprisonment is unlawful, even where the person is arrested under a legal warrant executed by proper officers, if one of the objects of the arrest was to extort money or enforce the settlement of a civil claim. *Fillman v. Ryon*, 168 P. S. 484; s. c. 36 W. N. C. 391.

10. As to what constitutes duress, see a brief of authorities in note to *Lomerson v. Johnson*, 13 Atlan. 17.

DYING DECLARATIONS.

See EVIDENCE, XXX.

EASEMENTS AND SERVITUDES.

See INJUNCTION, IV.: WAYS.

1. The owner of ground through which a channel for surface water has flown for a long time, is liable in damages for diverting the same upon the land of his neighbor. *Rhoads v. Davidheiser*, 133 P. S. 226; s. c. 25 W. N. C. 513.

2. The right to maintain water upon adjoining property at a certain height by a mill-owner, may be acquired by user for twenty-one years; the extent of such an easement is the height of the water at its ordinary level as compared with known water-marks. *McGeorge v. Hoffman*, 133 P. S. 381. See *Gehman v. Erdman*, 105 Ibid. 371.

3. Where one lot-owner had the right to carry surface water by a covered drain over another's land, and used it to drain

his cesspool, the exercise of the right might be abated entirely until means had been taken to reduce it within its proper limits. *Crosland v. Pottsville Borough*, 126 P. S. 511.

4. One who purchases a lower farm, must take notice of the rights of an owner of an upper farm as to drainage. *Bellas v. Pardoe*, 15 Atlan. 662.

5. Persons having no interest in a water-course as riparian owners, cannot sue for damages the alienee of the party who obstructed it, and thereby caused injury to their property. Such damages are properly chargeable to him by whom the trespass was committed. *Schlag v. Jones*, 131 P. S. 62.

6. Where a township has acquired an easement to flow water over certain land, whether by grant or prescription, more than a mere non-user for three years is required to destroy it; so, it is not within the power of one supervisor to grant a surrender of it. *Eshleman v. Martic Township*, 152 P. S. 68.

7. In a proceeding under the act 10 June 1893 (Brightly's Purdon 426), for the termination of an easement which has been abandoned by a corporation possessing the right of eminent domain, where it appears that there are no facts in dispute, the court will not frame an issue requiring the intervention of a jury. *Delaware & Hudson Canal Co. v. Genet*, 169 P. S. 343; affirming s. c. 15 C. C. 215.

8. Where a testator confirmed a gift previously made in his lifetime to two of his children as follows: "I give and bequeath my said grocery store, the stock, fixtures and business," to said two children, and he then devised all his real estate to all his children as tenants in common, and it appeared that the grocery store was in one of testator's houses; it was held, that the two children took merely an easement to carry on the grocery business in the store, and that such easement ceased by non-user when they discontinued the business. *Spellbrink's Estate*, 15 C. C. 506.

9. A person boring for oil or gas hav-

ing knowledge that neighboring water-wells are supplied from a stratum of clear water, and that a deeper stratum of salt water when penetrated by such boring is likely to rise and mingle with the fresh, is liable for a failure to use means to prevent such mingling, which he might do by a reasonable outlay. *Colins v. Chartier's Valley Gas Co.*, 131 P. S. 143; s. c. 139 Ibid. 111; 27 W. N. C. 217. See *Pennsylvania Coal Co. v. Sanderson*, 113 P. S. 126; *Lybe's Appeal*, 106 Ibid. 634.

10. Under a deed conveying all the merchantable coal lying and being within certain boundaries with the free and uninterrupted right of way for the purpose of digging, mining and carrying away the said coal, the grantee has no right to take through the pit or over the surface of the tract, coal from an adjoining tract owned by him; and this, though both tracts were formerly owned by one person, who used a visible road or way over the surface of the coal conveyed, to transport coal from the other tract. *Webber v. Vogel*, 159 P. S. 235.

11. Equity will not interfere by way of a mandatory injunction to restrain the maintenance of structures upon an adjoining lot in violation of restrictive conditions in a deed, when there has been long-continued delay in asserting the right and a remedy exists at law. *Orne v. Fridenberg*, 143 P. S. 487.

12. The violation of a building restriction in a deed may not be restrained, where there has been a change of surroundings in the neighborhood, in the character of the improvements and in the purposes to which they are applied. *Orne v. Fridenberg*, 143 P. S. 487.

13. Where a continuous and apparent servitude is imposed upon one portion of land for the benefit of another portion, by the owner thereof, who subsequently conveys the portions to different persons, the purchaser of the servient property takes it subject to the easement or servitude so imposed. *Geible v. Smith*, 146 P. S. 276; *Ormsby v. Pinkerton*, 159 P. S. 458.

14. Where the owner of two lots built a house on one of them, the cornice of which projected over the other lot, and he subsequently sold the house and the land on which the house stood, and by subsequent conveyances the title to the other lot came to the plaintiff and the title to the house came back to the original owner; it was *held*, that the latter's right to maintain the cornice could not be controverted by the plaintiff. *Grace Methodist Episcopal Church v. Dobbins*, 153 P. S. 294; reversing s. c. 12 C. C. 375.

15. Where an owner of land, one part of which is lower than the other, digs a ditch over both parts to serve as a surface water-course, and then sells the lower part to one purchaser and the upper part to another, the former takes subject to the servitude imposed upon the land by his vendor. *Sharpe v. Scheible*, 162 P. S. 341.

16. In an action for purchase money of real estate, it was *held*, that where a deed in a vendor's line of title contains a condition that no mill, factory, brewery or distillery shall be erected on the land, the vendor has not a title which is either good or marketable or clear of all incumbrances; and it was further *held*, that the vendee's agreement to build dwelling-houses did not cure the imperfection in the vendor's title. *Batley v. Foerderer*, 162 P. S. 460; reversing s. c. 34 W. N. C. 37.

17. Where an owner of three adjoining lots executed three deeds on the same day to three different persons, and the deed for the middle lot contained a covenant that the grantee should not build upon the rear of the lot, but the other two deeds did not refer to such restriction, but did recite the fact of the conveyance; it was *held*, that the restriction was in the nature of a covenant running with the land, and created an easement of light and air in favor of the adjoining lots. *Muzzarelli v. Hulshizer*, 163 P. S. 643.

18. As to the right to forcibly remove

obstructions to an easement, see note to *Freeman v. Sayre*, 2 Atlan. 654.

ECCLESIASTICAL TRIBUNALS.

See CHURCHES.

EJECTMENT.

- I. When ejectment lies.
 - (a) Generally.
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- II. Who may maintain ejectment.
- III. On what title ejectment lies.
- V. What will defeat an ejectment.
- VI. Of the writ.
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 - (a) Death of plaintiff.
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 - (h) Costs.
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- IX. Mesne profits.
- X. Rule to bring ejectment.

I. When ejectment lies.

(a) Generally.

1. Ejectment lies by a vendor of land against a vendee or his assignee, where there is a default in payment of the interest on the purchase money or an instalment of the principal. *Brown v. Devitt*, 131 P. S. 455; s. c. 26 W. N. C. 55.

2. Upon a contract for the sale of an oil leasehold, ejectment lies to enforce the payment of the purchase money; and an assignee of the vendee cannot defend upon a belief that its lien was lost by the substitution of new notes, and the vendor's release of the right to have the oil run to his credit. *Ibid*.

3. If defendant holds as tenant under the plaintiff, no ejectment will lie, if no notice to quit had previously been given. *Logan v. Quigley*, 11 Atlan. 92.

4. Where an equitable ejectment is

brought by a mortgagor out of the possession against a mortgagee who is in under the mortgage, a tender of the amount due on the mortgage, made before suit brought, is ordinarily a condition precedent to the recovery. If it be alleged that the mortgagee has been paid out of the rents and profits, an account may be taken at the trial to determine the truth of plaintiff's claim and if such account shows the payment of the debt in full, plaintiff is entitled to an unconditional verdict; if, however, such account shows a balance still unpaid, such unpaid balance may be secured by a conditional verdict ascertaining the amount due and enabling the plaintiff to recover subject to its payment. *Crouse v. Binkley*, 167 P. S. 182.

5. Where the legal title to real estate and the right of possession thereunder is involved, the defendant is entitled to a trial by jury, and a court of equity has no jurisdiction by injunction to try the question according to the course of procedure in chancery. *Pennsylvania Canal Co. v. Middletown & Harrisburg Turnpike Co.*, 11 C. C. 582.

See INJUNCTION.

(b) Second ejectment.

6. A verdict and judgment for plaintiff for an undivided part of the land sued for, in an equitable ejectment, is a bar to a subsequent action to recover the other undivided parts of the same land. *Schive v. Fausold*, 137 P. S. 82.

7. One verdict and judgment in an equitable ejectment has all the conclusiveness of a decree in chancery as to every matter therein litigated, and where the record is so general that it does not show what particular matters were litigated, it is competent to show by extrinsic evidence what those matters were. *German-American Title & Trust Co. v. Shallcross*, 147 P. S. 485.

8. An action of ejectment to recover possession of real estate purchased by defendant at a sheriff's sale under an agreement in writing under seal, to reconvey on payment of indebtedness, is an equita-

ble ejectment, and one verdict and judgment are conclusive. *Budd v. Finley*, 151 P. S. 540.

9. One who takes a conveyance of the legal title with knowledge that his grantor has agreed to sell the land to another person, takes it subject to the equitable estate already vested in the first purchaser; an ejectment against such a first purchaser in possession is an equitable ejectment. *Riel v. Gannon*, 161 P. S. 289.

10. An ejectment by the heirs of a decedent against an administrator who has taken a conveyance from a person who bought the land at the administrator's sale, is an equitable ejectment. *Henninger v. Boyer*, 10 C. C. 506.

11. Where creditors have prosecuted their claims to judgment and bought the land at sheriff's sale, an action of ejectment to recover possession upon the ground that the land has been conveyed in fraud of creditors, is a legal ejectment and one verdict and judgment therein is not conclusive between the parties. *Weller v. Dilley*, 12 C. C. 84.

12. Where a second ejectment is between the same parties and the premises and title are the same as a former one, proceedings will be stayed until the costs of the first ejectment are paid. *Reehling v. Writer*, 3 York 95.

II. Who may maintain ejectment.

13. Ejectment lies by a wife against her husband living separate from her, who against her will has taken and retained possession of her real estate. *McKendry v. McKendry*, 131 P. S. 24.

14. A tenant in common may recover in ejectment against a co-tenant who takes possession of the whole premises and asserts title thereto; the actual ouster need not be accompanied by actual force. *Shrauder v. Snyder*, 6 Montg. 66; reversed on another point in s. c. 142 P. S. 1.

15. If the person who was the owner of land at the time of the appropriation by a railroad company dies without having received payment or security, his

right to maintain ejectment devolves upon his heirs. *Oliver v. Pittsburgh V. & C. Railway Co.*, 131 P. S. 408.

16. If a railroad company enters upon land and makes improvements without proceedings to condemn, the owner may bring ejectment; and this, though they entered with his knowledge. But execution will be stayed, on payment of costs, for a time sufficient to condemn the land. *Allegheny Valley Railroad Co. v. Colwell*, 15 Atlan. 927.

17. Where a railroad company enters upon land to construct its road, relying upon the grant of the right of way from an alleged owner and without acquiring the right in condemnation proceedings, a subsequent grantee of the real owner may afterwards maintain ejectment against the company, but upon a recovery the supreme court will stay the execution for a sufficient time to enable the railroad company to condemn the right of way. *Richards v. Buffalo, N. Y. & P. R. R. Co.*, 137 P. S. 524.

18. The holder of the legal title cannot maintain ejectment against the holder of the equitable title. *Wind v. Haas*, 7 Lanc. 121.

19. A party cannot maintain ejectment to enforce specific performance, if he has been guilty of such gross laches as conveyed the idea that he had abandoned his rights. *Randall v. Mulley*, 1 Lack. Jur. 211.

20. A tenant ejected in summary proceedings, which are set aside on writ of error, cannot maintain ejectment, his term having expired before suit brought. *Horner v. Marietta*, 135 P. S. 418; s. c. 38 P. L. J. 112.

21. Where a deed conveyed lands in fee reserving the right to use the lot by the grantors during their joint natural lives, it was *held*, that the instrument was not merely testamentary but a conveyance, and being made in trust for children of the grantor who were minors, created merely a dry trust which was executed on the majority of the beneficiaries; an ejectment therefore for the

recovery of the land by a *cestui que trust*, was properly brought in his own name. *Cable v. Cable*, 146 P. S. 451.

22. Where land was devised to a son during his natural life, and it was provided that if the testator's wife should survive him, she should be maintained out of the products of the land as long as she remained his widow, and after the death of the son the property was devised to the testator's grandson subject to such maintenance, and after the son's death the interest of the grandson was sold by the sheriff; it was *held*, that the grantee of the purchaser could maintain ejectment against the widow, who was merely entitled to a charge upon the land and not to an interest therein which would give her the right of possession. *Walker v. Gibson*, 164 P. S. 512.

23. Where an assignee for creditors disclaims any title to the property in question, the creditors cannot use his name as plaintiff for their use, in an action of ejectment, without first establishing the title in the assignee. *Guarantee Trust Co. v. Powel*, 29 W. N. C. 571.

24. Where the evidence in ejectment disclosed the fact that one of the plaintiffs induced the defendant to buy the tract of land to which he, the plaintiff, claimed title by a prior grant, the court directed a compulsory non-suit as to him, under the act 31 March 1823 (*Brightly's Purdon* 712), and a verdict was subsequently rendered for the other plaintiff who was not a party to the fraud. *Foust v. Northern Central Ry. Co.*, 5 York 34; s. c. 4 Del. 496. See *Foust v. Northern Central Ry. Co.*, 5 York 35.

III. On what title ejectment lies.

25. A plaintiff can recover in ejectment upon a title sustained only by proof of adverse possession for twenty-one years. *Douglas v. Irvine*, 126 P. S. 643. See *Thomson v. Philadelphia and Reading Coal and Iron Co.*, 133 P. S. 46.

26. A plaintiff to entitle him to recover, must show either title out of the commonwealth; or thirty years' possession, as prescribed by the act of 27 April 1855 (*Brightly's Purdon* 1211); or adverse possession for twenty-one years; or that both parties derive title from the same source; or that defendant holds as tenant under the plaintiff; or that plaintiff claims by descent or devise from one who has died seised. *Herber v. Shoemaker*, 7 C. C. 496.

27. If the plaintiff fails to show title from the commonwealth, and claims that the defendant holds through him, he must show how defendant came into possession. *Larned v. Sharpe*, 5 Montg. 31.

28. In ejectment by a grantee of a sheriff's vendee, the plaintiff, showing nothing else, must at least show title or possession in the execution debtor. *Herber v. Shoemaker*, 7 C. C. 496.

29. If the plaintiff relies solely upon his title as a purchaser at sheriff's sale, he must prove the defendant's possession at the time of the levy and sale; otherwise a verdict should be directed for the defendant. *Yost v. Brown*, 126 P. S. 92; affirming s. c. 5 C. C. 526.

30. Upon an agreement at bar that the heirs of a certain person were owners in 1853 for the purpose of partition, and a proof of a regular succession of conveyances to the plaintiff, there is sufficient to sustain a verdict in the latter's favor. *Bunting v. Lutz*, 132 P. S. 192.

31. The plaintiff is not entitled to a verdict upon the mere production of a deed to himself, from one, who is not shown to have either right, title, interest or possession, where it is not shown that both parties claim from the same source, or that defendants entered as tenants of the plaintiff, or that any of plaintiff's predecessors had ever been in possession. *Bonaffon v. Peters*, 134 P. S. 180; s. c. 25 W. N. C. 537.

32. Upon a conveyance of land from a father to his son, a covenant by the son in a collateral agreement to maintain his

sister gives her no interest in the land; she cannot maintain an equitable action of ejectment upon it. *Harkins v. Doran*, 15 Atlan. 928.

33. Where a conveyance was expressly made subject to a specified lien and the grantor testified that the lien, formed part of the purchase money, he could enforce its payment by an action of ejectment against his vendee and a subsequent purchaser. *Schnyder v. Orr*, 149 P. S. 320.

34. A grant of the exclusive right of interment in certain burial lots, subject to the regulations of a cemetery company, conveys no such interest in the land as will support an action of ejectment. *Hancock v. McAvoy*, 151 P. S. 460.

35. Where the franchises and property of a railroad company have been sold at a receiver's sale, the company cannot recover a part of its road-bed by an action of ejectment on the ground of fraud in the sale. *Newcastle Northern Ry. Co. v. Newcastle & Shenango Valley R. R. Co.*, 152 P. S. 96; affirming s. c. 12 C. C. 71.

36. Where an owner of land has agreed to convey land to a railroad company for a right of way, and has let the company into possession, he may enforce the covenants as to the payment of the purchase money, the preservation of a spring and the building of a crossing by an action of ejectment. *Daubert v. Pennsylvania R. R. Co.*, 155 P. S. 178.

37. Where land is unoccupied and unimproved, the title carries with it the possession, and such possession is sufficient to maintain ejectment. *Irwin v. Patchen*, 164 P. S. 51.

38. Upon an executory contract to sell lands to a railroad company for a right of way, where it was stipulated that the company should construct and maintain a good and sufficient crossing over the right of way on the premises; it was held, that the landowner was entitled to have inserted in his deed such an exception and reservation, and that he could maintain equitable ejectment to compel the acceptance by the railroad company of a deed containing such a reservation. *Hall*

v. *Clearfield & Mahoning Ry. Co.*, 168 P. S. 64.

V. What will defeat an ejectment.

39. The refusal of a rule for possession, under the local act of 13 May 1871, is no bar to an action of ejectment by the purchaser at sheriff's sale. *Bartolet v. Saylor*, 12 Atlan. 854; s. c. 11 Cent. 787.

40. A defendant in ejectment establishing a complete legal title, is not affected by an equity without notice thereof. *Stark v. Shippey*, 1 Lack. Jur. 109.

41. Where the defendant in ejectment purchased town lots from the plaintiff, paid the purchase money, went into possession and made improvements, but the deeds, by mistake, conveyed other lots, the defendant is entitled to a verdict. *Trexler v. Fisher*, 130 P. S. 275.

42. Where a terre tenant in possession is not made a party to the *scire facias*, he may, in ejectment, by the purchaser, at sheriff's sale, under a *levari facias*, set up that the mortgage was paid before the sale. *Coursin v. Shrader*, 146 P. S. 475.

43. Where the defendant claimed title by adverse possession for over twenty-one years by Kemp his predecessor, and the plaintiff offered in evidence a lease by his predecessor to Kemp, and the defendant introduced evidence that the lease was given while Kemp was in possession and was executed, not for the purpose of creating the relation of landlord and tenant, but to prevent Kemp's creditors from taking the land in execution, a judgment on a verdict for the defendant was affirmed. *Bidwell v. Evans*, 156 P. S. 30.

VI. Of the writ.

44. The writ of ejectment is admissible in evidence, though not set forth in the plaintiff's abstract of title. *Logan v. Quigley*, 11 Atlan. 92.

45. The misnaming of the township in the *præcipe* and writ in ejectment may be amended under the act of 10 May 1871. *Stimmel v. Miller*, 8 C. C. 128.

VII. Pleading.

46. The misnaming of the township in the *præcipe* and writ in ejectment may be taken advantage of by plea of not guilty; a plea in abatement is not necessary. Doubt was expressed whether a plea in abatement is admissible at all in ejectment. *Stimmel v. Miller*, 8 C. C. 128.

47. Where a contract for the sale of land is set up in the plaintiff's abstract of title, it should be set out with sufficient particularity to take the transaction out of the statute of frauds, and with such averments of facts as will disclose to the adverse party complete information regarding its essential elements. *Melvin v. Handley*, 3 Lack. Jur. 289.

48. In ejectment where the abstract of title omits relevant matters of defence, the court should permit an amendment upon equitable terms. *Meade v. Clarke*, 159 P. S. 159.

49. Upon the trial of an action of ejectment, where it was discovered that the plaintiff's abstract made a mistake in referring to a certain deed given to the party through whom both parties claimed title, the court granted the plaintiff leave to amend. *Foust v. Northern Central Ry. Co.*, 5 York 33.

VIII. Practice.

(a) Death of plaintiff.

50. Where the plaintiff in an action of ejectment dies, his heirs may be substituted in his place, as the parties to the action; and this, whether they desire it or not. *Ballentine v. Negley*, 158 P. S. 475.

51. Upon the death of a plaintiff in ejectment, his heirs may either adopt the pending action or ignore it and institute a suit in their own name. *Reitz v. Thomas*, 13 C. C. 315.

(b) Admission to defend.

52. One who intervenes as a defendant in an ejectment is liable for the costs

upon a verdict and judgment against him. *Donlin v. Donlin*, 5 Kulp 302.

53. Where issue has been joined in an action of ejectment and the plaintiff files an affidavit suggesting the death of the defendant after suit brought, the court will make absolute a rule to amend the record by substituting the tenant for life and residuary legatees under the will of the decedent. *Davis v. Davis*, 13 C. C. 221.

(c) Trial.

54. If in ejectment the defendant set up a resulting trust, the court should determine whether the evidence is sufficient to justify a decree in its favor; if not, a verdict should be ordered for the plaintiff. *Wylie v. Mansley*, 132 P. S. 65; s. c. 25 W. N. C. 279.

55. In ejectment, the only question being one of lines, it was properly left to the jury. *Kime v. Polen*, 8 Atlan. 783.

56. In ejectment by a purchaser at sheriff's sale against a previous vendee of the defendant, the question of fraud in the transfer was properly left to the jury. *Close v. Benjamin*, 9 Atlan. 51.

57. The application of the description in a levy and sheriff's deed to the land, is a question for the jury. *Stroup v. McCloskey*, 3 Cent. 613.

58. An action of ejectment may be referred to arbitrators under the compulsory arbitration act of 16 June 1836 (Brightly's Purdon 125) and in such case a rule of reference may be entered without filing a declaration; the *præcipe* is sufficient compliance with sec. 9 of that act. *Reed v. Long*, 10 C. C. 253.

(d) Evidence.

59. In Allegheny county under rule 90, the plaintiff having filed his abstract of title it is properly admissible in evidence. *Hart v. McGrew*, 11 Atlan. 617.

60. A deed describing a tract but by three courses and distances, and, though by a different tract number, as containing the same number of acres as the land in dispute, is, in ejectment, if identified by

witnesses as the land in dispute, admissible in evidence. *Van Horne v. Clark*, 126 P. S. 411.

61. In ejectment by a husband for his deceased wife's real estate, his election to take it as tenant by the curtesy is evidence pertinent to the issue. *Logan v. Quigley*, 11 Atlan. 92.

62. In ejectment by a vendor against a vendee, after the execution and delivery of the deed, parol evidence that the original contract which led to the deed was a gaming contract of insurance is admissible. *Smith v. Steffy*, 6 Lanc. 169.

63. The plaintiff in ejectment cannot avoid his own deed to the defendant by showing that it was executed in pursuance of a lottery and therefore invalid. *Allebach v. Hunsicker*, 132 P. S. 349.

64. If the defendant set up an equitable title he must show not only its validity but that the plaintiff acquired title with notice that his, the defendant's equitable title, was outstanding. *Allebach v. Wood*, 3 Cent. 533.

65. In ejectment against husband and wife for land sold as the property of the husband at sheriff's sale and purchased by the plaintiff, the laboring oar is on her to show that the property was bought with her own means. *Steckman v. Schell*, 130 P. S. 1.

66. In ejectment by a sheriff's vendee if the plaintiff put in evidence a deed by the defendant in the execution to her daughter executed and recorded two years before the judgment was entered, the burden is on him to show that the conveyance was made to hinder, delay or defraud the judgment creditor; otherwise he was properly nonsuited. *Brown v. McCormick*, 135 P. S. 434.

67. In ejectment by the grantee of a purchaser at sheriff's sale under a mortgage against the mortgagor and his wife in possession, it is no defence that the property was deeded to the husband by mistake, that he mortgaged it without his wife's knowledge and that the purchaser at sheriff's sale had agreed to con-

vey the premises to the wife. *O'Neil v. Sholes*, 16 Atlan. 89. See s. c. 3 C. C. 172.

68. Where the plaintiff in ejectment was the purchaser at sheriff's sale under a judgment against defendant's father, and the defendant claimed under a deed from her father made prior to the entry of the judgment, the defendant was competent to show, notwithstanding her father's death, that the real consideration of the deed (expressed therein as nominal) was her personal services rendered under an express contract. *Van Horne v. Clark*, 126 P. S. 411.

69. Where the insanity of a grantor, as found by an inquest, antedated his deed, it was competent for the grantees, in ejectment against them, to prove his declarations fifteen months before, that he intended to execute the deed to them. *Rice v. Rice*, 127 P. S. 181.

70. Sufficiency of the evidence of adverse possession by the plaintiff in ejectment for twenty-one years to entitle the case to go to the jury, though the defendant's paper title be the better. *Thomson v. Philadelphia & Reading Coal and Iron Co.*, 133 P. S. 46.

71. In an action of ejectment, where the sole defence is, that the prior conveyance from the common grantor to the plaintiff erroneously included the land in dispute, by the mutual mistake of the parties to it, such mistake must be established by proofs which would justify a chancellor in reforming the deed; evidence is inadmissible of the undisclosed intentions and opinions of the parties to the plaintiff's deed. *Breneiser v. Davis*, 141 P. S. 85.

72. Where the plaintiff in ejectment showed title to a tract, which included the land in dispute, and the defendant put in evidence a deed to himself from plaintiff's ancestor, and the bearing of a certain line with a statement that it was at right angles with another line were inconsistent, and there were other circumstances showing that the bearing was a mistake; it was held, that the burden of proof was

on the defendant to show that the disputed land was enclosed in the disputed line. *Henry v. Huff*, 143 P. S. 548.

73. Color of title in defendants may be shown by the will of a former owner, though no title be shown in the testator. *Holloway v. Jones*, 143 P. S. 564.

74. Where the testimony of the plaintiff himself showed that he held the land under a sale for taxes as seated land, when in point of fact it was unseated, it was not error to instruct the jury that he had not shown such title as gave him a right to a verdict. *Holloway v. Jones*, 143 P. S. 564.

75. In ejectment, where the defendant claims title under a deed in which the grantors are described as man and wife, evidence is admissible that the grantors were married; and this, although it appears that the woman was married eighteen years before to another man, and there is no evidence either of the death or divorce of the first husband. *Moore v. Miller*, 147 P. S. 378.

76. In an action of ejectment by a married woman claiming title against her husband's creditors, where the plaintiff shows that she purchased the property with her own money, she is entitled to recover; otherwise, if the title was put in her name to cheat and defraud her husband's creditors. *Delaney v. Mulligan*, 148 P. S. 157.

77. The records and proceedings for specific performance under and by virtue of which defendants acquired title are admissible in evidence in ejectment, and parol evidence is not admissible to contradict the record in order to show that one of the plaintiffs had no guardian. *Cochran v. Sanderson*, 151 P. S. 591.

78. Where an ejectment is brought against an intruder, and the plaintiff relies upon possession alone, he must show an actual possession, evidenced by acts indicating permanency of occupation. *Akin v. Byrd*, 153 P. S. 23.

79. Where the plaintiff in ejectment claims as a devisee under her husband's will, it is not necessary for her to prove

either acceptance or election to take under the will; the presumption is that every devisee has accepted the bounty of his or her devisor. *Darlington v. Darlington*, 160 P. S. 65.

80. Where purchasers at a sheriff's sale under a judgment against a husband, bring ejectment and the husband is the defendant and claiming possession under a title which he alleges to be that of his wife, evidence is admissible of acts and declarations of the husband against interest although not made in the presence of his wife; and in such a case the plaintiff may also show that the property was assessed in the name of the husband. *Miller v. Baker*, 160 P. S. 172.

81. Assessment books and tax receipts cannot prove title in ejectment, but they are some evidence of claim and are more or less efficient as a basis of inference. *Irwin v. Patchen*, 164 P. S. 51.

82. A recital in the deed in the line of title, under which both parties claim in an ejectment, that the grantor was seised of the title, is sufficient to warrant a finding that title was out of the commonwealth. *McGrew v. Harmon*, 164 P. S. 115.

83. In an action of ejectment against a husband and wife, where the defendants offered in evidence a deed to the husband by name "and wife"; it was held, to be unnecessary for the defendants to prove the identity of the defendant's wife with the wife mentioned in the deed. *King v. Davis*, 13 C. C. 657.

84. In an action of ejectment, the plaintiff must recover on the strength of his own title, and the burden is upon him to show that a division fence, erected by him and the defendant, is not on the true line. *Wiggins v. Hunt*, 6 Kulp 375.

85. Upon the trial of a second ejectment between the same parties on the same title, the record of the judgment in the former ejectment is not receivable as a conclusive adjudication of the matters in dispute. *Lash v. Spayd*, 141 P. S. 360.

86. Where the plaintiff in ejectment

sets up a record title and the defendant offers evidence tending to show that the plaintiff and his brother, who was defendant's predecessor in title, divided the land by a parol partition, in pursuance of which the plaintiff's brother entered into possession and such testimony is contradicted on the part of the plaintiff, the case is for the jury. *McKnight v. Bell*, 168 P. S. 50.

(e) Of the verdict.

87. In an action to recover the whole of a tract of land, recovery may be had for an undivided part thereof. *Bachop v. Critchlow*, 142 P. S. 518.

88. In an action of ejectment against a husband and wife brought by a creditor of the husband to try the title to land held in the name of the wife, a verdict may be entered in favor of the plaintiff for an undivided portion of the land, in proportion to the amount of the purchase money that the jury find was paid by the husband. *Phillips v. Hanby*, 5 Del. 102.

89. A verdict for defendant in ejectment will not be set aside unless it appear that it was wrong beyond all reasonable doubt. *Ziegler v. Harlow*, 6 Kulp 473.

90. In ejectment by a vendor to enforce the specific performance of a contract for the sale of land, the plaintiff is entitled to a conditional verdict unless he has received his pay or is estopped from enforcing payment. *Hunter v. Thompson*, 5 Cent. 247.

91. Where a defendant's wife, having an equitable interest in the land, was induced to confide in the verbal promises of a creditor of her husband that he would purchase for her benefit at a sheriff's sale, and, in pursuance of this, allowed him to become the holder of the legal title, a subsequent denial by the latter was such a fraud as would convert him into a trustee *ex maleficio*. In ejectment, by the purchaser, however, the court will direct a verdict for the plaintiff, to be vacated, and judgment for the defendant, on the payment of the indebtedness due the

plaintiff in specified instalments. *Cowperthwaite v. First National Bank*, 2 Cent. 795. See s. c. 102 P. S. 397.

92. In ejectment by an alleged mortgagor to establish a deed to be but a mortgage, a conditional verdict will not be ordered, where there is no allegation of payment or tender and but scanty evidence about the whole transaction. *Levick v. Bensing*, 1 Mona. 592; s. c. 17 Atlan. 10; *Munger v. Casey*, 1 Mona. 688; s. c. 17 Atlan. 36.

93. A vendee cannot maintain ejectment against a vendor without proof of a previous tender of the purchase money, which must be maintained by producing the money in court; without such tender he is not entitled to a conditional verdict. *Randall v. Mulley*, 1 Lack. Jur. 211.

94. If judgment be entered in favor of plaintiff to be released on payment of a sum certain within a specified time, time is of the essence of the contract, and if payment be not so made, the judgment becomes absolute and indefeasible. The plaintiff's counsel has no power to extend the time nor can the court interfere. *Beatty v. Hamilton*, 127 P. S. 71.

95. The question whether a verdict in ejectment should have been conditional, providing for repayment of the purchase money, cannot first be raised in the supreme court. *Bennett v. Hayden*, 145 P. S. 586.

96. A court of law has no jurisdiction in an equitable ejectment to compel the defendant to satisfy a mortgage for which he has received credit in the conditional verdict; the only remedy is by a bill in equity. *German-American Title & Trust Co. v. Shallcross*, 147 P. S. 485.

97. Where a vendor of land brought an equitable ejectment which resulted in a conditional verdict which was complied with by the defendant and a deed made to him; it was held, that the acceptance by the parties of the verdict and deed was a final settlement between them, and that thereafter all the vendee's rights and privileges, under the

original article of agreement, ceased. *Buscon v. Cannon*, 158 P. S. 225.

98. A bill in equity is a proper proceeding on the part of a defendant in an equitable ejectment to compel the specific performance by plaintiff of a condition of the verdict requiring a conveyance of the legal title. *Riel v. Cannon*, 161 P. S. 289.

(g) Of the judgment.

99. A judgment for want of an appearance at or after the second term, is valid in ejectment. But the court will open it upon proof that the defendant was ignorant of the existence of the suit. *Patterson v. Mahan*, 5 Kulp 355.

100. A judgment in ejectment entered against a tenant on a warrant of attorney for breach of a condition of the lease, will be stricken off, if the defendant has had no opportunity to be heard on the question of breach. *Secor v. Shippey*, 7 C. C. 555.

101. In an action of ejectment, a finding by a referee, that one of the defendants was not in the actual possession or occupancy of any building upon the premises, and that he has no interest of any kind in the goods or any part of them at any time contained in any of the buildings, justifies a judgment in favor of such defendant. *Lowenstein v. Ecker*, 155 P. S. 304.

102. In an action of ejectment to enforce a resulting trust, the judge is a chancellor upon the question of the existence of the trust, and if, in his judgment, the evidence is insufficient to sustain a verdict, the case should be taken from the jury. *Gilchrist v. Brown*, 165 P. S. 275.

103. Where defendants in ejectment appeared in *propria persona* and filed a plea, but failed to serve a copy on the plaintiff, whereupon judgment was taken against them and execution issued and duly executed, the court refused to open the judgment and let the defendant into a defence, where the application was made several months afterwards and

no good excuse or meritorious defence was shown. *Letchworth v. Bunting*, 12 C. C. 587.

(h) Costs.

104. Where the defendants served are proved to have been in possession when the writ was served, the right of the plaintiff is undoubted to proceed against them for costs, even though they claim no title and this right cannot be defeated by the heirs of one of the defendants disclaiming after substitution. *Dull v. Ulshafer*, 140 P. S. 537.

105. Where one plaintiff in ejectment was nonsuited and the other obtained a verdict against the defendant, a successful plaintiff was awarded judgment with costs, and the defendant was awarded costs against the plaintiff who was nonsuited. *Foust v. Northern Central Ry. Co.*, 5 York 35.

See Costs.

(i) Execution.

106. Under a writ of *habere facias* the sheriff cannot put out of possession persons not holding under the defendant; and this, although they came into possession after the issuing of the writ of ejectment. Where a tenant holds under the defendant the sheriff can put him out, but his return should show that essential fact. *Krepps v. Mitchell*, 156 P. S. 320. See *Kelly v. Northrop*, 159 P. S. 537.

107. The sheriff's return to a writ of *habere facias*, showing that the defendant had been placed in possession of the premises by the sheriff, and the sheriff's return to the writ in the case being tried, are *prima facie* evidence of the plaintiff's possession of the land in dispute, and without evidence of ouster, they are conclusive evidence of such possession. *Haupt v. Haupt*, 157 P. S. 469.

108. The sheriff will be ordered to execute a writ of *habere facias*, although a third person intervenes and avers that the defendant is not in possession, and that the claimant has been in possession in her own right prior to the execution of the lease between the plaintiff and

defendant and that she, the claimant, did not claim, under the defendant or under any one claiming by or under him. *Kelly v. Northrop*, 159 P. S. 537.

IX. Mesne profits.

109. For the recovery of rents and profits of land retained by the defendant in possession, after a judgment, for plaintiff in ejectment, pending a writ of error resulting in affirmance, the act of 11 June 1879 (Brightly's Purdon 716) affords a sufficient remedy. An action for the same does not lie upon the recognizance in error. The statute 16 and 17 Charles II., ch. 8, is not in force in Pennsylvania. *Johnson v. Hessel*, 134 P. S. 315; s. c. 26 W. N. C. 20.

110. After the death of the plaintiff his administrator may proceed and give notice of a claim for mesne profits. *Hart v. McGrew*, 11 Atlan. 617.

111. In ejectment to compel the removal of the mouth of a sewer from plaintiff's wharf-lot not bulkheaded, evidence is not admissible on the question of mesne profits, of the rental value of the lot if it had been bulkheaded. *Harris v. Philadelphia*, 16 Atlan. 740.

112. In trespass for mesne profits the plaintiff may recover damages beyond the teste of the writ of ejectment. *Bush v. Gamble*, 127 P. S. 43.

113. In an action for mesne profits the return of the summons in the preceding ejectment, in which the plaintiff had judgment for the land, was held to be conclusive evidence of the possession of all the defendants at the time of service, and presumptive evidence of their continuance in possession until overcome by evidence to the contrary. *Thornton v. Britton*, 144 P. S. 126.

114. Where a lessee of a tenant in common is lawfully in possession of the whole tract, an entry by the other tenant in common, coupled with an unlawful taking of a portion of the crop, becomes a trespass *ab initio*; the remedy of the excluded tenant in common is an action

against the co-tenant, or, if he repudiates the lease he may sue the lessee for mesne profits or for use and occupation. *Baker v. Lewis*, 150 P. S. 251.

115. In an action for mesne profits, where the plaintiff has previously recovered in ejectment, the judgment in ejectment is conclusive of the plaintiff's right to the possession of the premises, and to recover the mesne profits as against the defendant in the ejectment. *Shaeffer v. Eichert*, 10 C. C. 360.

X. Rule to bring ejectment.

116. A defendant who loses in the first action of ejectment, but who continues to retain possession, is not entitled under the act of 21 May 1881 (Brightly's Purdon 713) to an order on the plaintiff to commence a second action. *Dewire v. Laufer*, 2 Northam. 36.

117. Where one judgment is entered for defendant, a rule on the plaintiffs under the act 21 May 1881 (Brightly's Purdon 713), to bring a second action, should be entered to the record of the first action and for the same interest or title as therein determined; where the proceeding on the rule was entered as a new proceeding and for a different interest or title; it was *held*, that it was defective and could not be sustained. *Mapel's Petition*, 14 C. C. 335. See *Mapel v. Gallatin*, 14 C. C. 421.

118. Under the act 8 March 1889 (since amended by the act 25 May 1893, Brightly's Purdon 715), permitting persons in possession to obtain rule on a party not in possession to bring action, and authorizing judgment upon a failure to appear and show cause within six months after service of the rule; it was *held*, that to bring the plaintiff within the act, it is necessary that the court shall be satisfied that he is in possession and that the defendant claims title to the land; it was further *held*, that the court would not refuse to consider a supplemental answer because it had not been filed within six months from the service of the rule. *Huntzinger v. Helfenstein*, 10 C. C. 576.

119. The act 29 March 1824, sec. 4 (Brightly's Purdon 711), providing for ejectment for land on which no person resides, and which has been sold for taxes, is still in force, and an action brought after five years from the sale of the same for taxes is barred by the act 3 April 1804, sec. 3 (Brightly's Purdon 2060). The act 8 March 1889 (amended by the act 25 May 1893, Brightly's Purdon 715), providing that persons in possession may obtain a rule on parties not in possession, but claiming title to bring ejectment, does not repeal or supplant the established system for the recovery of unseated lands sold for taxes and has no application thereto. *Dull v. Ahls*, 14 C. C. 350.

ELECTION.

See CRIMINAL LAW, XVI.: HUSBAND AND WIFE, IX.: INSURANCE.

- I. Right of election.
- II. Evidence of election.
- III. When a party may be put to an election.
- IV. When an election may be retracted.
- V. Effect of an election.

I. Right of election.

1. A surviving husband may elect to take his wife's real estate, as tenant by the curtesy, against her will. Such election is not prohibited by the act of 3 June 1887. *Teacles's Estate*, 132 P. S. 533; affirming s. c. 6 C. C. 553; *Kneedler v. Leaver*, *Ibid.* 556.

2. In ejectment by a husband for his deceased wife's real estate, his election to take it as tenant by the curtesy is evidence pertinent to the issue. *Logan v. Quigley*, 11 Atlan. 92.

3. A widow who, for thirty years preceding the death of the testator, did not assert herself to be his wife, but had married another man, will not be permitted to elect to take against his will. *Richardson's Estate*, 132 P. S. 292; affirming s. c. 6 C. C. 653; s. c. 46 L. I. 139, 148.

4. The right of a widow to elect to take against her husband's will does not depend on the *quantum* of benefits she receives or renounces under it. *Cunningham's Estate*, 137 P. S. 621; s. c. 38 P. L. J. 129.

5. Where an intended wife executed an antenuptial contract by which she released her future interest in her intended husband's estate, it was *held*, that it was conclusive as to her rights; a promise by the husband, afterwards violated, to preserve unrevoked a codicil to his will giving her the one-third of all his estate was without sufficient consideration to operate as a revocation of the settlement. *Kesler's Estate*, 143 P. S. 386. Reversing s. c. 7 C. C. 598.

6. A widow has a right to claim her exemption, although her husband has directed that the legacy bequeathed to her shall be in lieu of dower and exemption and she has elected to take under the will. *Peebles's Estate*, 157 P. S. 605.

7. Where a testatrix had no estate in land which she assumed to devise which it was possible for her to pass by any devise she could make, and her estate absolutely ceased with her life; it was *held*, that no title by election could be acquired under her will against an intervening purchaser without notice. *Mansfield Coal & Coke Co. v. Boice*, 165 P. S. 27.

8. Where a contract of bailment provided for the lease of a machine at a certain hire payable in instalments, the lessor to retain title until the last instalment was paid, and the contract was accompanied by a bond and warrant to confess judgment; it was *held*, that the lessor might, upon default, either rescind the contract and take possession of the machine, or enter judgment upon the bond, but having elected to resume possession he could not afterwards enter judgment. *Seanor v. McLaughlin*, 165 P. S. 150.

9. Where a woman married again four years after being deserted by her husband but under a reasonable supposition that he was dead; it was *held*, that she was not

thereby estopped, upon discovering that her second marriage was prior to the death of her first husband, from electing, as his widow, to take against the will of her first husband. *Johnson's Estate*, 10 C. C. 461.

10. Where the holder of an option elects to accept its conditions, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract, but if an acceptance be not made within the time fixed, the other party is no longer bound by his offer and the option is at an end. *McMillan v. Philadelphia Company*, 159 P. S. 142. See *Cochran v. Pew*, 159 P. S. 184.

11. Where a person holds two incompatible offices, he has the right to elect which he will retain, and if he so elect, the court, in *quo warranto* proceedings, will enter judgment of ouster in accordance with the election; the judgment will be entered in accordance with the petition of the relator. *Comm'th v. Haeseler*, 161 P. S. 92.

II. Evidence of election.

12. A written consent to his wife's will, signed by a husband before he knew its contents, is not an acceptance under it. *McDonald's Estate*, 37 P. L. J. 275.

13. After a husband has taken out letters of administration *cum testamento annexo* upon his wife's will, acted as administrator for two years and filed his account, it is too late for him to elect to take against it. *Scholl's Appeal*, 1 Mona. 572; s. c. 17 Atlan. 206.

14. A widow dying shortly after her husband, the testator, and having made no election, the presumption is she takes under the will. *Jackson's Appeal*, 126 P. S. 105.

15. It is unimportant that the filing by a widow of a formal paper electing to take against her husband's will, was under the stress of an order from the court. *Cunningham's Estate*, 137 P. S. 621; s. c. 38 P. L. J. 129.

16. The election of a widow to take under her husband's will must be proved by unequivocal acts. She is entitled to be informed of the relative value of the properties, between which she is entitled to choose. *Woodburn's Estate*, 138 P. S. 606; s. c. 27 W. N. C. 305.

17. A widow will not be held to have elected to take under her husband's will in the absence of clear and satisfactory evidence, that she acted under a full knowledge of her rights and of the condition of her husband's estate. *Holt's Estate*, 39 P. L. J. 394.

18. The assertion by defendant in an action of ejectment, of a contract for the sale of the land by plaintiff's testator, the defendant's ancestor, is not a disclaimer by the defendants of a devise to them of a portion of the land by plaintiff's testator. *Brownfield v. Brownfield*, 151 P. S. 565.

19. Upon a sale of machinery "to perform in a satisfactory manner," a non-return and notice to the seller to put it in a satisfactory condition, is an election to retain, and the purchaser is liable for the contract price, less a proper deduction. *Stutz v. Coal and Coke Co.*, 131 P. S. 267.

20. Where a lessee in an oil lease agreed to complete a well within six months or pay a certain sum per annum for delay within three months after the time for completing the well, and six days after the expiration of the nine months the lessor leased the premises to another person for a long term of years; it was held, that this was an election to enforce a forfeiture and that thereafter the lease was a nullity. *Wolf v. Guffey*, 161 P. S. 276.

21. Where a testator gave his widow the use of his farm during her life, and provided that should she choose to sell it, then she was to have a certain amount of the proceeds and the balance was to go to his children, and it was further provided that after her death his children should sell the farm and divide the proceeds; it was held, that a transfer by one of the sons of his interest in the estate,

stated to be a one-fourth interest in certain real estate therein described, constituted an election to take as realty and passed a good title. *Major's Estate*, 11 C. C. 359.

III. When a party will be put to an election.

22. Witnesses attending two suits on the same day must elect against which defendant to have their costs taxed. *Wiggins v. Kelly*, 7 Lanc. 83.

23. Where a person, either by deed or will, makes a gift of property to one person and by the same instrument gives to another person property belonging to the first donee, the owner of the property so disposed of must elect whether he will hold under the donative instrument or adversely to it; he cannot do both. *Zimmerman v. Lebo*, 151 P. S. 345.

24. Where a testator bequeaths property to A of which the testator is the owner and he then bequeaths other property to B of which A is the owner, A must elect either to take under the will or adversely to it; he cannot claim the legacy and also his individual property. *Rafferty's Estate*, 40 P. L. J. 188.

25. A devisee who is also the heir at law will not be permitted to take under the will real estate in this state, and at the same time to disaffirm the validity of a devise to other persons of real estate in the city of Washington, because the will was not authenticated by three subscribing witnesses as required in the District of Columbia. *Cummings's Estate*, 153 P. S. 397; reversing s. c. 12 C. C. 45.

IV. When an election may be retracted.

26. Where a widow has been induced to make her election to take under her husband's will, by an agreement with the children concerning the general distribution of the estate, not in conformity with the terms of the will and without the consent of the executors and trustees,

she will be permitted to retract her election. *Maffet's Estate*, 6 Kulp 452.

V. Effect of an election.

27. If a wife die partially intestate, leaving no children, the husband electing to take against the will, is entitled to only one-half the entire estate. He cannot take one-half of what passes under the will, and the whole of what is undisposed of. *Lee's Appeal*, 24 W. N. C. 363; affirming *Lee's Estate*, 22 *Ibid.* 45.

28. If a husband refuses to take under his wife's will, his share should not contribute to costs not necessarily incurred in an ordinary administration. *McDonald's Estate*, 37 P. L. J. 275.

29. A testator having devised to his widow one equal third of his estate, in lieu of dower, she cannot take her third under the will and one-half of an undisposed-of surplus against the will. *Jackson's Appeal*, 126 P. S. 105.

30. A widow who acquiesces in a sale under her husband's will and makes claim to the proceeds, will be held to have relinquished her dower in the property. The fund, however, will be treated as realty for the purpose of determining the quantum of her interest, which, she having elected against the will, is for life only. *Cunningham's Estate*, 137 P. S. 621; s. c. 38 P. L. J. 129.

31. As to the right of a widow to accept the provisions of her husband's will and also claim dower, see note to *Endicott v. Endicott*, 3 *Atlan.* 162.

32. A widow having renounced under her husband's will, an inquest appraising her statutory dower will not be set aside where the valuation is not grossly inadequate. *Evans's Estate*, 8 *Lanc.* 17.

33. Where a widow took a life estate in lieu of dower; it was held, that repairs to the realty which were ordered by the trustees without notice to the life tenant and which were in the nature of betterments, would be charged against the estate, where it appeared

that the life tenant was seventy years of age and that her share of such expense, according to the Carlisle tables, would be minute. *Griffith's Estate*, 12 C. C. 614; s. c. 32 W. N. C. 62.

34. A widow, who elects to take under her husband's will, thereby becomes a purchaser for value and is entitled to preference over other general legatees. *Wolfsberger's Estate*, 15 C. C. 395.

35. Where a widow of a decedent filed her election to take under his will, which devised to her a house and lot, and afterwards a street was opened taking a portion of the lot and viewers assessed damages to the widow from which the executor appealed, and the jury awarded larger damages to him; it was held, that a new trial would be granted pending a rule to strike off the appeal. *Weaver v. Lancaster County*, 8 *Lanc.* 315; s. c. 4 *Del.* 510. The appeal was subsequently stricken off. *Weaver v. Lancaster County*, 9 *Lanc.* 133.

36. The election of a widow to take against her husband's will is equivalent to her death, as to definite and residuary legacies which by the will are payable on her death. *Ferguson's Estate*, 138 P. S. 208; s. c. 27 W. N. C. 63; s. c. 38 P. L. J. 157. *Vance's Estate*, 141 P. S. 201.

37. A widow electing to take against the will of her husband cannot use the will for the execution of certain powers of appointment under the act of 4 June 1879 (*Brightly's Purdon* 2105). *Lines v. Lines*, 2 *Northam.* 349; affirmed in s. c. 142 P. S. 149.

38. Where a husband, who is also a legatee, elects to take against the will of his wife, his legacy will be sequestered in favor of a devisee of realty to a sufficient extent to make good to the latter his loss resulting from the husband's election. *Lyon's Estate*, 15 C. C. 353.

39. Where a widow elects to take against her husband's will the court will assume jurisdiction to sequester the benefit intended for her, in order to compensate those whom her election disappoints.

Evans's Estate, 150 P. S. 212; affirming s. c. 8 Lanc. 321.

40. Under the act 6 May 1887 (Brightly's Purdon 305) the interest of a non-resident deceased member of a joint stock company is liable to the collateral inheritance tax, where the real and personal property of the company is situate within this state. Where the widow elected to take against the will, and she was paid a certain sum in full for all her claims against the estate; it was *held*, that the full value of the testator's interest in the company was subject to the tax. *Small's Estate*, 151 P. S. 1; reversing s. c. 11 C. C. 1. See s. c. 12 C. C. 226.

41. Where the object of a testator is to secure to his widow the payment of a certain portion of the income of his whole estate during her life, and he creates a trust for such object, the widow's election to take against the will terminates the trust. *Woodburn's Estate*, 151 P. S. 586.

42. Where a widow elects to take against the will, her substituted devisees and bequests are a trust in her for the benefit of the disappointed claimants to the amount of their interests therein. *McIntosh's Estate*, 158 P. S. 528.

43. Where a widow elects to take against a will, she cannot claim to take as personalty, real estate which is converted by the terms of the will. *Barber's Estate*, 14 C. C. 167.

44. Where a testator left an estate of over twenty-five thousand dollars and gave his widow merely an annuity of one hundred and thirty-six dollars and shortly after his death the widow was declared a lunatic, and pending proceedings contesting the inquisition, the executors paid one thousand dollars to the attorney in fact for the legatees, which was unconditionally paid over by him for the widow's support, and afterwards her committee claimed against the will; it was *held*, on distribution of the estate, that equity required that the thousand dollars should be deducted from the widow's share.

Hambricht's Estate, 169 P. S. 57; affirming s. c. 12 Lanc. 131.

45. Where a widow paid her husband's debts with money due from a beneficial certificate, in pursuance of instructions contained in his will, and she was subsequently allowed to take against the will; it was *held*, that she was entitled to be subrogated to the rights of the creditors paid by her. *Holt's Estate*, 39 P. L. J. 394.

46. Where a testator devised his estate to a trustee to pay the income to his wife for life, provided she should support and clothe a certain daughter and one A, so long as they should remain with her and demean themselves properly, and after his wife's death the income was to be paid to his two daughters and the said A and their survivors during life, and at their death the estate was to vest in his grandchildren, and the widow elected to take against the will; it was *held*, that the income in the trustee's hands was first applicable to the maintenance of his daughter and the said A. *Ballantine's Estate*, 42 P. L. J. 416.

47. Where there is a life estate to the widow with remainder to her heirs, and she refuses the life estate, the gift to her heirs is not thereby accelerated, but the residuary legatee, or next of kin under the intestate law, takes the life estate until her death, then her heirs take the remainder. *Keys's Estate*, 36 W. N. C. 231; s. c. 4 Dist. Rep. 134. See *Keys's Estate*, 4 Dist. Rep. 281, 283.

48. Where a widow who is also executrix makes no claim of exemption before the auditor, but seeks to establish her ownership in a fund which it is claimed should have been included in her account, she cannot, after the auditor has decided against her, claim the fund under the exemption law. *Countryman's Estate*, 151 P. S. 577.

49. Where the plaintiff in ejectment claims as a devisee under her husband's will, it is not necessary for her to prove either acceptance or election to take

under the will; the presumption is that every devisee has accepted the bounty of his or her devisor. *Darlington v. Darlington*, 160 P. S. 65.

50. An election *in pais* to take under a will should be intelligently made and should be unambiguous and positive in its character in order to amount to an estoppel; a legatee who has received his legacy and afterwards concludes to contest the will, may return the legacy to the executors and then proceed; it was doubted whether the receipt of money by a legatee claiming to be entitled to receive it, and much more as an heir at law, could be treated as an election to affirm the will. *Miller's Estate*, 159 P. S. 562. See *Miller's Estate*, 166 P. S. 97.

51. Where a devisee under a will elects to take and retain exclusive possession thereunder of a specific portion of the realty, he is estopped from denying the exclusive title of another devisee to another portion of land also so occupied by him. *Martin's Estate*, 11 C. C. 245; s. c. 30 W. N. C. 461.

52. One who elects to accept a benefit under a will is estopped from setting up a claim repugnant to it; a legatee who accepts his legacy cannot claim realty as heir at law on the ground that as to the latter the will is invalid. *Barber's Estate*, 14 C. C. 167.

53. Where a testator charged his sons with certain advancements entered in a memorandum book; it was *held*, that upon the sons' electing to take under the will they had no standing to contest the correctness of the amounts charged against them in the testator's book. *Schell's Estate*, 15 C. C. 372.

54. Where a legatee under a will receives the legacy bequeathed to him therein, and signs a release through mistake and without a full knowledge of the contents of the will, and such release was obtained by the false and fraudulent representations of the executor, the legatee will not be estopped thereby from petitioning the court for an issue to test

the validity of the will. *Getz's Estate*, 3 York 50. See *Getz v. Getz*, 1 York 137.

55. A plaintiff having, upon the order of the court below, exercised its election as to which of three judgments it would enter, is estopped from complaining of the order, on error. *Scranton Building Association v. Ranck*, 13 Atlan. 840.

56. Where a testator bequeathed to his wife the income of one-third of his estate, and also the three hundred dollar exemption and the widow elected to take under the will; it was *held*, that she was entitled to both the three hundred dollar exemption allowed under the act 14 April 1851 and the additional three hundred dollars as bequeathed in the will, and that her interest in the crops attached immediately upon the death of the testator. *Snider's Estate*, 16 C. C. 233.

ELECTION LAW.

See CHURCHES: CONSTABLES: CORPORATIONS.

- I. Election laws.
- II. Nominations to office.
 - (a) Certificate of nomination.
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- X. Ballots.
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XI. Qualifications of electors.

- (a) General principles.
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XII. Of the return.

XIII. Controverted elections.

- (a) Jurisdiction.
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- (g) Opening ballot boxes.
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XIV. Penal offences.

I. Election laws.

1. The act of 14 February 1889 (Brightly's Purdon 373), providing for the election of constables for three years, applied to the election on the third of February of the current month; and this, though ten days' notice could not be given of the election. *Constable's Case*, 7 C. C. 550; s. c. 25 W. N. C. 555; *Weikel's Bond*, 8 C. C. 121; contra, *Talton's Bond*, 7 C. C. 636; *Hunsinger's Case*, 8 Ibid. 173; *Constables' Bonds*, Ibid. 282.

2. The act of 4 May 1889 (Brightly's Purdon 373), providing for the election of constables in wards of the cities of second and third classes is not in conflict with article III., sec. 7, of the constitution. A constable is not, strictly, a township or ward officer within the meaning of that section, and his election is capable of classification. *Reading's Constables*, 8 C. C. 101.

3. The ballot act of 19 June 1891 does not transcend the powers of the legislature in dealing with the subject of elections; it carefully preserves the right of each elector to vote for whom he pleases without any unnecessary inconvenience; it is not in violation of the constitutional provisions that elections shall be free and equal and that election laws shall be uni-

form throughout the state; its title is sufficient and it applies to all public officers throughout the state. *De Walt v. Bartley*, 146 P. S. 529; affirming s. c. 1 Dist. Rep. 199. See *Ripple v. County Commissioners*, 1 Dist. Rep. 202.

4. The supreme court has no original jurisdiction of a bill to restrain county officers from carrying into execution the ballot act of 19 June 1891; the county would not be a proper party to such a bill. *De Walt v. Bartley*, 146 P. S. 525.

5. The ballot act of 19 June 1891 is not special legislation, nor is it unconstitutional for want of uniformity; the differences in preliminary procedure in boroughs and townships and in counties and cities are matters of detail within the legislative discretion. *Meredith v. Lebanon County*, 1 Dist. Rep. 220.

6. The local act 26 April 1846, P. L. 419, relating to the county of Bradford and providing that the expenses of township elections shall be paid by the townships, is not repealed by the ballot law of 19 June 1891. *North Towanda v. Bradford County*, 2 Dist. Rep. 517.

7. Upon the submission of a municipal question to the vote of the people, such as an increase of indebtedness, the act 10 June 1893, sec. 14 (Brightly's Purdon 740), does not apply; that act is silent upon the question of such elections which are still regulated by the acts 20 April 1874 and 9 June 1891. *Evans v. Willistown*, 168 P. S. 578; s. c. 36 W. N. C. 385; affirming s. c. 15 C. C. 326. See *Comm'th v. Weir*, 15 C. C. 425.

8. The act 8 May 1889 (Brightly's Purdon 2011), providing that when any borough shall be divided into wards, there should be elected an assessor for each of said wards who shall perform all the duties relating to elections as well as to the valuation of property, is not unconstitutional as local or special legislation. *Comm'th v. Green*, 7 Kulp 151; s. c. 5 Del. 342.

II. Nominations to office.

(a) Certificates of nomination.

9. A nomination to office must be certified by the president and secretary of the body which nominates; the approval of a certificate of nomination by a city committee is of no legal consequence. *Dailey's Certificate*, 12 C. C. 155.

10. Where a certificate of nomination purported on its face to be signed by the president and secretary of the primaries, but the testimony showed that the signers were the president and secretary of a ward committee, the certificate was held to be invalid. *Allegheny City Election*, 12 C. C. 660.

11. Under the act 22 March 1859 (Brightly's Purdon 1740) affidavits to certificates of nomination or nomination papers may be made before prothonotaries and other commissioned clerks of courts. *In re Affidavits*, 15 C. C. 65.

12. To entitle a party to make and certify nominations, it must have polled two per centum of the largest entire vote cast for any office, for its candidate for that office. *Wilkes-Barre Township Nominations*, 7 Kulp 529.

13. Where a certificate of nomination filed with the secretary of the commonwealth, is regular in form, and no objections have been filed in the common pleas of Dauphin county, the secretary has no power to withhold his certification upon the ground that the party making the nomination did not at the preceding election poll three per cent of the vote; that question is triable only in the common pleas of Dauphin county upon objections filed. *Robbins v. Harrity*, 2 Dist. Rep. 163.

14. Where a judicial district is composed of two counties, a nomination made by a party in only one county is not a valid nomination, and the certificate of such a nomination is wholly void. *Ingram's Certificate*, 14 C. C. 1; *Craig's Certificate*, 14 C. C. 3.

15. A nomination for senator by a minority of conferrees is invalid; a nom-

ination is invalid which is made by a party not constituted according to the established custom governing nominations in a district composed of three counties. *Savage's Nomination*, 15 C. C. 229; s. c. 15 C. C. 306.

16. A certificate of nomination will be held valid where no fraud was committed or intended, although the party rules as to voting were violated. *Little's Certificate*, 12 C. C. 159.

17. Where a ward executive committee is recognized as legal by the city executive committee and such ward committee elects a member as temporary chairman of a legislative convention, the person nominated by such a convention would be recognized as the regular candidate of the party. *Donahue's Certificate*, 12 C. C. 198. Such a nomination will be held valid notwithstanding irregularities in the manner in which some of the delegates were elected. *Ker's Certificate*, 12 C. C. 200.

18. The act 20 May 1864 (Brightly's Purdon 1420), that in case of a vacancy occurring in either branch of the councils of Philadelphia, the same shall be filled at the next general election for the unexpired term, was held not to be repealed by the ballot act 19 June 1891, P. L. 349, sec. 5, and where a vacancy occurred in the select council twenty-one days before election and a nomination was made thirteen days before election; it was held, that the certificate must be accepted by the county commissioners who would be compelled by mandamus to print the nominee's name upon the official ballot. See act 10 June 1893 (Brightly's Purdon 738). *Clay's Nomination*, 12 C. C. 419.

19. Where a comparatively small number of electors of a ward called a caucus meeting and decided to dispense with the primary election and made nominations and certified the same to the county commissioners, the certificate being signed by the president and secretary of the meeting; it was held, that the nomination certificate was invalid. *Allegheny City Election*, 12 C. C. 660.

20. Where nominations are made at a caucus held under the rules of a party, the validity of the nominations cannot be questioned upon the ground that some of the electors refused to be bound by its actions and held another caucus; in the absence of party rules, however, where usage is set up as authority for declaring the act of one caucus valid and the other invalid, the fact that a considerable number of electors have not acquiesced in it and that the usage has not been uniformly followed prevents its recognition as equivalent to an established rule of the party. *Wilkes-Barre Township Nominations*, 7 Kulp 529.

21. Under the act 10 June 1893, sec. 5 (Brightly's Purdon 738), a certificate of nomination of a candidate for the office of associate judge must be placed on file with the secretary of the commonwealth thirty-five days prior to the election. *Weyant's Nomination*, 13 C. C. 561.

22. Where the certificate of nomination of an associate judge has been filed with the county commissioners instead of with the secretary of the commonwealth as required by the act 10 June 1893, sec. 5 (Brightly's Purdon 738), the county commissioners cannot certify the nomination to the sheriff for publication; neither the secretary of the commonwealth nor the county commissioners can cure the mistakes made by parties filing papers illegally. *Cresswell's Nomination*, 13 C. C. 562.

23. Under the act 10 June 1893, sec. 6 (Brightly's Purdon 738), a certificate of nomination not filed with the secretary of the commonwealth at least twenty-one days before the election is null and void. *Ewing's Certificate*, 13 C. C. 638.

24. A member of the legislature being a state officer, his certificate of nomination or his nomination paper must, under the act 19 June 1891, be filed with the secretary of the commonwealth. *Page v. Lyter*, 15 C. C. 219.

25. During the year 1892, it was held, that the last day for filing certificates of nomination with the secretary of the

commonwealth was September 13, and nomination papers September 20; and certificates of nomination with the county commissioners September 27, and nomination papers October 4. *Certificates of Nomination*, 12 C. C. 157.

26. Objections to certificates of nominations of judges, senators and representatives, other than mere objections to form, must be filed in the court of common pleas of Dauphin county. *Dailey's Case*, 12 C. C. 163; s. c. 31 W. N. C. 128.

27. Under the act 10 June 1893, secs. 6 and 12 (Brightly's Purdon 738, 739), objections filed five days after the filing of the amended affidavit to a certificate of nomination filed after the last day for filing the original certificate are not filed within the required time. *Ewing's Certificate*, 13 C. C. 638.

28. It is not a valid objection to a certificate of nomination, that the convention refused to wait until an unusual hour or to adjourn until the following day, to permit the arrival of delegates who had been detained by extraordinary floods. *Davis's Certificate*, 15 C. C. 305.

29. Upon objections to a certificate of nomination, it was held, that a candidate had power to substitute one conferree for another, but when he ceases to be a candidate, such power ceases; the vacancy caused by such withdrawal can be filled by the same conference subject to such changes in its personnel as might be legally made. *Ashcom-Critchfield Nomination*, 15 C. C. 415.

30. The county is liable to a constable for services rendered in serving notice of objections to certificates of nomination and of the hearing. *Early v. Luzerne County*, 7 Kulp 512.

31. Where, pursuant to notice, all the parties appear at the hearing of objections to a certificate of nomination and examine and cross-examine the witnesses; it will be held, that any defect due to the failure to give notice of the time when the objections would be filed, have been waived. *Wilkes-Barre Township Nominations*, 7 Kulp 529.

(b) Nomination papers.

32. A nomination paper vouched for by the affidavit of only four signers must be rejected; so, a nomination paper bearing evident marks of alteration will be disregarded, and one not containing the requisite number of signatures of qualified electors, will be *held* to be invalid. Separate nomination papers essentially alike and certified to by different sets of vouchers are permissible. *King's Nomination*, 12 C. C. 161.

33. Objections to signatures in nomination papers must state which of the signatures is fraudulent. *Ewing's Certificate*, 13 C. C. 638.

34. Under the act 10 June 1893, sec. 6 (Brightly's Purdon 738), the failure of the signers and affiants to vouch for the signatures of the signers of nomination papers is a defect, which may be remedied under the direction of the court. *Ewing's Certificate*, 13 C. C. 638.

35. Where the affidavit to nomination papers was defective because two of the signers and affiants were not qualified electors, not having paid a state or county tax within two years; it was *held*, that the defect in the affidavit might be amended. *Butler's Nomination Papers*, 16 C. C. 78; s. c. 7 Kulp 489; 6 Del. 111.

36. Under the act 10 June 1893, sec. 3 (Brightly's Purdon 737), requiring nomination papers to be signed by at least two per cent of the largest entire vote for any officer elected at the last preceding election; it was *held*, that the election for congressman at large was an election over the whole state, and the vote of any particular district for the office could not be made the basis of district nominations. *Nomination Papers*, 15 C. C. 228.

37. Amendments to nomination papers must be made by the persons who have signed them. *Savage's Nomination*, 15 C. C. 306.

38. Under the act 10 June 1893, sec. 4 (Brightly's Purdon 737), the word "Democratic" should not be used in nomination papers filed by the Citizens'

Democratic party. *Savage's Nomination*, 15 C. C. 508.

39. Where the Republican candidate for alderman, nominated at a primary meeting of electors, filed his certificate of nomination and his unsuccessful competitor filed a nomination paper for the same office which declared him to be an "independent republican" candidate; it was *held*, that the use of the word "Republican" by the latter was not forbidden by the proviso of sec. 4, act 10 June 1893 (Brightly's Purdon 737), said nomination paper following a certificate of nomination made at a primary election; that proviso is confined to nomination papers which follow certificates of nomination made by a convention of delegates. *Brackenridge's Nomination*, 15 C. C. 647.

40. Where a township was divided into five districts, it was *held*, that six conferrees, three from each of two districts who had nominated tickets for all but one district and also an entire township or school district ticket, had no authority under the act 10 June 1893, sec. 2 (Brightly's Purdon 737), to file nomination papers. *Butler Township Nomination Papers*, 14 C. C. 470.

41. Under the act 10 June 1893 (Brightly's Purdon 737), nomination papers for candidates for the house of representatives may be filed with the county commissioners. *Prohibition Party's Nomination Papers*, 15 C. C. 319.

42. The validity of nomination papers for congressional districts will not be passed upon by the court of common pleas of Dauphin county when the objections are merely as to form or are not filed in said court; and this, though the petition be filed by the secretary of the commonwealth. *Jobes's Nomination*, 12 C. C. 253; *Van Storch's Nomination*, 12 C. C. 253.

III. Election Districts.

43. In a proceeding to divide an election district, the court may inform itself on the subject either by the statements of the petition, the depositions of witnesses,

the testimony of witnesses produced before the court, the report of commissioners or by the report of a master or auditor. *New Garden Election District*, 3 Dist. Rep. 375.

IV. Polling Places.

44. A polling place will not be fixed at a house where intoxicating liquor is sold except in case of imperious necessity — act 19 May 1887 (Brightly's Purdon 727). *In re City Polls*, 13 C. C. 663.

45. A polling place cannot arbitrarily be changed by the court without a proper petition under the act 18 May 1893 (Brightly's Purdon 726). *In re City Polls*, 13 C. C. 663.

46. A voter can only exercise the privilege of voting within the limits of the election district in which he resides; under the constitution an election held outside of an election district is void. The act 11 June 1891, P. L. 296 (repealed by implication by the act 18 April 1893, Brightly's Purdon 726), which enabled a township adjoining a city or borough to hold elections in said city or borough, was held to apply only to elections at polling places to be thereafter fixed. *Smith v. Higby*, 12 C. C. 423; s. c. 2 Dist. Rep. 311; contra *Election Instructions*, 2 Dist. Rep. 299; *Metzzer's Case*, 2 Dist. Rep. 301.

47. Where, for a long period of years, elections have been held in a particular house, after the original house designated has been torn down, it will be presumed that the change was made by lawful authority; where the original place fixed was the village schoolhouse, an election held in a new schoolhouse in a different part of the village was held to be valid. *Smith v. Higby*, 12 C. C. 423.

48. Where a citizen has once given his consent to the use of his property as a place for holding elections, he must submit to its use until a change is made in accordance with the law; such change can only be made by the people at a public election called at the instance of a fair proportion of the voters or by the court

upon an emergency that is imperative. Under the act 10 June 1893, sec. 19 (Brightly's Purdon 742), the county commissioners cannot select a new polling place at their discretion; it is only when the room heretofore designated is insufficient to accommodate the cumbersome machinery required by that act, that they have a right to seek another. *Morse Sub-School District v. Mercer*, 40 P. L. J. 150.

49. Where it appeared that the mayor's proclamation fixed the place of holding the election at John Hughes's tin shop, whereas the election was actually held at Samuel Hare's plumbing shop at another place where two previous elections had been held and where also the registry list had been posted; it was held, that the election was null and void in the absence of testimony to show that it was impossible to hold the election in the place designated in the proclamation. *Blaze's Election*, 40 P. L. J. 184.

50. Where the lessee of the regular appointed place for holding an election refused the use of his place, and the polls were opened at a house about one hundred and fifty feet distant, and it did not appear that any one made any objection or that any voter lost his vote; it was held, that the election was legal and that the votes of the district would be counted. *Rohrkaste's Election*, 40 P. L. J. 375.

51. Under the act 19 June 1891 (see act 10 June 1893, sec. 19, Brightly's Purdon 742), it was held, that the county commissioners must construct a temporary room, where there is no room of adequate size at the regular polling place; they cannot rent a room elsewhere within the district. *Egley v. Armstrong County Commissioners*, 158 P. S. 65.

V. Registry of electors.

52. A person is not entitled to be registered as a voter who has merely occupied a law office for ten months prior to the election in the precinct, but who has slept and taken his meals elsewhere. *Leaman's Case*, 10 C. C. 479.

53. A judge at chambers has power to order that a petitioner be assessed and his name be placed on the registry list, if, in his opinion, the applicant is entitled to be so assessed; such an assessment, however, will not confer the right to vote unless it be done at least two months before the election. *Tribble's Application*, 8 Lanc. 253.

54. A judge in vacation will order that a voter be assessed and his name placed on the registry list, where such order will do any good. *Northrup v. Whipple*, 2 Lack. Jur. 104.

55. Where an assessor on account of sickness failed to make a revised registry list for the February election, and the county commissioners being unable to furnish such list, the board used the list that was used at the previous November election; it was *held*, that the board did the best thing they could under the circumstances, and that the election was legal and the votes of the district would be counted. *Rohrkaste's Election*, 40 P. L. J. 375.

56. The office of assistant borough assessor is abolished by the act 14 February 1889 (Brightly's Purdon 721). *Wood v. Armstrong County*, 12 C. C. 289.

57. Under the act 14 February 1889 (Brightly's Purdon 2011) the qualified voters of every borough and township must elect an assessor for three years to perform all the duties of assessors relating to elections as well as to the valuation of property. The act 16 June 1891 (Brightly's Purdon 2011) provides that where a township contains more than one election district, each district shall elect an assistant assessor to perform the duties of assessor so far as they relate to elections. The office of assistant assessor for land valuation purposes has been abolished. *Comm'th v. Cornelius*, 15 C. C. 73.

58. In boroughs divided into wards each ward elects an assessor for three years who performs all the duties in his ward as to elections and the valuation of property; there is no authority for

the election of a borough assessor or assistant assessors. *Blackman v. Horton*, 15 C. C. 314.

59. The following seems to be a summary of the main provisions of the several acts of assembly relating to assessors; in each township, borough or ward thereof there shall be elected triennially an assessor to serve for three years; when a vacancy occurs the county commissioners shall fill the vacancy until the next triennial election; such assessors shall perform all the duties relating to elections as well as as those relating to the valuation of property. In all boroughs divided into more than two wards, the office of assistant assessor is abolished and the assessors of the wards must jointly perform the duties of various assistant assessors in making their triennial assessment. In every township or ward which may have been divided into election districts there shall be elected annually an assistant assessor in each election district, who shall perform all the duties relating to elections now required to be performed by assessors in boroughs and townships having but one election district. The assessors of such townships as have been divided into election districts are divested of the duties of the office so far as they relate to elections, which are to be performed by the assistant assessors of the election districts. *Assessor's Case*, 9 Lanc. 190. See *In re Assistant Assessors*, 1 Dist. Rep. 142; s. c. 41 P. L. J. 312, 313.

60. "Josiah Trumpore" was held to be properly registered as "Jess. Trumpart." *O'Day's Contest*, 5 Kulp 491.

61. For instances of sufficient and insufficient registration on the principle of *idem sonans*, see *Cusick's Election*, 1 Lack. Jur. 265; affirmed in *Cusick's Election*, 136 P. S. 459; s. c. 26 W. N. C. 425.

VI. Non-registered voters.

62. The 10th section of the act of 30 January 1874 (Brightly's Purdon 735), prescribing the manner in which non-registered voters must prove their qualifi-

cation, is constitutional. Its provisions are mandatory and must be complied with. *Cusick's Election*, 136 P. S. 459; s. c. 26 W. N. C. 425; affirming s. c. 1 Lack. Jur. 265.

63. Upon the qualification of a non-registered voter, an affidavit is defective which does not state when and where the voter was born, and when and where the tax claimed to be paid was assessed and where and to whom paid. *Ibid.*

64. An affidavit merely defective from the absence of the jurat may be reformed upon due proof. But a number of affidavits cannot be so reformed by one general affidavit. *Ibid.*

65. Upon a contested election where the name of a proponent voter was not on the registry list, the vote will be rejected unless the legal affidavits supporting his right to vote are subscribed to and filed; so, a vote cannot be counted where it is shown that the proponent had not paid a state or county tax as required by law. *Middendorf's Case*, 4 Dist. Rep. 78.

66. Under the act 10 June 1893 no person whose name does not appear upon the ballot and voting check lists, can vote without making proof of his right to vote; this proof must be made when the right to vote is claimed and cannot be made on the trial of a contested election. *White's Election*, 4 Dist. Rep. 363.

VII. Election officers.

67. An election officer detained by his duties beyond the hour of midnight, is entitled to an additional day's pay. *Potter v. Tioga County*, 8 C. C. 24; contra, *Bratton v. Perry County*, 6 *Ibid.* 62.

68. Election officers under the act of 2 July 1839 (Brightly's Purdon 728) are entitled to \$1.50 per day in conducting general, special or local elections. *Potter v. Tioga County*, 8 C. C. 24.

69. The act of 2 July 1839 (Brightly's Purdon 728), as to the pay of election officers, is superseded as to Lycoming county, by the act of 13 March 1873, and a return judge is no longer entitled un-

der the former act to a *per diem* compensation for returning the election papers to the prothonotary. *Bubb v. Lycoming County*, 134 P. S. 112.

70. A judge of election is eligible as a candidate for the office of township collector at the election at which he serves as judge. *McKenzie's Election*, 13 C. C. 546.

71. Where the complainants were elected as judge and inspectors for the ensuing general election, at a Republican primary election, but the returns were not made to the division officers on the same evening as required by the party rules, and the party rules also provided that a contest should be heard and decided on the second night after the election; it was *held*, that the irregularity as to return was not fatal to the election, and where other officers were elected three months afterward, it was *held*, that they would be enjoined by preliminary injunction from interfering with the complainants in the exercise of their offices. *Gray v. Tooma*, 13 C. C. 625.

VIII. Policemen at the polls.

72. A policeman has no business at the polls except when specifically required by the election officers to prevent the commission of offences or to preserve the public peace; and this, notwithstanding the act 10 June 1893, sec. 28 (Brightly's Purdon 748). *Beitler's Petition*, 34 W. N. C. 476; s. c. 15 C. C. 166.

IX. Notice of election.

73. An election without a proclamation will be sustained if it appear that the electors had a general knowledge of it. *Comm'th v. Reynolds*, 5 Kulp 547.

74. The county is liable for constables' fees for serving notices of election on school directors, judges and inspectors of election and assessors. The act of 15 June 1840 (Brightly's Purdon 760) is not repealed by the act of 30 June

1874. *Lehigh County v. Yingling*, 6 C. C. 594.

75. Under the act 23 June 1885, P. L. 144, it was *held*, that the sheriff could not bind the county by authorizing the publication of his election proclamation in more than four newspapers. *Bartholomew v. Lehigh County*, 148 P. S. 82. See the act 10 June 1893 (Brightly's Purdon 727).

76. Under the act 10 June 1893, sec. 10 (Brightly's Purdon 727), it is the duty of the sheriff to give notice of general elections, either by notices posted in the most public places or by advertisement in at least two newspapers, his duty is in the alternative; where a sheriff published notice in newspapers; it was *held*, that he could not be allowed afterwards to elect to charge fees for posting. *Burnett v. Mercer County*, 3 Dist. Rep. 379.

X. Ballots.

(a) Printing ballots.

77. In an election for borough officers, it is proper to print on the official ballot all the names of all candidates placed in nomination by nomination papers, under the designation of the proper office in alphabetical order according to their surnames. *McKees Rocks Election*, 11 C. C. 193.

78. As to the form of official ballots under the act 19 June 1891, see *In re Official Ballots*, 1 Dist. Rep. 727.

79. Under the act 19 June 1891 (see act 10 June 1893, sec. 13, Brightly's Purdon 740) the borough auditors are entitled to compensation at the rate of two dollars per day for services rendered in the printing and distribution of official ballots. *Corr v. Lackawanna County*, 163 P. S. 57; reversing s. c. 13 C. C. 12; and overruling *Lewis v. Montgomery Co.*, 9 Montg. 89. See *Packer v. Northampton County*, 10 Lanc. 253.

80. Upon the submission of a municipal question to the vote of the people, such as an increase of indebtedness, the

expense of printing the ballots must be borne by the municipality and not by the county. *Comm'th v. Weir*, 15 C. C. 425.

(b) Preparation of ballots.

81. All ballots must be prepared in the booth in the voting room. *Little Beaver Township Election*, 15 C. C. 81.

82. The voter is the sole judge of his own disability; his declaration that he desires assistance in the preparation of his ballot cannot be met and overthrown by proof of its falsity. *Beaver County Election*, 12 C. C. 227; contra, *Election Instructions*, 2 Dist. Rep. 1.

(c) Marking ballots under act 19 June 1891.

83. Under the ballot act of 19 June 1891, it was *held*, that it was immaterial where the cross was placed on an official ballot or whether a cross be used at all, provided the voter's choice could be determined from the face of the ballot; a ballot on which a cross was placed in the margin immediately to the right of a candidate's name instead of in the square to the right of his place of residence, was *held* to be a good ballot. *Weidknecht v. Hawk*, 13 C. C. 41.

84. Under the act 19 June 1891, it was *held*, that a cross marked at the left of the name, although partly within the space containing the name, was too vague and indeterminate to be counted, but a cross marked in the space where the title of the office was printed and directly above the name of a candidate, would be counted; so, where a cross was marked in the square at the right of the party name at the head of a group of candidates and in the opposite group there was a cross marked at the right of the name of the opposing candidate; it was *held*, that the vote would be counted for the candidate whose name was particularly marked. *Hughes's Election*, 3 Lack. Jur. 313.

85. Ballots marked with a cross to the left of the party name at the head of

each group and with no other mark will not be counted; nor ballots marked with a cross to the left of the name of the office to be filled; nor ballots marked with a cross to the right of the name of a candidate but not in the proper margin, but in the portion of the ticket provided for the insertion of additional names. *Laucks's Case*, 10 Lanc. 228.

86. Ballots marked with a cross to the right of the party name, not in the space left for that purpose, but in a vacant space immediately after the same, will be counted; so will ballots marked with a cross to the right of a candidate's name, not in the space provided for that purpose, but in a vacant space immediately after the name; and so ballots marked with a cross in the proper margin opposite the party designation at the head of the group, there being no mark opposite the name of either candidate, will be counted for that candidate whose party designation is marked. *Laucks's Case*, 10 Lanc. 228.

87. Where the voter marks individuals and also marks the head of a group, the marking of the individual must prevail. *Twentieth Ward Election*, 3 Dist. Rep. 120. See s. c. 3 Dist. Rep. 122.

88. As to the legality of ballots and the marking of the same under the act 19 June 1891, see *Contested Election for Mayor of York*, 13 C. C. 205. But see act 10 June 1893 (Brightly's Purdon 743).

89. As to the proper marking of ballots under the act 19 June 1891, see *Election Instructions*, 2 Dist. Rep. 1.

(d) Marking under act 10 June 1893.

90. Under the act 10 June 1893 (Brightly's Purdon 743) a vote should be counted though the voter fails to use a cross (X) mark, if he uses instead some other mark or written expression which sufficiently indicates his choice. *Hempfield Township Election*, 14 C. C. 577.

91. Under the act 10 June 1893

(Brightly's Purdon 743), it was *held*, that a vote should be counted although the ballot contained no crosses or marks whatever, but the name of one of two opposing candidates was erased with a lead pencil. *Coleman v. Gernet*, 14 C. C. 578.

92. Where there were two partial tickets on an official ballot and one was marked "Democratic" and the other "by nomination papers," and both together made one full and complete ticket; it was *held*, that the voter might indicate his intention to vote both tickets by marking in the circle at the head of each ticket. *Reed v. McArthur*, 15 C. C. 136.

93. Where a voter has made his cross at the left of a candidate's name instead of at the right, his intention is sufficiently clear and the ballot should be counted. *Sharon Hill Election*, 5 Del. 433.

94. Under the act 10 June 1893, sec. 22 (Brightly's Purdon 743), a ballot marked with two horizontal lines within the circle at the head of the ticket, or a ballot marked with a cross alongside of said circle but on the outside of it, or a ballot marked with a cross between the heavy lines designating the column of candidates to be voted for, is defective and should not be counted. *East Coventry Election*, 3 Dist. Rep. 377.

95. A ballot should not be counted where a voter has marked his ballot with a stroke instead of a cross; the act 10 June 1893, sec. 22 (Brightly's Purdon 743), is mandatory. *Long v. Kochenderfer*, 3 Dist. Rep. 678.

96. The act 10 June 1893, sec. 22 (Brightly's Purdon 743), is merely directory; where the intention of the voter to vote for a given candidate can be gathered from the face of the ballot, such intention must prevail no matter how it was expressed. *Middendorf's Case*, 4 Dist. Rep. 78.

(e) Names not on ballot.

97. The provision in the ballot law of 19 June 1891 (Brightly's Purdon 743), authorizing any voter to insert any name

not already on the ballot, authorizes such insertion to be made by the use of a printed adhesive slip. *De Walt v. Bartley*, 146 P. S. 529; affirming s. c. 1 Dist. Rep. 199. See *Ripple v. County Commissioners*, 1 Dist. Rep. 202.

98. Where a person is voted for whose name was not already on the ballot, the only prescribed mode of voting is by inserting the name in the blank space in the right-hand column of the official ballot; the name only should be thus inserted and not the title of the office to be filled. *Little Beaver Township School Directors' Election*, 165 P. S. 233.

99. The name of a candidate may be inserted on the ballot by writing or by pasting a slip with the name printed upon it in the space provided therefor, but the law does not authorize the use of a blanket slip by which the titles of other offices, designation of spaces and directions are obliterated. *Little Beaver Township Election*, 15 C. C. 81.

(g) Counting ballots.

100. In counting the votes, it is the duty of the election officers to count or to refuse to count all ballots; to seal up certain doubtful ballots and place them in the custody of the judge, is improper and may subject the officers to indictment; such ballots cannot be considered in computing the vote upon a contest. *Twentieth Ward Election*, 3 Dist. Rep. 118.

101. Where certain ballots by a mistake or blunder were not returned to the ballot box, but kept in a sealed envelope in the custody of the judge, the court upon a contest will consider such ballots as if they had been properly deposited in the box. *Middendorf's Case*, 4 Dist. Rep. 78.

102. Unnumbered ballots found in the ballot box cannot be counted. *Hughes's Election*, 3 Lack. Jur. 313.

103. Under the old law, it was held, that where two ballots were folded together, they should not be thrown out unless the folding was "deceitfully" done, but that the court upon a contest would

not interfere with the honest decision of the election board on the subject. *Cosello's Contest*, 7 C. C. 30.

XI. Qualifications of electors.

(a) General principles.

104. As to the effect of two or more persons of exactly the same name voting in the same election district and one of them—it being undetermined which—being shown to be disqualified, see *Cusick's Contest*, 1 Lack. Jur. 265.

105. At a primary election the officers have no authority to swear witnesses as to the qualifications of a challenged voter. Swearing falsely by such a witness is not perjury. *Comm'th v. Lawrence*, 4 Del. 27.

106. When it appears upon a contested election that a ballot was illegally accepted and counted, such ballot will be thrown out; and this, though subsequent to the election the legal qualification of the voter has been proven; proof of qualification must be made when the vote is offered. *Sharon Hill Contested Election*, 5 Del. 381.

(c) Naturalization.

107. In contested election cases a certificate of naturalization is conclusive on the question of citizenship. *Cusick's Contest*, 1 Lack. Jur. 265.

108. In a contested election case, a certificate of naturalization, though conclusive of the facts therein contained, is not conclusive evidence of identity. *O'Day's Contest*, 5 Kulp 491.

109. The registration of a naturalized citizen in the manner prescribed by law with the letter "N" marked opposite his name, is *prima facie* evidence of his right to vote and it is the duty of the election officers to receive and count the vote unless he is challenged, but if challenged, it cannot be received without the production of the naturalization papers unless he has been a voter in the district for the time specified by law. *Sharon Hill Contested Election*, 5 Del. 381.

(d) Residence.

110. Sec. 16 of the act 3 April 1851 (Brightly's Purdon 245), requiring electors offering to vote at a borough election to have resided six months in the borough and to have paid a borough tax, is unconstitutional; the legislature has no power to add a qualification to the right of franchise not required by the constitution. *Rishel v. Luther*, 2 Dist. Rep. 769.

111. Where a voter had occupied a law office in a certain ward for more than ten months preceding the election, but had slept and taken his meals elsewhere; it was held, that he was not entitled to vote in that ward. *Leaman's Application*, 8 Lanc. 405.

(e) Payment of taxes.

112. A citizen who has paid his tax is entitled to vote, even though the collector may have been exonerated from its collection. *Cusick's Contest*, 1 Lack. Jur. 265.

113. Where a man pays the tax demanded of him by the collector based upon an assessment apparently standing in his name, he cannot be declared to have voted illegally; and this, though there be evidence that the assessment was intended for another man of the same name residing in another part of the district. *Hughes's Election*, 3 Lack. Jur. 313.

114. Proof of the non-assessment of taxes against a voter for the two years prior to the election, in the district in which he voted, does not establish *prima facie* that he had not paid a duly assessed state or county tax within two years. *Brislin's Case*, 12 C. C. 480.

115. A poll tax may be paid by the voter in person or by his agent or by a volunteer; the receiver of taxes will not be enjoined from receiving such payment. *Clark v. Taylor*, 1 Dist. Rep. 761; s. c. 9 Lanc. 376.

116. To entitle a person to vote, a tax must be paid by the voter or by some one acting for him under granted and not assumed power, or the voter must have

ratified the payment more than one month before the election; a payment by a political committee does not clothe the voter with the qualification of an elector unless authorized or ratified by the voter. *White's Election*, 4 Dist. Rep. 363.

117. In Indiana county after the extra assessments have been made by the assessors according to the local act 4 April 1872, P. L. 954, and the return made to the county commissioners, no citizen who has not paid his tax is at liberty to do so after a return made. *White's Election*, 4 Dist. Rep. 363.

XII. Of the return.

118. For returns of general elections, return judges are entitled to ten cents per mile under the act 2 July 1839 (Brightly's Purdon 750), in delivering returns, and pay for each day necessarily so spent. But for returns of local elections they are entitled to but six cents per mile under the act of 13 June 1840 (Brightly's Purdon 760), and no daily pay. *Potter v. Tioga County*, 8 C. C. 24.

119. The figures on the triplicate returns and return sheet do not necessarily control the tally sheet. *Comm'th v. Jenkins*, 6 Kulp 17.

120. Since the passage of the act 10 June 1893 (Brightly's Purdon 745), all election returns must be made to the common pleas, which has jurisdiction to correct palpable errors or fraud in the election returns for township and borough officers. *Sharon Hill Election*, 5 Del. 433.

121. Under the act 30 January 1874, sec. 38 (Brightly's Purdon 749), the power of the court, in computing the returns of an election, to correct errors, is limited to cases where the returns are missing, or palpable fraud or mistake is specified by the complaint of a qualified elector or is apparent on the return; the court has no jurisdiction upon an allegation that there were mistakes in counting the votes or that votes were rejected which ought to have been counted. *Ber-tolet's Election*, 13 C. C. 353.

122. When the returns of an election for burgess show a tie vote, neither candidate has any right to the office, but the burgess in office at the time holds over. *Sharon Hill Election*, 5 Del. 433.

123. Upon an election for school directors, where six directors were to be chosen, two for three years, two for two years, and two for one year, and the ballots of the six persons having a majority of all the votes cast failed to designate the term, but the six persons having a minority of all the votes cast had a majority of all the votes on which the term was designated; it was held, that the latter were elected; the act 11 April 1862, sec. 2 (Brightly's Purdon 348), only applies where all the voters neglect to designate on their tickets the term of office for which each person voted for is a candidate. *Chamberlin v. Hartley*, 152 P. S. 544.

XIII. Controverted elections.

(a) Jurisdiction.

124. A contestee cannot, by having himself sworn in to office during the pendency of a contest, so oust the jurisdiction of the court and end the contest. *Reed v. McArthur*, 15 C. C. 136.

(b) Of the petition.

125. Electors of one supervisor district are not qualified to sign a petition for contest in another district, because the election for both districts is held at the same place, and the election district embraces territory in both supervisor districts. *Third Road District Supervisor*, 8 C. C. 302.

126. The court will not entertain an election petition, wherein it is sought to contest in one proceeding, the election of burgess, school directors, councilmen, constable, tax collector and justice of the peace. *Coopersdale Election*, 157 P. S. 637; affirming s. c. 13 C. C. 62.

127. Where several candidates are voted on the same ballot, and the contestants allege fraud or mistake, calculated to affect the entire ticket, it is not necessary for the contestants to file as many copies of their petition as there are persons upon the ticket returned elected. *Moock v. Conrad*, 155 P. S. 586; affirming s. c. 13 C. C. 97; 2 Dist. Rep. 469. See *Coopersdale Election*, 157 P. S. 637.

128. The election of different persons to different offices cannot be contested by a single petitioner. *Butler Township Election*, 4 Dist. Rep. 350.

129. In cases of contested elections, allegations of fraud and mistake must be precisely and specifically set forth in the petition, and the proof must be explicit. *Common Council Contest, — First Ward, Lancaster*, 10 Lanc. 121.

130. An affidavit to a petition, it seems, is sufficient, which avers the statements of the petition are true to the best of the knowledge and belief of the affiant. *Moock v. Conrad*, 155 P. S. 586; affirming s. c. 13 C. C. 97; 2 Dist. Rep. 469.

131. Proceedings will not be quashed as vague and indefinite when the petition embraces everything essential under the act of assembly; especially is this so when the petition has already been adjudged in due form by the attorney-general. *White's Election*, 4 Dist. Rep. 363.

(c) Amendment.

132. Where a petition for a contest contains averments sufficient to give jurisdiction, the petition may be amended at any time. *Acker v. Conrad*, 13 C. C. 97.

133. After the time allotted for contesting an election, the court will not allow the petition to be amended as to an omitted prerequisite necessary to confer jurisdiction, nor as to a matter essential to the form of the petition. *Butler Township Election*, 4 Dist. Rep. 350.

(d) Bill of particulars.

134. The better practice is to compel both parties in a contested election case to file bills of particulars in the first instance. *Cusick's Election*, 1 Lack. Jur. 265; affirmed in *Cusick's Election*, 136 P. S. 459; s. c. 26 W. N. C. 425.

135. If the contestant specify fraud in particular districts and the respondent aver fraud in all the districts, he cannot complain because testimony as to certain districts not named by the contestant is disadvantageous to him, the respondent. *Cusick's Election*, 136 P. S. 459; s. c. 26 W. N. C. 425; affirming s. c. 1 Lack. Jur. 265.

136. The court may order the parties to file bills of particulars so that the issues may be defined and the investigation kept within reasonable bounds. *White's Election*, 4 Dist. Rep. 363.

(e) Hearing.

137. In a contested election, witnesses cannot be compelled to testify for whom they voted, in the absence of proof that they voted illegally; such privilege, however, to refuse to answer is a personal one and may be waived by the voter. *O'Day's Contest*, 6 Kulp 474.

138. Upon the trial of a contested election, it is not essential that ballots attacked be specially offered in evidence; such offer is not necessary when the ballot boxes are produced by order of court. *White's Election*, 4 Dist. Rep. 363.

139. Upon the trial of a contested election case, the presumption is in favor of the legality of the vote; the burden is upon the attacking party to show either that the voter lacked some qualification, or had lost his right to vote by failure to observe some positive requirement, or had forfeited his right by giving or receiving a bribe. *White's Election*, 4 Dist. Rep. 363.

140. Where a voter received a valuable consideration for his vote, he forfeits his right to vote, and his vote may be

thrown out upon the trial of a contested election. *White's Election*, 4 Dist. Rep. 363.

(g) Opening ballot boxes.

141. The illegality of votes must be *prima facie* established before an order will be made to have the ballot boxes opened. *Brislin's Case*, 12 C. C. 480.

142. Upon a petition alleging that the return sheets of certain divisions did not contain true returns of the ballots cast, and that the election officers through ignorance or mistake had failed to properly count the votes cast, and had rejected ballots without legal cause, the judges of the common pleas, sitting to count the votes of a municipal election, refused to make an order for the opening of certain ballot boxes and the examination of the ballots therein contained. *Twentieth Ward Election*, 2 Dist. Rep. 396. See *Twentieth Ward Election*, 13 C. C. 609; *Moock v. Conrad*, 155 P. S. 586.

143. In a contested election case since the ballot act 19 June 1891, where the petitioners allege fraud, mistake and irregularity in the returns, and support their allegation with evidence, the court will order the opening of the ballot boxes and a recount of the ballots; the ballots are the best evidence of the result of the election. *Twentieth Ward Election*, 13 C. C. 609. See *Twentieth Ward Election*, 2 Dist. Rep. 396; *Moock v. Conrad*, 155 P. S. 586.

144. A petition asking for the opening of ballot boxes and a re-computing of votes should be verified by affidavit; such a petition is not sufficient which avers no fraud or mistake and no facts from which they could be inferred, but simply avers that full justice can only be done by a recount of the votes. *Twentieth Ward Election*, 3 Dist. Rep. 118.

145. Upon a contested election when it appears that illegal votes have been received and counted, the court will open the ballot box and throw out the illegal

ballots. *Sharon Hill Contested Election*, 5 Del. 381.

146. The common pleas sitting for the purpose of computing election returns, has no power to open the ballot boxes and recount the ballots, for the purpose of correcting an alleged mistake of the election officers. *Carbondale Election Returns*, 3 Lack. Jur. 101.

147. Upon the hearing of a contested election the court will not order the ballot box to be brought into the court where a number of ballots were not counted because of alleged defects, when it is not proven by the testimony that a count of such ballots would not change the result. *Common Council Contest, — First Ward, Lancaster*, 10 Lanc. 121.

148. Where it is shown that certain ballots were not counted by the election officers and such officers are unable to adequately describe such ballots or give satisfactory reasons for rejecting them or specify accurately the number rejected, the court will order the ballot boxes to be opened and a recount made. *Loucks's Case*, 10 Lanc. 228.

(h) Judgment.

149. The act 8 May 1854 sec. 6 (Brightly's Purdon 347) providing that if the legality of any election for school directors be contested, the quarter sessions shall examine into the elections and either confirm it or set it aside, and if set aside, then shall order a re-election, contemplates a contest on the sole ground of the illegality of the whole election. It does not apply to proceedings under the act 19 May 1874 (Brightly's Purdon 763), where the only complaint is as to who were duly elected; in such a case the court will decide who was elected, and will not order a new election. *Reed v. McArthur*, 15 C. C. 136.

(i) Costs.

150. Where the bulk of the illegal votes rejected by the court were improperly received through the carelessness of

the assessors and election officers, it was held, that the costs should be put upon the county. *White's Election*, 4 Dist. Rep. 363.

(k) Appeal.

151. No appeal lies to the supreme court in contested election cases. *Yonkin's Appeal*, 12 Cent. 371; affirming *Yonkin's Contested Election*, 2 C. C. 550.

152. The supreme court has no authority to review the facts on *certiorari* in a contested election case. *Ibid.*

153. No appeal lies from an order of the court of quarter sessions refusing to quash a petition in a contested election case. *Moock v. Conrad*, 155 P. S. 586; affirming s. c. 2 Dist. Rep. 469.

154. Upon *certiorari* to an order of the quarter sessions in an election case, the evidence and the opinion rendered by the court below forms no part of the record and cannot be considered by the supreme court; a final decree will not be reversed because the court below, before proceeding to final hearing, failed to dispose of a petition of certain of the signers for leave to withdraw, of a motion to strike off the names of persons alleged not to be electors, and of a motion to quash. *Comm'th v. Ramsay*, 166 P. S. 642.

XIV. Penal offences.

155. Upon the charge of rejecting the vote of a qualified voter, it is error to include the judge and two inspectors in the same indictment, but the misjoinder may be avoided by dropping the name of two by amendment or *nolle pros.* *Comm'th v. Youlls*, 5 Kulp 231.

156. An indictment is sufficient under the act of 2 July 1839 (Brightly's Purdon 494), which charges an election officer with rejecting the vote of a "qualified voter"; this implies that he was a citizen. *Ibid.*

157. Where the defendant was committed upon an affidavit charging him

with conspiring with persons named to cheat and defraud at a specified election, and in pursuance of said conspiracy making a false and fraudulent return of said election and conspiring to procure the casting of illegal votes and preventing qualified electors from exercising their right of suffrage; it was held, that such a commitment would not support an indictment which charged a conspiracy with unknown persons to prevent divers persons whose names were unknown from voting, they, the said divers persons, being then and there qualified to vote; and the indictment was quashed. Where there is a desire to indict for some other offence there should be another binding over. *Comm'th v. Hunter*, 13 C. C. 573.

158. The act 2 July 1839, sec. 102 (Brightly's Purdon 494), punishing wilful frauds by election officers, is not repealed by the ballot act 19 June 1891, P. L. 349. *Comm'th v. Casey*, 14 C. C. 389.

159. Primary election officers, conducting an election for a delegate to a county convention, may be indicted under the act 29 June 1881 (Brightly's Purdon 761) for a false return of the delegate elected. *Comm'th v. Boyle*, 14 C. C. 561.

160. In an indictment under the act 29 June 1881 (Brightly's Purdon 761) for making a false return, a count will be sustained which charges a conspiracy to commit the act. *Comm'th v. Boyle*, 14 C. C. 561.

161. The inspectors and judges of a primary election cannot be jointly indicted under the act 29 June 1881 (Brightly's Purdon 761) for holding such election without taking the oath, but they may be jointly indicted for false counting and making false returns. *Comm'th v. Boyle*, 14 C. C. 561.

162. An indictment for a violation of the primary election law 29 June 1881 (Brightly's Purdon 761) should aver that the primary election was held for the purpose of nominating candidates for state, city or county offices as the case may be,

within this commonwealth. *Comm'th v. Young*, 15 C. C. 349.

ELECTRIC LIGHT.

See CONSTITUTIONAL LAW: GAS:
NATURAL GAS.

1. The act 20 May 1891 (Brightly's Purdon 242), authorizing boroughs to manufacture electricity for commercial purposes, is constitutional; it is not in conflict with article IX., sec. 7, of the constitution. *Linn v. Chambersburg Borough*, 160 P. S. 511.

2. Electric light companies have no exclusive privileges; under the act 8 May 1889 (Brightly's Purdon 770) an electric light company cannot be chartered to supply electricity to more than a single municipality. *Home Electric Company*, 11 C. C. 179; s. c. 29 W. N. C. 383.

3. The real estate of an electric light company, being part of its capital stock and paying state taxes, is exempt from taxation by the city. *Lancaster v. Edison Electric Illuminating Co.*, 7 Lane. 317; *Scranton v. Scranton Electric Light and Heat Co.*, 8 C. C. 626.

4. An electric light company is not exempt from taxation on its capital stock, as a manufacturing company under the act of 30 June 1885. Manufacturing companies are limited to those which produce material substances. *Comm'th v. United States Electric Light Co.*, 7 C. C. 90.

5. Councils have no right to couple their permission to enter upon the city streets and string wires, with a condition that the company shall furnish the city with one free light for every thirty paid lights. *Scranton Electric Light and Heat Co. v. Scranton*, 4 Del. 117; s. c. 1 Lack. Jur. 177.

6. A city may pass an ordinance compelling the owners of all electric poles to number and initial each pole and to take out a license at a cost of fifty cents per year for each pole, and imposing a penalty

of five dollars for each and every offence. But a company refusing to mark and number its poles and take out a license is guilty of but one offence and liable to but one penalty. *Lancaster v. Edison Electric Illuminating Co.*, 8 C. C. 178.

7. Permission to occupy the streets of a municipality with electric light poles is subject to the police power of the city, and where a street is being graded and a vitrified pavement is being laid, a mandamus will lie to compel the removal of the poles within the curb line. *Monongahela City v. Monongahela Electric Light Co.*, 12 C. C. 529.

8. In proceedings by mandamus to compel an electric light company to remove poles because they prevent the paving and curbing of the street; it is not necessary to set out in the petition the ordinance under which the street is being paved. *Monongahela City v. Monongahela Electric Light Co.*, 12 C. C. 529.

9. An electric light company will be enjoined from locating its poles on the side of a country road until a bond be given for the payment of such damages as an abutting landowner may sustain by their location. *Haverford Electric Light Co. v. Hart*, 13 C. C. 369.

10. Where an electric light company agreed to supply a borough at the lowest price charged to other boroughs and the lowest price directly charged was twenty-three cents per lamp each night, but it appeared that the company had taken an assignment of a contract made by another company to supply a borough at eighteen cents per night; it was held, that under the contract with the plaintiff borough, the company could only charge eighteen cents per lamp. *Edgewood Borough v. Wilkinsburg Electric Co.*, 39 P. L. J. 344.

11. A city contractor will not be enjoined from proceeding with a paving contract at the suit of a gas company seeking to lay its trenches, who have delayed their work for an unreasonable time. *Wilkes-Barre Gas Co. v. Hendler*, 7 Lanc. 42.

12. The engine, machinery and appli-

ances of an electric light plant do not pass to the purchaser of the real estate at sheriff's sale under a mortgage, unless it was the intention to make the plant a part of the realty when it was erected. *Vail v. Weaver*, 132 P. S. 363.

13. The ownership of the wires beneath the plastering, used in wiring a building for electric lighting, was left to the jury under all the evidence as a question of fact. *Harrisburg Electric Light Co. v. Goodman*, 129 P. S. 206.

14. In an action for a designated quantity of electricity at a fixed price per lamp hour, an affidavit of defence is sufficient which avers that the measurement of current used was incorrect, that the meter was out of order and did not register correctly, that the meter was the property of the plaintiffs and under their sole control, that it was removed by plaintiffs and that defendant had no opportunity to test by a new and correct meter and that in consequence he could not tell in what sum he was indebted to plaintiffs for electricity actually consumed. *Edison Electric Light Co. v. McCorkell*, 161 P. S. 227.

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EMINENT DOMAIN.

See COMMON SCHOOLS: CONSTITUTIONAL LAW: HIGHWAYS: NATURAL GAS: PHILADELPHIA: PIPE LINE COMPANIES: RAILROAD COMPANIES: WATER COMPANIES.

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- 1. A plaintiff must come into a court of equity with clean hands. *Thompson's*

Appeal, 13 Atlan. 952; affirming *Rhodes's Estate*, 43 L. I. 58; *Brown v. Pitcairn*, 148 P. S. 387.

2. The maxim that he who comes into a court of equity must come with clean hands is confined to misconduct in regard to, or at all events connected with, the matter in litigation. *Hays's Estate*, 159 P. S. 381; affirming s. c. 41 P. L. J. 792.

3. A chancellor will turn a deaf ear to a married woman, who has attempted to dispose of her property in fraud of her husband's rights. *Hedden's Appeal*, 17 Atlan. 29.

4. As to what is such lapse of time as will preclude equitable relief, see memorandum of authorities in notes to *Le Gendre v. Byrnes*, 14 Atlan. 621; *Mitchell v. Farrish*, Ibid. 712; *Chamberlain v. Lyndeborough*, Ibid. 865; *Culver v. Pier-son*, 15 Ibid. 269.

5. A party to a contract cannot by his "order" upon the other party relieve himself of his own contract obligations. He who seeks to compel performance by others, must show his right to ask it by showing his own performance of all that is preliminary, and his readiness to perform what is coincident to that which he asks done by others. *Mints's Appeal*, 128 P. S. 163.

6. A combination among brewers to prevent competition among themselves is an illegal combination in restraint of trade, and equity will not, upon a bill for an account, enforce the claim of one member of such an illegal combination against the other members, where his cause of action is based upon the illegal agreement. *Nester v. Continental Brewing Co.*, 161 P. S. 473; affirming s. c. 12 C. C. 417.

II. Jurisdiction of equity.

(a) General principles.

7. Equity has jurisdiction to decree a conveyance of real estate from defendant to plaintiff, where the case involves

a trust. *Chadwick's Appeal*, 7 Atlan. 178.

8. A bill in equity will lie to enforce contribution, where one of several joint debtors discharges the same for the benefit of all. *Gordon v. Freed*, 4 Montg. 183.

9. Equity will assume jurisdiction where the complaint charges injuries and threatened injuries from an unlawful interference with a water-course. *Bolton v. Swartz*, 4 Montg. 198.

10. The equity side of the common pleas has jurisdiction to enforce the payment of legacies charged on land, notwithstanding the conferring of such jurisdiction upon the orphans' court by the act of 24 February 1834 (Brightly's Purdon 620). See act 17 May 1866 (Brightly's Purdon 1634). *Brotzman v. Brotzman*, 1 Northam. 13; affirmed in *Brotzman's Appeal*, 119 P. S. 645.

11. Equity has jurisdiction of a bill by the assignee of an insolvent bank against the president and others, charging that the defendants had withdrawn large sums and used them in gambling in oil, on the ground that the remedy at law, involving the consideration of a mass of complicated accounts, would be inadequate. *Warner v. McMullin*, 131 P. S. 370.

12. If distinct matters be charged in the bill, and one fails or is not cognizable in equity, the bill may be good as to the other. *Bishop v. Cowden*, 5 Montg. 151.

13. A court of equity having jurisdiction of an executory contract for the sale of real estate, may issue an injunction to keep the property in *statu quo*. *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, 138 P. S. 22; affirming s. c. 7 C. C. 277; 24 W. N. C. 573.

14. Equity has jurisdiction to enjoin the successor in title of a lessor in an oil mining lease from mining for oil on part of the demised premises, at the suit of the assignee of the lessee. *Duffield v. Hue*, 136 P. S. 602; s. c. 26 W. N. C. 387.

15. Where certain matters were placed under the control of a church conference and the authority of the conference was defied by its members, and the power of the association to enforce obedience to its decree was exhausted; it was *held*, that equity would assume jurisdiction and grant relief; and this, though by the discipline of the association such conference was to be the supreme court of law of the church. *Brown v. Painter*, 8 Montg. 130.

16. Equity has jurisdiction of a bill filed for the appointment of a receiver for a joint stock company. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

17. If a report of referees awards money to be paid by defendant and other things to be done by plaintiff, if the court cannot enforce both they will enforce neither. A justice has no jurisdiction of a suit for the money awarded; the remedy is by bill in equity. *Yates v. Demmer*, 9 C. C. 80; s. c. 4 Del. 324.

18. A court of law has no jurisdiction in an equitable ejectment to compel the defendant to satisfy a mortgage for which he has received credit in the conditional verdict; the only remedy is by a bill in equity. *German-American Title & Trust Co. v. Shallcross*, 147 P. S. 485.

19. Where the plaintiff in an injunction bill claims an exclusive right to mine coal in certain lands, and avers that the defendant is taking it out and shipping it in such quantities that the mines will soon be exhausted, equity has jurisdiction to restrain such a continuous trespass. *Jennings v. Beale*, 158 P. S. 283.

20. Where a bill to restrain the trespass upon real estate is filed and the deed under which the plaintiff claims is recited in the chain of title and is admitted in the pleadings, and the only question is whether it confers a right upon the plaintiff to mine coal, no such question of title arises as will deprive a court of equity of jurisdiction. *Jennings v. Beale*, 158 P. S. 283.

21. Where a court of equity has jurisdiction of a person, it may issue an in-

junction to prevent his trespassing on lands in another county. *Jennings v. Beale*, 158 P. S. 283.

22. Equity has jurisdiction to restrain the drilling of an oil well where the lease, under which the right is claimed, does not grant a conveyance in fee, but merely an incorporeal hereditament. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

23. Proceedings will not be set aside, except in a clear case, for want of jurisdiction, after the defendant has acquiesced in the reference to a master involving heavy costs. *Evans v. Goodwin*, 132 P. S. 136; affirming s. c. 46 L. I. 168.

24. The supreme court does not favor giving jurisdiction to equity by consent; where, however, something might be said in favor of the jurisdiction and the case had proceeded to final hearing, the court disposed of the case as it stood. *Jinks v. Banner Lodge*, 139 P. S. 414; affirming s. c. 37 P. L. J. 446.

25. When the parties to a suit in equity have submitted to the jurisdiction and taken the chances of a decree in their favor, an objection that it should have been at law, first made in the supreme court, will not prevail unless the want of jurisdiction is so plain as to justify a dismissal of the court's own motion. *Edgett v. Douglass*, 144 P. S. 95.

26. After a full hearing upon exceptions to a master's report, and after heavy costs have been incurred, a doubt as to equitable jurisdiction is not sufficient to oust it. *Drake v. Lacoe*, 157 P. S. 17; reversing s. c. 2 Lack. Jur. 382.

27. A court of equity will not permit an objection to its jurisdiction to prevail in a doubtful case after the parties have voluntarily proceeded to a hearing on the merits before a master. *Shillito v. Shillito*, 160 P. S. 167.

(b) When equity will not entertain jurisdiction.

28. Equity has no jurisdiction of a bill praying that the defendant's interest in

certain patents be sold and the proceeds applied to the plaintiff's judgment. *Rut-ter's Appeal*, 8 Atlan. 170.

29. A bill setting forth an absolute conveyance under the supposition that it was in trust for the plaintiff's sister, and praying that the defendant and his wife (the plaintiff's sister) be declared trustees for plaintiff, shows no case for equitable interference. *Way's Appeal*, 8 Atlan. 173.

30. Equity has no jurisdiction of a bill to enjoin defendants from using an alley which they claim the right to use. *Quinn's Appeal*, 11 Atlan. 649; s. c. 10 Cent. 350.

31. The court having found against the plaintiff on every averment in his bill, the disclosure by the evidence of some other demand capable of being enforced at law, but not in equity, will not give the court jurisdiction to proceed upon that cause of action. *Ahl's Appeal*, 129 P. S. 49. See *Wolford v. Railroad Co.*, 5 York 186.

32. A bill in equity will not lie by a second lessee of oil lands alleging a forfeiture by a prior lessee in possession. The plaintiff has an adequate remedy at law either by ejectment or an action for damages. *Thomas v. Hukill*, 131 P. S. 298.

33. A lease for an ochre mine providing that if the royalties be not paid for the term of three months then the lease to be null and void, a bill in equity will not lie against the lessees in possession to enforce a forfeiture, the lessors having an adequate remedy at law in assumpsit for arrears. *Hoch v. Bass*, 133 P. S. 328.

34. Upon the pledge of shares of stock for a simple particular indebtedness, with power to sell and apply, equity has no jurisdiction to compel a retransfer and account. The pledgor has a complete remedy at law. *Roland v. Lancaster County Nat. Bank*, 135 P. S. 598.

35. Equity has no jurisdiction to enjoin the trespass on mining rights; the disputed legal title must first be settled at law. *Duncan v. Hollidaysburg & Gap Iron Works*, 136 P. S. 478; s. c. 26 W. N. C. 479.

36. The common pleas has no jurisdiction of a bill in equity to obtain a construction of a last will and enforce payment of purchase money on a sale of real estate devised, but where no such objection was raised, the court affirmed the decree but was not willing that such affirmance should be used as a precedent. *Sauer v. Mollinger*, 138 P. S. 338.

37. An owner of personal property may transfer the title by the gift of it direct to the donee, or he may impress upon it a trust for the donee's benefit; in either case, however, if the transaction remains imperfect and executory, equity will not aid in its enforcement. *Smith's Estate*, 144 P. S. 428. See *Gaffney's Estate*, 146 P. S. 49.

38. Equity will not assume jurisdiction over a claim which is merely a claim for damages for breach of contract, nor over a cause in which the accounts are all on one side and no discovery is sought. *Paton v. Clark*, 156 P. S. 49.

39. A court of equity has no jurisdiction to supervise and direct the exercise of the official discretion of a board of school directors in the location of a school-house, where such discretion has been exercised without fraud. *Roth v. Marshall*, 158 P. S. 272.

40. Where the legal title to real estate and the right of possession thereunder is involved, the defendant is entitled to a trial by jury, and a court of equity has no jurisdiction by injunction to try the question according to the course of procedure in chancery. *Pennsylvania Canal Co. v. Middletown & Harrisburg Turnpike Co.*, 11 C. C. 582.

III. Trusts.

41. A voluntary deed of trust is not revocable unless obtained by fraud or imposition, or executed under a misapprehension of fact or its legal effect. *Saylor v. Leedom*, 5 Montg. 78.

42. A deed of trust executed by the plaintiff on account of his intemperate habits, will not be annulled on his refor-

mation, in the absence of allegations of fraud, incapacity, neglect or undue influence. *Graybill v. Johns*, 7 Lanc. 147.

43. In the absence of a certain intent in a deed of trust to make a gift irrevocable, the omission of a power to revoke is *prima facie* evidence of a mistake. *Bristor v. Tasker*, 135 P. S. 110; s. c. 26 W. N. C. 115.

44. Equity will not enforce the provisions of a secret trust in a bill of sale made to hinder and delay creditors. *Guggenheimer's Appeal*, 2 Cent. 526.

45. A spendthrift having by deed created a trust in favor of his wife and children, equity will not set it aside, though it convey practically his whole estate, without reserving any power of revocation, or of support for himself, beyond his incidental rights as a member of his wife's family. *Merriman v. Munson*, 134 P. S. 114.

46. Though to make a contract valid upon a trust fund a joint exercise of judgment by all the trustees is essential, yet if a contract be executed by one, with the knowledge of the others, who acquiesce for years, a chancellor will not grant affirmative aid. *Philadelphia Trust, S. D. and Ins. Co. v. Philadelphia & Reading Coal and Iron Co.*, 139 P. S. 534; s. c. 27 W. N. C. 325.

47. Where real estate was devised in trust to testator's "trustee and executors hereinafter named," and in a later clause he named a trust company as trustee and executor, and three individuals as co-executors; it was *held*, that a court of equity had jurisdiction to enforce the trust. *St. Margaret Memorial Hospital v. Pennsylvania Co. for Ins. on Lives & Granting Annuities*, 158 P. S. 441.

48. Where a father entered into an oral contract to purchase land and directed that the deed should be made to his daughter, and before the deed was made the owner entered into a written agreement to sell the land to another person; it was *held*, upon a bill against the vendor for specific performance and against the first grantee to have her de-

clared trustee of the legal title, for the second purchaser, that the grantee's father, who was the real purchaser, was a necessary party to the bill. *Maguire v. Heraty*, 163 P. S. 381.

49. Where a person receives money to be paid to another or to be appropriated to a particular purpose, and he does not pay it to the person nor apply it to the purpose intended, he becomes a trustee and he may be sued either in law or in equity. *Minter v. Bittinger*, 3 York 203.

50. Upon a bill to re-establish a trust where the defence was justifiable, it was *held*, that the costs would be divided. *Old Eagle School Property*, 36 W. N. C. 348.

51. Where property was devised to a daughter for life and in trust for her children, and in case of her death without children then to the testator's heirs at law at the time of her death, and the daughter carried on the business of brick making upon the property and died insolvent; it was *held*, that a bill did not lie by her creditors against her administrators and children for the purpose of holding the real estate liable, upon an averment that the estate of the daughter was made insolvent by the use of the plaintiffs' money in the improvement of the trust estate, their claims being for work done, materials furnished and money expended in making improvements and betterments to said estate. *Heburn v. Spotts*, 168 P. S. 346.

See TRUSTEES.

USES AND TRUSTS.

IV. Mistake.

52. If a scrivener be not instructed to insert a clause in an agreement, its omission does not amount to a scrivener's mistake. *Tagg v. Behring*, 10 Atlan. 782.

53. Where the defendant in ejectment purchased town lots from the plaintiff, paid the purchase money, went into possession and made improvements, but the deeds by mistake conveyed other lots, the

defendant is entitled to a verdict. *Trexler v. Fisher*, 130 P. S. 275.

54. Where a policy in a mutual insurance company was written by mistake for three instead of five years, entered on the books of the company as a five-year policy and the insured paid assessments thereon after the expiration of three years; it was *held*, in a suit for a loss, that the question of mistake was for the jury. *Noel v. Pymatuning Mut. Fire Insurance Co.*, 130 P. S. 523.

55. To reform an instrument on the ground of mistake, it must be made to appear "clearly and satisfactorily, by clear, full and definite testimony, to the satisfaction of the jury." *Claybough v. Goodchild*, 135 P. S. 421; *Stafford v. Giles*, *Ibid.* 411.

56. In a suit on a covenant of general warranty in a deed for the value of a coal vein which the grantor did not own and which was not excepted in the deed, evidence that the grantees knew that the grantor did not own the coal and did not include it, is sufficient to go to the jury on the question of the reformation of the deed on the ground of mutual mistake. *Stafford v. Giles*, 135 P. S. 411.

57. If money be paid by a receiver to a party litigant, under an order of court obtained by mistake or fraud, a chancellor may require the money to be refunded. *Palmer v. Allen*, 136 P. S. 556; s. c. 26 W. N. C. 514.

58. Where a creditor held a life policy for six thousand dollars on the life of his debtor, and agreed to take therefor a paid-up policy for twenty-five hundred dollars, and at the time of the transaction the debtor had been dead for ten days, the supreme court in reversing a decree sustaining a demurrer to a bill to set aside the transaction, *held*, that the transaction was a bargain made under the influence of a mutual mistake of facts, and that it would be grossly inequitable to hold the plaintiff to it. *Riegel v. American Life Ins. Co.*, 140 P. S. 193; reversing s. c. 7 C. C. 445. See s. c. 153 P. S. 134.

59. Where a creditor held a life policy

on the life of her debtor, whose whereabouts was unknown, and she made an arrangement with the company, under which she surrendered the policy and took a paid-up policy for twenty-five hundred dollars in lieu thereof, both parties acting on the supposition that the assured was alive when in point of fact he had been dead for ten days; it was *held*, that such an agreement having been made under the influence of a mutual mistake of fact, the plaintiff was entitled to have the original policy reinstated as of the date of its surrender. *Riegel v. American Life Ins. Co.*, 153 P. S. 134; reversing s. c. 12 C. C. 177.

60. In an action of ejectment, where the sole defence is that the prior conveyance from the common grantor to the plaintiff erroneously included the land in dispute by the mutual mistake of the parties to it, such mistake must be established by proofs which would justify a chancellor in reforming the deed; evidence is inadmissible of the undisclosed intentions and opinions of the parties to the plaintiff's deed. *Breneiser v. Davis*, 141 P. S. 85.

61. Where a judgment is confessed to secure the debtor's several creditors, the moneys collected upon it to be distributed "among all my creditors share and share alike," it may be shown on distribution that the intention of both the debtor and trustee was to secure only certain specified claims scheduled in writing at the time, and that by mistake certain words which would have so restricted the security, were omitted from the confession. *Jenkins v. Davis*, 141 P. S. 266; reversing s. c. 6 Montg. 56.

62. Where the evidence showed that a boundary line run by the surveyor was a mistake merely and never had been adopted as a consentable line; it was *held*, in an action for timber cut, that judgment was properly directed for defendant, where the plaintiff failed to show title to the land upon which the alleged trespass was committed. *Waters v. Starr*, 142 P. S. 418.

63. In an action to recover back a sum paid by plaintiff to defendant in consequence of an alleged mutual mistake in carrying into effect an amicable partition of land, a verdict for the plaintiff was sustained where the trial judge, satisfied as a chancellor of the sufficiency of the evidence, had properly submitted the question of mistake to the jury. *Reed v. Horn*, 143 P. S. 323.

64. Where a husband as administrator of his wife, charges himself in his account by mistake, with money which is really his own, the court may permit him to withdraw it from the account. *Qualters's Estate*, 147 P. S. 124.

65. Where residuary legatees have, by mistake, received an amount in excess of their interest, they will be required to refund to the widow her share, but interest will only be allowed from the date at which the demand for restitution was made. *Grim's Estate*, 147 P. S. 190; affirming s. c. 48 L. I. 86.

66. To reform a deed on the ground of mistake, the evidence must be clear, precise and indubitable; it must not only be credible but of such weight and directness as to make out the facts alleged beyond a reasonable doubt. *Boyer-town Nat. Bank v. Hartman*, 147 P. S. 558.

67. A mere mistake in charging goods to the wrong person does not discharge the real debtor; the plaintiff does not thereby lose his right of action against the person, to whom and at whose request, he furnished the goods. *Ashman v. Weigley*, 148 P. S. 61.

68. Where money which is due to a person is paid to him without fraud, he may retain it although he could not have recovered it at law. Where the sheriff paid to the plaintiff in an execution the amount due to him as disclosed by the searches, and it was afterwards discovered that a city claim was a prior lien and the sheriff was compelled to pay such lien; it was held, that the sheriff could not recover the amount of the claim from the plaintiff in the execu-

tion. *Krumbhaar v. Yewdall*, 153 P. S. 476.

69. In an action for goods sold and delivered, it is a good defence that the goods were furnished the defendants not as purchasers, but as managers of a business entered upon for the benefit of both parties, and as plaintiff's contribution to the stock, and that such stipulation had been omitted by mistake from the written agreement. *Lee v. Taylor*, 154 P. S. 95.

70. Where a landowner goes to the county treasurer's office for the purpose of paying all overdue taxes and preventing a sale of his property, and he pays all the taxes demanded, his property cannot be sold subsequently for taxes, which the treasurer, by mistake, failed to demand of him. *Pottsville Lumber Co. v. Wells*, 157 P. S. 5.

71. The sale of a ground-rent was not set aside on the ground of mistake where it appeared that the defendant owned the ground-rent which she thought was irredeemable and gave it to her son to deliver to an auctioneer to be sold, who so represented it to the auctioneer, who so advertised and sold it, that the plaintiff's decedent bought the ground-rent as an irredeemable one, relying upon the defendant's representation, and plaintiff took the title papers to a title company who insured it as irredeemable, where two years and a half were permitted to elapse before the bill was filed, and it did not appear that there was any intentional misrepresentation as to the quality of the ground-rent. *Clapp v. Hoffman*, 159 P. S. 531.

72. Where an executor agrees in writing to pay out of his commissions whatever fees should be allowed to his counsel, it is no defence in an action to recover the fee that the writing was signed by him in the haste and excitement of the court-room and did not contain the agreement as he made it. *Reilly v. Daly*, 159 P. S. 605.

73. Where a deed to a church conveyed more land than the parties intended, and the grantee forced the grantor to resort

to a bill in equity for a reconveyance; it was held, that the costs of the equity suit should be borne by the grantee. *Shedwick v. Prospect Methodist Episcopal Church*, 160 P. S. 57.

74. A mistake in the entry of a judgment will not be corrected to the prejudice of subsequent lien creditors. *Stroudsburg Bank v. La Bar*, 7 C. C. 163.

75. Equity will not enforce a covenant to keep open an alley, which found its way into a deed by mistake, where the parties rectified the error among themselves and acquiesced in it for many years. *Corbett v. Bloch*, 1 Lack. Jur. 441.

76. Where the maker of a promissory note made an assignment for creditors, and a dividend was paid to the payee's administrator by mistake, instead of to his assignee, an auditor, appointed to distribute the estate of the payee, can correct the mistake and award the dividend to the holder of the note. *Fisher's Estate*, 7 Lanc. 333.

77. As to when an instrument will be reformed on the ground of mistake, see note to *Fehlberg v. Cosine*, 13 Atlan. 112.

See EQUITY, III., VI.

V. Fraud.

78. An assignee in bankruptcy acquires the right to all property fraudulently conveyed by the bankrupt; a creditor cannot, after the commencement of the proceedings in bankruptcy, institute proceedings to set aside a fraudulent conveyance. So equity will not, in aid of an execution, entertain a bill of discovery against the supposed fraudulent assignee of the bankrupt by one of his creditors. *Miners' Nat. Bank's Appeal*, 9 Atlan. 299.

79. Upon a bill to set aside articles of separation on the ground of fraud, the court may, upon an answer denying the allegations of the bill, dismiss the same; but, in the absence of a cross-bill, it is error to further decree that the articles be given full force and effect. *Brockman's Appeal*, 3 Cent. 546.

80. A mortgage accepted by a vendor,

in furtherance of a fraud upon the latter's creditors will not be enforced. *Rowland v. Martin*, 4 Cent. 760.

81. A bill in equity lies to set aside an award of a prospective arbitrator on the ground of fraud, but the plaintiff must aver and prove that the party benefited by the award participated in the fraud charged. Evidence that the arbitrator was partial and unfair and knowingly made an improper decision, is insufficient. *Hartupee v. Pittsburgh*, 131 P. S. 535.

82. A bill in equity does not lie to compel the reconveyance of shares of stock sold to the defendant under fraudulent representations made by him, where the relief sought is merely compensation in damages; in such a case there is an adequate remedy at law. *Edelman v. Latshaw*, 159 P. S. 644; affirming s. c. 9 Montg. 83.

83. A court of equity has power to nullify a judgment of another court of concurrent jurisdiction on the ground of fraud, and decree a sheriff's sale thereunder to be of no effect, but such jurisdiction will not be assumed where the plaintiff's bill contains substantially the same averments as were contained in a petition in such other court praying that the judgment be stricken off and the execution set aside, upon which petition such rules were discharged. *Wallace v. Stevenson*, 42 P. L. J. 363.

See EQUITY, XIV.

FRAUD.

VI. Account.

84. If a lease of coal lands be amicably forfeited, and there be a subsequent reletting to the principal of the former tenant, the recognition of the subsequent tenant is a bar to a bill for an account against the first. *Reed's Appeal*, 7 Atlan. 174.

85. In a suit for a balance found in favor of the plaintiff by a settlement of a partnership account, such settlement acquiesced in for years is conclusive, unless it clearly be shown, and this within a reasonable time, that a mistake was committed. *Varner's Appeal*, 16 Atlan. 98.

86. Where the complainant contributed funds for the erection of a factory upon the land of his former partner, who subsequently conveyed the premises, a bill will not lie against the purchasers for an account. There is an adequate remedy at law. *Mather's Appeal*, 1 Cent. 342.

87. Where an account was stated in accordance with a preliminary decree ordering the same, and exceptions to the same were dismissed by the court below, the supreme court will not on appeal revise or correct such account, the evidence upon which the original decree was based, not being supplied. *Wagenhorst's Appeal*, 126 P. S. 127.

88. If practically all the stockholders of a corporation agree to contribute to a guaranty fund for the payment of the debts of the corporation, the surplus to be divided among the stockholders; one who has complied with his portion of the agreement is entitled to an account of said guaranty fund from the others; and this, though the franchises and property of the corporation have been since sold under its mortgage. *Huston's Appeal*, 127 P. S. 620; reversing *Huston v. Clark*, 45 L. I. 236.

89. If a bill, filed for discovery and account, allege not only a partnership, but also a contract imposing mutual duties of accounting, and such accounts are necessarily continuing, the case is a proper one for equitable cognizance; the bill should not be dismissed as one for specific performance. *Oil Well Packer Co.'s Appeal*, 128 P. S. 421. See *Oil Well Packer Co. v. Jarecki Mfg. Co.*, 157 P. S. 342.

90. A bill by an assignee for creditors for the sale of stock and account, against one who had received certain notes from the assignor for speculation, was properly disposed of by final decree after a report of the master on its merits. *Evans v. Goodwin*, 132 P. S. 136; affirming s. c. 46 L. I. 168.

91. Where one of several heirs has had possession of the real estate, equity will compel him to account to his co-heirs for their proportion of the rental

value of the land; and this, whether his exclusive possession was with or without the consent of the other owners. *Clayton v. McCay*, 143 P. S. 225.

92. Assumpsit lies for the balance of an account, where the only work for the jury is to add the debit and credit side of the account and strike the balance; in such a case it is not necessary to bring account render, or to file a bill in equity. *Richey v. Hathaway*, 149 P. S. 207.

93. Where a defendant is found liable to account, he should be awarded an opportunity to state an account before the entry of a final decree. *Reeder v. Trullinger*, 151 P. S. 287.

94. Upon a bill to restrain a continuing trespass, an account of damages previously sustained follows as an incident and to avoid multiplicity of suits. *Walters v. McElroy*, 151 P. S. 549.

95. Where a partner who had overdrawn his account was requested to make it good, but did not do so, and a year later he was requested to withdraw, and from that date until his death he had no business transactions with the partnership, and made no claim upon it; it was held, that there was a dissolution of the firm by acquiescence in the demand, and a bill for an account by his legal representatives would be refused. *McConomy v. Reed*, 152 P. S. 42; affirming s. c. 9 Lanc. 65.

96. Upon a bill for an account, the supreme court will not necessarily reverse because the bill merely sets forth facts, which amount to a claim by an administrator for money of his decedent, for which assumpsit is an adequate remedy. *Fidelity Title & Trust Co. v. Weitzel*, 152 P. S. 498.

97. Upon a bill for an account between partners, where it is agreed to submit the matters in dispute to arbitration, and before the award was filed one of the parties revoked the submission, and, after the revocation, the award was filed but was subsequently stricken off, and the parties proceeded under the bill before an examiner and master; it was

held, that the parties had waived the submission and award, and that it was the duty of the master to decide the case on its merits. *McKenna v. Lyle*, 155 P. S. 599.

98. Equity will not assume jurisdiction over a claim, which is merely a claim for damages for breach of contract, nor over a cause in which the accounts are all on one side and no discovery is sought. *Paton v. Clark*, 156 P. S. 49.

99. An assignment of the lease by the lessee for an increased consideration with wholly new stipulations, with right of re-entry for condition broken, and with an express assumption of continuing liability by the assignors, and a manifest intention to sub-let, will not destroy the privity of the estate between the lessors and lessees so as to bar a bill against the lessees for an account; such a defence would have to be set up by demurrer or in the answer, or in the proceedings before the master, and could not for the first time be alleged at the oral argument before the court. *Drake v. Lacoe*, 157 P. S. 17; reversing s. c. 2 Lack. Jur. 382.

100. Where the owners of a patent licensed another to sell it at the rate of forty dollars for each article, and without authority they revoked the license and then began selling the article at twenty-five dollars; it was *held*, in an action for an account, that the licensees were only obliged to account at the rate of twenty-five dollars, and that the licensors were bound to account to the licensees for the profits on the articles sold by them, and that the costs should be equally divided between the parties. *Oil Well Packer Co. v. Jarecki Mfg. Co.*, 157 P. S. 342.

101. A bill for an account, in order that a final settlement of a trust estate may be made, and the plaintiffs receive whatever they may be entitled to and for further relief, is substantially a bill for a termination of the trust, settlement and distribution. *Myers v. Bryson*, 158 P. S. 246.

102. Upon a bill for an account against

a partner, where it appeared that the plaintiffs had assigned all their interest in the assets of the firm to the defendant for a money consideration, and the plaintiffs contended that the defendant had knowledge of a claim against a railroad company for discrimination, and that he had concealed the facts relating to this claim at the time the assignment was made, but the defendant averred that all the parties knew of the existence of the claim, and they had frequently discussed it, which the plaintiffs did not deny; it was *held*, that the bill was properly dismissed. *Wiley v. Brundred*, 158 P. S. 579.

103. Where land is devised to two sons, who are charged with maintaining the testator's widow and daughters, and one of the sons has performed such duty, he may, by bill in equity, compel the other to contribute to the expense thereof where a question of accounts is raised by the pleadings. *Shillito v. Shillito*, 160 P. S. 167.

104. Under the act 13 April 1854, P. L. 352, the county of Lancaster may proceed to recover money from the city of Lancaster for opening streets, either by assumpsit or bill in equity, but the remedy by mandamus is inappropriate. That act contemplates yearly statements and the striking of a balance every twelve months, and if the county has not kept the account directed by the act, the court will state an account, and will not allow recovery for any items which had accrued six years prior to the date of the suit. *Lancaster County v. Lancaster City*, 160 P. S. 411; affirming s. c. 10 Lanc. 65. See s. c. 12 Lanc. 81.

105. A combination among brewers to prevent competition among themselves is an illegal combination in restraint of trade, and equity will not, upon a bill for an account, enforce the claim of one member of such an illegal combination against the other members, where his cause of action is based upon the illegal agreement. *Nester v. Continental Brewing Co.*, 161 P. S. 473; affirming s. c. 12 C. C. 417.

106. Where the property of a corporation was sold under a mortgage, and the purchasers organized a new company and took possession of all the assets of the old company, and agreed to pay a certain amount for the personal property and to account for the book debts which they could collect; it was *held*, that the new company was not liable for the book accounts which they were unable to collect, and that they were entitled to have the value of certain fixtures, to be deducted from the appraisement of the personal property, which they had agreed to pay. *Huston v. Clark*, 162 P. S. 435; affirming s. c. 3 Dist. Rep. 2.

107. Where, upon a bill for an account, the defendant has permitted the case to go to a master and all the testimony has been taken and the master's report has been filed, the bill will not be dismissed, although there may be an adequate remedy at law. *Searight v. Carlisle Deposit Bank*, 162 P. S. 504.

108. Upon a bill for an account between partners, where it appears that the proceedings had been necessary to the settlement of matters in dispute, the costs would be divided between the parties in proportion to their interests in the firm. *Wilson v. Black*, 164 P. S. 555.

109. Where a husband upon purchasing real estate took title in his wife's name and the latter contributed a small amount of the purchase money and made a will devising the land to her husband, and subsequently the property was sold and with the proceeds the husband bought other real estate in his own name and dealt with it as his own for several years, until there was a separation between himself and his wife; it was *held*, that the evidence was sufficient to rebut the presumption of a gift, but that the wife was entitled to a portion of the purchase money contributed by her, with interest from the time the husband sold the property and began to treat the proceeds as his own. *Moore v. Moore*, 165 P. S. 464.

110. Upon a bill for an account, the plaintiff's ownership of certain money given by his wife to the defendant is not sufficiently established by proof that his wife had no property at the time of her marriage and had inherited none since; she might have acquired money in some other way. *Saake v. Dornier*, 167 P. S. 301; s. c. 36 W. N. C. 204; affirming s. c. 3 Dist. Rep. 170.

111. Upon a bill for an account where charges of fraud and mismanagement are denied by the answer, the court will hear and dispose of such charges as a preliminary question, but if in the course of that hearing, it becomes evident that an advisor to the court is necessary, it will call in the aid of an expert accountant. *Conard v. Dingee*, 3 Dist. Rep. 631.

112. Where a bill was filed by a member of a joint stock company praying for a dissolution and an account and a decree for an account was entered by consent; it was *held*, that after the master had made his report stating the account, it was too late for the defendants to object that such a bill would not lie. *Weller v. Wood*, 6 Kulp 526.

113. A stated account is a bar to a bill for an account without a particular specification of fraud or error; but the mere rendering of an account does not make it an account stated. *Spring Brook R. R. Co. v. Lehigh Coal & Navigation Co.*, 1 Lack. L. N. 31.

114. Where mortgagees are in possession of the property or the mortgagors have possession for the purpose of paying specific charges and debts by setting aside a percentage of certain receipts, a bill will lie for an account for all such receipts. *Spring Brook R. R. Co. v. Lehigh Coal & Navigation Co.*, 1 Lack. L. N. 31.

115. To sustain a bill for an account, there must be mutual demands; equity has no jurisdiction where the receipts are all on one side and no discovery is sought. *Battin v. Martin*, 10 Lane. 209.

116. Upon a bill for an account, the court will not open previous stated ac-

counts between the parties and decree a new accounting, as though no former settlements had been made, in the absence of allegations of fraud, omission or mistake in the stated accounts. *Keperling v. Bitzer*, 10 Lanc. 332.

117. Upon a bill for an account by one partner against another, where the plaintiff claimed that there had been a settlement of the partnership affairs in 1875, and asked for an accounting of their affairs since such settlement, and the defendant averred that there was no full settlement in 1875 and that the firm between himself and the plaintiff was formed in 1870 out of a firm in which there was a third partner, and prayed for an accounting from the beginning, including the assumed liabilities of the old firm, and the master found that there had been no settlement since the organization of the firm in 1870 and had gone back to that date; it was *held*, that he had erred in not having ascertained the interests of the plaintiff and defendant in the old firm when that firm passed into the new one; and this, although the third member of the old firm was living and had not been made a party to the proceeding. *Breneman v. Breneman*, 10 Lanc. 387. See s. c. 12 Lanc. 153.

118. Where a receiver had been appointed for a mutual insurance company, it was *held*, that a bill would not lie against the officers of the company by policy holders to compel them to account, and it was further *held*, that it was the duty of the receiver to deal fairly with the members of the corporation, and if access to the books of the company was denied to members, by which they could prepare affidavits of defence to suits brought by the receiver, judgment on such suits would be suspended until an inspection was allowed. *Becker v. New Hanover Mutual Fire Ins. Co.*, 8 Montg. 134.

119. Upon a bill by a partner for an account where the defendant denies the partnership which is found to exist, the

costs of the entire suit will be charged upon the defendant. *Steiger v. Bradley*, 34 W. N. C. 123.

120. A bill in equity lies for an account against a corporation and the officers and directors thereof individually and for a discovery; in such a case, a decree of dissolution and the appointment of a receiver who is also made a party, is not inconsistent with the relief prayed for. *Heindel v. Southern Pennsylvania Mutual Relief Ass'n*, 3 York 204.

See ACCOUNT.

VII. Corporations.

121. Under sec. 13 of the act 16 June 1836 (Brightly's Purdon 775) a court of equity has power to supervise and control the election of directors of a corporation whenever it is made to appear that by means of fraud, violence or other unlawful conduct on the part of the corporators, a fair and honest election cannot be had; the court may appoint a master *pro hac vice* in any particular case. *Tunis v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 149 P. S. 70; affirming s. c. 11 C. C. 450, 452.

122. Under the act 16 June 1836 (Brightly's Purdon 775) a court of equity will supervise and control corporate elections where it is shown in advance that by reason of fraud, violence or other unlawful means, a fair and honest election cannot be had; but such power will not be exercised to set aside an election regularly held, and where such an election is held at the proper place and the appointed time and the meeting is regular, quiet and orderly, the only way to contest its validity is by writ of *quo warranto* as provided by the act 14 June 1836 (Brightly's Purdon 1773). *Jenkins v. Baxter*, 160 P. S. 199.

123. Where no other means is provided for filling vacancies in the board of directors of a corporation, a court of equity has jurisdiction to order an election to fill

such vacancies. *Forsyth v. Brown*, 13 C. C. 576; s. c. 33 W. N. C. 72.

124. A bill in equity does not lie to compel the surrender of the property of a corporation, where it appears that the real question in controversy is the validity of the election of the defendants as officers of the corporation; in such a case *quo warranto* is the appropriate remedy. *Bedford Springs Co. v. McMeen*, 161 P. S. 639.

125. Where the members of a corporation agreed in writing to borrow money on the credit of the directors and to hold themselves responsible for the payment of the loan and hold the directors harmless on account thereof; it was held, that such an agreement could be enforced by a bill in equity. *Heebner v. Anders*, 8 Montg. 16.

126. Under the act 19 June 1871 (Brightly's Purdon 780) the court has power to determine whether a corporation has the right to do the act complained of, but where the right was granted and lost by laches, the commonwealth alone can move for a forfeiture. *Cheltenham & Willow-Grove Turnpike Co. v. Jenkintown Electric Ry. Co.*, 10 Montg. 104; *Pennsylvania R. R. Co. v. Montgomery County Pass. Ry. Co.*, 10 Montg. 97; reversed on another point in s. c. 167 P. S. 62.

127. A bill in equity lies for an account against a corporation and the officers and directors thereof individually and for a discovery; in such a case a decree of dissolution and the appointment of a receiver who is also made a party, is not inconsistent with the relief prayed for. *Heindel v. Southern Pennsylvania Mutual Relief Ass'n*, 3 York 204.

128. Where a person subscribes to the unissued stock of a corporation, and such a subscription is accepted by the corporation and recognized by the stockholders and directors, the latter are estopped from asserting that the subscription is invalid because not made in writing and in the prescribed form; in such a case a stockholder has no remedy in equity to compel the issue of any portion of such stock to

himself or to have the subscription declared invalid; if injured, his remedy is at law for damages. *Shellenberger v. Patterson*, 168 P. S. 30.

See CORPORATION.

VIII. Partnership.

129. Where one claims that a partnership existed between himself and the decedent, and that, on a settlement of accounts, the decedent's estate will be found indebted to him, the jurisdiction to determine the fact of partnership and to state an account is in the common pleas in equity and not in the orphans' court. *Weigley v. Coffman*, 144 P. S. 489.

See EQUITY, XLVI.

PARTNERSHIP.

IX. Marshalling of assets and securities.

130. Where an executor lends to a legatee upon mortgage a portion of a fund in which the legatee is entitled to share after the termination of a life estate, such mortgage is satisfied by operation of law in an amount equal to the amount of the mortgagor's legacy, immediately upon the death of the life tenant; and in such a case an assignment of the mortgage by the executor after the death of the life tenant, does not prevent an extinguishment of the mortgage to the extent of the legatee's interest in the estate and a bill will not lie to postpone the lien of the mortgage to that of a second mortgage, until, by a settlement of the executor's account, it is ascertained what amount is due to the mortgagor as legatee. *Henderson v. Stryker*, 164 P. S. 170.

131. Pieces of land subject to a common incumbrance, when sold successively, are liable for the incumbrance in the inverse order of alienation; a mortgagee with knowledge of a sale and conveyance by the owner of a portion of the mortgaged premises, cannot levy his

debt out of the portion of the land first sold. *Turner v. Flenniken*, 164 P. S. 469.

132. Upon a bill to compel the application of real and personal property which an executrix in her own individual name had conveyed to a trustee, to the payment of a judgment recovered against her as executrix; it was *held*, that the bill was fatally defective, where there was no averment that any portion of such property formerly belonged to, or was derived from the decedent's estate. *Ferguson v. Yard*, 164 P. S. 586.

X. Specific performance.

(a) When it will be decreed.

133. If defendant's wife refuses to join in the deed and the plaintiff agrees to accept a deed from the husband alone, a decree may be made to that effect. *Harrigan v. McAleese*, 16 Atlan. 31.

134. Equity will decree the specific performance of a parol contract for the sale of land, where possession has been taken in pursuance thereof, and valuable improvements made, and the plaintiff has been in possession for upwards of fourteen years; and this, though the full purchase money has not been paid. Delivery of the deed will be decreed on payment of the balance due. *Schuey v. Schaeffer*, 130 P. S. 16.

135. Equity will not specifically enforce a contract to sell real estate evidenced simply by the receipt of the vendor for a portion of the purchase money. *Sylvester v. Born*, 132 P. S. 467.

136. Equity will enforce a parol contract to sell lands, where it appears that a deed was duly executed and delivered, and then handed back to the vendor for correction, who wrongfully retained it, and further that the plaintiff was given and retains possession. *Graft v. Loucks*, 138 P. S. 453; s. c. 27 W. N. C. 184.

137. A contract for the conveyance of land giving the front line, and providing that it shall extend along an indicated

side line in depth sufficient to make two acres, is sufficiently specific to authorize a decree for specific performance. *Felty v. Calhoon*, 139 P. S. 378; s. c. 38 P. L. J. 228. See *Felty v. Calhoon*, 147 P. S. 27.

138. Upon proof of a parol contract made by a decedent to sell real estate, of possession taken by the vendee, of payment of part of the purchase money and of improvements by the vendee, the orphans' court will, on petition of the executor, make a decree of specific performance on the payment of the balance of purchase money due. *Simmon's Estate*, 140 P. S. 567.

139. Where the defendant held a judgment against the plaintiff under which he had levied on the plaintiff's real estate and plaintiff presented a petition to open the judgment, whereupon the plaintiff agreed to discontinue the proceedings to open, upon the defendant agreeing to sell the plaintiff's real estate at sheriff's sale and to buy it in and to reconvey the land to plaintiff at any time within two years on tender of the amount bid; it was *held*, that a bill for specific performance would lie to compel the defendant to reconvey the land on tender of the bid. *Kramer v. Dinsmore*, 152 P. S. 264.

140. A court of equity will enforce an agreement to assign a patent by a decree for specific performance. *Hepworth v. Henshall*, 153 P. S. 592.

141. Where the defendant, a physician, sold his practice to another physician, and verbally stipulated that at the end of a certain time he would cease practicing, and the vendee sold the practice to the plaintiff, who was also a physician, and the defendant again began to practice, and the defendant and plaintiff entered into an agreement in writing, whereby, in consideration of two hundred dollars, the defendant agreed that he would not practice in the locality for a period of ten years, that he would use his influence in favor of plaintiff, that he would not manufacture or put on sale any medical prep-

aration during the ten years, and for the true performance of the covenants he bound himself in the penal sum of four hundred dollars, and before the expiration of the ten years the defendant resumed his practice; it was *held*, that the penal sum was a penalty and not liquidated damages, that it was not intended that defendant should have the privilege of practice on the payment of four hundred dollars, and that plaintiff was entitled to an injunction for the specific performance of the contract. *Wilkinson v. Colley*, 164 P. S. 35; reversing s. c. 6 Kulp 401.

142. Where a person has covenanted or agreed to render personal services of a particular kind, for a definite period, exclusively to another, for a valuable consideration, equity will enjoin against a breach of such engagement, where plaintiff will suffer a loss for which he can have no adequate remedy at law. *Philadelphia Ball Club v. Hallman*, 8 C. C. 57; *American Ass'n Ball Club v. Pickett*, 47 L. I. 212; contra, *Harrisburg Ball Club, v. Athletic Association*, 8 C. C. 337.

143. Upon a bill for the specific performance of an agreement for the conveyance of land, the court overruled a demurrer on the ground that there was no agreement in writing nor possession by the complainant, where the bill alleged that there was a parol agreement for a specific value to be given in work with the balance to be paid in cash, that the said work had been done and that a deed was executed by the defendant, but they refused to deliver it upon tender of the balance in cash. *Brophy v. Hagan*, 12 C. C. 365.

144. Where the defendant contracted to assign to the plaintiff all improvements of a dental engine; it was *held*, that a modification of the device by enlarging the groove in a treadle wheel and putting resin on a cord so as to prevent it slipping in the groove, was an improvement, and that a decree would be granted for the assignment of such improvement in accordance with the terms of the con-

tract. *White Dental Mfg. Co. v. Bonwill*, 15 C. C. 76.

145. Equity will compel the specific performance of a contract for the sale of stock in a railway company or other business corporation when it appears that the remedy at law is inadequate or damages impracticable. *Norristown Traction Co. v. Slinguff*, 7 Montg. 83.

146. When the specific performance of a contract will be decreed, see note to *People's Savings Bank's Appeal*, 3 Atlan. 823.

(b) When it will be denied.

147. A married woman cannot bind herself to convey real estate except by an agreement in writing separately acknowledged. *Caldwell's Appeal*, 7 Atlan. 211.

148. In a proceeding against a married woman to compel the specific performance of a contract to sell real estate, the court will consider her state and condition as a married woman, and if the transaction be inequitable and unjust or rendered so by matters subsequently occurring, specific performance may be denied, and the parties turned over to their remedy in damages; and this, even where the agreement is perfectly good, the price adequate and no blame attaches to the purchaser. *Friend v. Lamb*, 152 P. S. 529.

149. A married woman cannot be compelled to specifically perform a contract for the sale of real estate where she has signed but not acknowledged the agreement of sale; the act 8 June 1893 (Brightly's Purdon 1299) does not change the law in this respect. *Whitlinger v. Jack*, 16 C. C. 112.

150. A description of a lot as on the right hand of a certain street going towards the river, twenty feet wide, running back to another certain street, is too indefinite for the contract of sale to be enforced, where it appears as merely a portion of a larger lot owned by defendant. *Holthouse's Appeal*, 12 Atlan. 340.

151. Specific performance of a contract for the sale of land will not be decreed if

the description be vague; nor, though the description be unambiguous, if a serious doubt arises from the testimony whether the minds of the parties met understandingly as to the object matter of the contract. *Cortelyou v. Ott*, 1 Northam. 170; affirmed in *Cortelyou's Appeal*, 102 P. S. 576.

152. Equity will not, by a decree for specific performance, enforce a contract which is vague and uncertain in its provisions and where the defendant himself could not enforce it against the plaintiff, even if he so desired. *Ballou v. March*, 133 P. S. 64.

153. Equity will not decree specific performance if the plaintiff has failed to perform his share of the contract; and this, though the defendant may have his action at law for damages for the plaintiff's default. *Datz v. Phillips*, 137 P. S. 203; s. c. 26 W. N. C. 512; reversing s. c. 46 L. I. 250.

154. Where an offer to sell land at a certain price was telegraphed with a request for an answer immediately, and the telegram was received on the forenoon of April 7th, and on April 8th the owner sold to other parties, and on April 9th the party who received the telegram sent a letter accepting the offer and subsequently tendered the purchase money; it was held, that the acceptance was too late, and a suit for specific performance would not lie. *Childs v. Gillespie*, 147 P. S. 173.

155. Where a purchaser of land, by deceitful misrepresentations, induced defendant's agent to believe that he intended to use the land for the erection of a dwelling-house, when in fact he wanted it for a blacksmith shop, and the vendor, on learning that fact, refused to carry out the contract; it was held, that a decree for specific performance should be refused; he who comes into equity must do so with clean hands. *Brown v. Pitcairn*, 148 P. S. 387.

156. An agreement in consideration of a half interest in a patent, to furnish and pay all moneys necessary to procure the patent and to put the same into practical

operation, will not be specifically enforced; where there is an adequate remedy at law for the breach of a personal contract, the supreme court will, of its own motion, dismiss a bill which is a mere attempt to specifically enforce it. *Weaver v. Shenk*, 154 P. S. 206.

157. A vendee of land will not be required to complete his purchase, where it appears that the vendor bought the land at a sheriff's sale and the affidavit in support of exceptions to the acknowledgment of the sheriff's deed averred that the vendor's husband had fraudulently procured the sale to defeat the rights of the real owners of the land who had recovered a verdict and judgment in ejectment. Where there is a color of outstanding title which may prove substantial, a purchaser of land will not be compelled to take it and encounter the hazard of litigation. *Herman v. Somers*, 158 P. S. 424.

158. Where a person enters into an oral contract to sell land and subsequently executes a written agreement to sell the land to another person, the vendor, though not legally liable under the oral contract, is morally liable, and if he chooses to carry it out, a court of equity will not deny him the right to do so by compelling a specific performance of his written contract with the second purchaser. *Maguire v. Heraty*, 163 P. S. 381.

159. A bill will not lie for the specific performance of a contract, entered into between two incorporated insurance companies, without legislative authority, for the purpose of merging one of the companies into the other, such a contract being *ultra vires*. *Home Friendly Society v. Tyler*, 9 C. C. 617.

160. Payment of part of the purchase money upon a parol contract to sell land, is not such a partial performance of the contract as will entitle the vendee to a decree for specific performance. *Becker v. Patten*, 10 C. C. 643.

161. A party cannot maintain ejectment to enforce specific performance, if

he has been guilty of such gross laches as conveyed the idea that he had abandoned his rights. *Randall v. Mulley*, 1 Lack. Jur. 211.

162. A bill for specific performance cannot be defeated because the plaintiff's claim rests in parol, when the evidence shows a resulting trust, and that defendants are trustees *ex maleficio*. *Kennedy v. McCloskey*, 37 W. N. C. 106; reversing s. c. 10 Montg. 204.

163. The specific performance of a contract to purchase land was refused, where it appeared that the agent of the vendor had made misrepresentations as to the amount of rent paid for the houses, and had stated that the rent was paid promptly when it appeared that the rent was badly in arrears. *Hostetter v. Daly*, 42 P. L. J. 223.

164. A decree for the specific performance of a contract will not be made where the contract is uncertain. *Kraber v. Nes*, 3 York 123.

165. A power given to an executor to sell the real estate during the lifetime of the testatrix's husband, and a direction to sell immediately after his death, does not empower the executor to enter into an agreement giving the privilege to buy at any time within three years and a half; such an agreement is not a use of the power but a surrender of it for a fixed time, and will not be enforced by a decree for specific performance. *Hickok v. Still*, 36 W. N. C. 329.

(c) Suits for specific performance.

166. A suit for specific performance by a vendee under articles, against one who received, with notice, a conveyance of the legal title from the vendor prior to the latter's death, must be brought in the common pleas; the orphans' court has no jurisdiction. *White v. Patterson*, 139 P. S. 429.

167. A bill in equity is a proper proceeding on the part of a defendant in an equitable ejectment to compel the specific performance by plaintiff of a condition of the verdict requiring a conveyance of the

legal title. *Riel v. Gannon*, 161 P. S. 289.

168. Upon a bill for the specific performance of a contract to sell land, such contract being in writing and made by an agent of the owner but without authority in writing; it was *held*, that an averment in the bill that the defendant had executed a deed in pursuance of the agreement which she still retained in her possession, was sufficient to entitle the plaintiff to go to his proofs. *Becker v. Patten*, 10 C. C. 643.

169. In a bill for specific performance, it is not necessary to aver that the agreement was in writing; the statute of frauds established a rule of evidence and not one of pleading. *Breitenstein's Estate*, 40 P. L. J. 255.

170. One who seeks specific performance of a contract to make a coal lease must show that he has performed or offered to perform the act which forms the consideration. *Davies v. Maxwell*, 5 Kulp 351.

171. In an action to enforce the specific performance of a written contract which is lost, the precise terms of the whole agreement must be proved by the most clear and indisputable evidence. *Van Horn v. Munnell*, 145 P. S. 497.

172. In an action of replevin to recover timber cut on land where an equitable ownership in the land growing out of a parol contract is set up as a defence, the defendants occupy the same position as if they had filed a bill for specific performance and their rights must be so clearly established as to justify a chancellor in enforcing the alleged parol contract. *Henrici v. Davidson*, 149 P. S. 323.

173. Upon a bill for specific performance of a contract for exchange of lands where an allegation as to false and fraudulent representations as to liens is made a ground by the defendant for a rescission of the contract, the burden of proof rests upon the defendant, and in the absence of an affirmative finding of fraudulent representation or of fraudulent concealment,

the record of the liens is as effectual notice as actual notice. In such a case it is incumbent on the defendant to make his election to rescind promptly, and where the time originally fixed for delivery of the deeds passed without such delivery, both parties concurring and the defendant elected to treat the contract as enforced; it was *held*, that he could not afterwards rescind the contract until, on full notice of his intention, and after the expiration of a reasonable time for performance; in such a case there can be no right to rescind except for gross negligence or inability to perform. *Williams v. Thomas*, 7 Kulp 371.

174. In ejectment by a vendor against a vendee to enforce specific performance of an agreement to purchase land, where the defendant claims that a sufficient deed was not tendered to him, it is error for the court, after construing the agreement to the jury, to leave it to them to determine, from inspection, whether the deed was sufficient under the written agreement. *Beeson v. Porter*, 155 P. S. 579.

175. In a bill for specific performance of a contract to sell land, the finding of the master that the written agreement between the parties contained the entire agreement was sustained. *Walton's Appeal*, 9 Atlan. 922.

176. Upon the sale of "138 feet, more or less," of river front, neither party taking the trouble to measure it, and it being ascertained afterwards to be but 123 feet; and an agreement by the vendor to complete a wharf within thirty days under penalty: the vendee, in a suit for specific performance, was not entitled to compensation for the loss of frontage nor damages for delay in completion, it not being in evidence that the vendee could not have gone into possession and engaged in business within the limited time. *McCullough v. Manning*, 132 P. S. 43.

177. A decree for specific performance, which includes the wife of the defendant, who was not a party to the proceeding, is

erroneous. *Brown v. Pitcairn*, 148 P. S. 387.

178. Upon a bill for specific performance, where it appears that the defendant has placed it out of his power to execute the contract, because of a conveyance previously made to another person, the defendant is liable for damages, and such damages may be ascertained in the equity proceeding. *Maguire v. Herity*, 163 P. S. 381. See *Fitzpatrick v. Engard*, 4 Dist. Rep. 87.

179. Where the defendants contracted to sell to the plaintiff a lot or piece of ground known as Nos. 928, 930 and 932 North Eighth street, 53 feet 4 inches front and 53 feet 7 inches deep, and it appeared that the lot was not rectangular in shape but a portion of it extended beyond the lines formed by the rectangle mentioned, and that the lot was used for one purpose and without any fence separating the extension from the rest of the lot; it was *held*, upon a bill for specific performance, that the plaintiff was entitled to a conveyance of the entire lot. *Shattuck v. Cunningham*, 166 P. S. 368.

180. A bill for the specific performance of a contract to sell land will not be dismissed where the plaintiff in any event is entitled to receive back the money paid on account. *Fitzpatrick v. Engard*, 4 Dist. Rep. 87. See *Fitzpatrick v. Engard*, 4 Dist. Rep. 383.

181. Where a bill filed for specific performance of a parol partition was dismissed and the parties were relegated to their legal rights; it was *held*, that such dismissal was no bar to the setting up of the parol partition as a defence in ejectment for the same land. *Lewis v. Baker*, 151 P. S. 529.

See EJECTMENT.

ORPHANS' COURT, I.

VENDOR AND PURCHASER.

XI. Delivery of specific articles.

182. A bill in equity will not lie for the restitution of a promissory note even upon an allegation that the assignment

was alleged to have been fraudulent; a decree for the surrender of papers is uniformly refused unless they be of particular value for whose detention pecuniary damages could not be an adequate compensation. *Kaul v. Henke*, 2 Dist. Rep. 236.

183. Where the pastor of a congregation had been suspended by the church courts, and he with others then withdrew from membership and organized into a different ecclesiastical congregation but continued to hold and use the church property and retained possession of its corporate seal; it was *held*, that equity had jurisdiction to enjoin such use and to compel the delivery of such corporate seal. *East End Reformed Presbyterian Congregation v. Milligan*, 40 P. L. J. 7.

XII. Reformation of contracts.

184. Equity will not reform a written instrument on the uncorroborated testimony of a single witness contradicting it, where the writing is supported by the plaintiff's testimony. *Gehres v. Crawford*, 9 Atl. 508.

185. Equity will not alter or reform an instrument where there is oath against oath as to whether the parties actually made a different agreement. *Bugger v. Cresswell*, 12 Atl. 829.

186. An article of agreement without acknowledgment or words of inheritance in which the vendor, in consideration of certain covenants, agrees to sell and "does sell and convey," is but an executory contract of sale. Equity in the absence of positive proof of fraud, accident or mistake, will not reform such a contract by inserting words of inheritance. *Pierce v. McCracken*, 5 Cent. 283.

187. Under the act of 25 May 1878 (Brightly's Purdon 635), equity will reform the acknowledgment of a married woman to an oil and gas lease. That act excludes from its operation only cases in which actions were commenced before its passage. *Manufacturers' Natural Gas Co. v. Douglas*, 130 P. S. 283.

188. Equity will not reform a written agreement upon the uncorroborated testimony of a single interested witness against the sworn answer of the defendant. *Dick v. Ireland*, 130 P. S. 299.

189. If the actual facts be in accordance with the law, an acknowledgment defective owing to the absence of venue, the failure to show a justice of the proper county, and the omission to state the presence and acknowledgment of the husband of one of the parties, may be reformed under the act of 25 May 1878 (Brightly's Purdon 635). *Cressona Savings Fund & Building Ass'n v. Sowers*, 134 P. S. 354; s. c. 26 W. N. C. 133.

190. A parol agreement by the vendor to refund the purchase money on failure of title, and to reimburse the vendee for his costs and expenses, is enforceable by action; its enforcement does not involve a proceeding to reform the deed, and such an agreement is not merged in a deed containing a covenant of special warranty, but no covenant of title, afterwards accepted by the vendee. *Close v. Zell*, 141 P. S. 390.

191. Where a note was discounted by the plaintiff for the payee, and it was an accommodation note, and the defence was made by the maker that he was not to be held liable on the note, it being made for the accommodation of the payee; it was *held*, that the instrument could not be reformed by the testimony of the defendant, denied by the plaintiff and unsupported by circumstances equivalent to another witness. *Mifflin County Bank v. Thompson*, 144 P. S. 393.

192. Where an absolute conveyance of real estate was made in 1860 to a brother and in 1861 the brother conveyed the real estate, subject to the payment of six hundred dollars, to the mother of the grantor and grantee, and, at her death, to the payment of ten thousand dollars, two-sixths to the grantee in the deed and one-sixth to each of the other heirs, omitting the grantor; it was *held*, that the absolute deed from brother to brother could not be reformed into a trust after the death of

the mother thirty years afterwards, upon the unsupported testimony of another brother who testified to his own conclusions rather than the declarations of the parties contracting. *Hunter's Estate*, 147 P. S. 549.

193. To reform a deed on the ground of mistake, the evidence must be clear, precise and indubitable; it must not only be credible but of such weight and directness as to make out the facts alleged beyond a reasonable doubt. *Boyertown Nat. Bank v. Hartman*, 147 P. S. 558.

194. Where a bill to reform a defective certificate of acknowledgment avers that the wife of the grantor was examined separate and apart from her husband, but that this, by accident and mistake, does not appear in the certificate, and the answer unequivocally denies the averment, such answer is responsive to the bill and must stand until overcome by sufficient proof. *Hand v. Weidner*, 151 P. S. 362; affirming s. c. 2 Lack. Jur. 78.

195. The evidence to reform a bill of sale by striking certain words out of the same, was *held* to be insufficient to submit to the jury. *McClain v. Smith*, 158 P. S. 49.

196. Where a husband by deed conveyed land to his wife, which was subsequently sold as his property, it was *held*, in an action by the devisees of the wife to recover the land, that the deed would not be reformed upon the testimony of declarations of the wife, that she assumed all the debts of the husband on condition that he would make her a deed for the land, and that her husband "had made her a deed and she was to pay the land out." *Long v. McConnell*, 158 P. S. 573.

197. A contract will not be reformed upon the mere allegation that the parties used language, which the defendants thought to mean what the law says it does not mean. *Cochran v. Pew*, 159 P. S. 184. See *McMillan v. Philadelphia Company*, 159 P. S. 142; *Liggett v. Shira*, 159 P. S. 350.

198. The court will not open a judgment in ejectment entered upon a lease, upon the allegation of a parol lease which would change the term, where the evidence of the lessee is not corroborated but is contradicted by the lessor and the time of the alleged parol agreement was when the lessee was already bound by the written lease for a further term of two years. *Gibson v. Vetter*, 162 P. S. 26.

199. A certificate of acknowledgment of a married woman to a mortgage which fails to show that the mortgage was read or otherwise made known to her, is fatally defective; the act 25 May 1878 (Brightly's Purdon 635), permitting defective certificates to be reformed, does not authorize the reforming of a certificate of acknowledgment except to conform to the facts as established by the evidence in the case. *Spencer v. Reese*, 165 P. S. 158.

200. Where the magistrate was dead and the plaintiff testified that the mortgage had been read to the defendant, but was contradicted squarely and directly by the defendant and her husband; it was *held*, that the evidence was insufficient to justify the court in reforming the certificate. *Spencer v. Reese*, 165 P. S. 158.

201. A written contract of a joint stock association being for a liability exceeding five hundred dollars, and signed but by one manager, will not be reformed in equity. *Andrews v. Youngstown Coke Co.*, 7 C. C. 67.

202. A policy of fire insurance will not be reformed by a court of equity on the ground of the insurer's ignorance of its stipulations simply because of his failure to read it, in the absence of proof that he was misled into believing that the contents of the policy were different from what they actually were. *Okes v. Fire Ins. Co.*, 12 C. C. 341.

203. A policy of fire insurance will not be reformed by a court of equity, where the insured has neglected for over three years to ascertain what property was cov-

ered by the policy. *Okes v. Fire Ins. Co.*, 12 C. C. 341.

204. Where a voluntary settlement in trust is made without the benefit of professional advice, and a clear understanding of the settlor's rights, the absence of a power of revocation is not conclusive upon her, and a court of equity will grant relief and reform the instrument by the insertion of such power, and by decreeing a reconveyance of the trust property. *Jackson v. Pennsylvania Co. for Ins. on Lives & Granting Annuities*, 2 Dist. Rep. 225.

205. A bill for the reformation of a deed will be sustained where the defendant's admissions show a mistake in the conveyance made by him. *Mowday v. Moore*, 9 Montg. 14.

206. Where a judgment is entered on a judgment note, it will be opened upon evidence of an indebtedness due by the plaintiff to the defendant at the time of the execution of the note, and the testimony of a subscribing witness that the note was practically signed as a receipt. *Wilson v. Cox*, 37 W. N. C. 142; reversing s. c. 10 Montg. 43.

207. Where A sold a tract of land to B and he subsequently sold another tract to C, and the two tracts were separated by a fifteen-foot-wide alley which in the first deed was described as a twenty-foot-wide alley; it was held, in a bill by A against C to reform the latter deed, that it was neither necessary nor proper to include B as a co-defendant. *Boehm v. Backman*, 3 Northam. 70.

208. In order to change or alter a written instrument the proof must be clear, precise and indubitable, that there was either fraud, mistake or accident in its creation, and this must be proved by the testimony of two credible witnesses or its equivalent. *Zeiger's Estate*, 11 C. C. 517; s. c. 3 Northam. 207.

209. Where execution was entered upon a bond which contained the words "without stay of execution"; it was held, that an execution thereon would not be set aside in the absence of precise and indubitable proof of an allegation on the part

of a defendant of an agreement that execution should not issue until the happening of a certain event. *Shrewsbury Savings Institution v. Seitz*, 2 York 153.

See EVIDENCE, XXXII.

XIV. Rescission, cancellation and reconveyance.

210. A deed made before the act of 8 June 1881 (Brightly's Purdon 651), though absolute in form, may be shown by parol evidence to be a mortgage, but such evidence must be clear, convincing and explicit. *Reeder v. Trullinger*, 151 P. S. 287.

211. Under the acts 13 June 1840 and 14 February 1857 (Brightly's Purdon 777) equity has jurisdiction to entertain a bill to set aside a deed alleged to have been executed by an attorney in fact through the corrupt procurement of the grantee; that ejectionment might lie will not oust the jurisdiction of equity. *Mortland v. Mortland*, 151 P. S. 593.

212. Where an attorney in fact, whose power has been revoked, executes a deed at the corrupt solicitation of the grantee, and receives from the grantee money which he does not pay over to the owner, of the land, such owner will not be compelled to repay the amount to the grantee as a condition precedent for a decree rescinding the deed. *Mortland v. Mortland*, 151 P. S. 593.

213. Where a vendor of timber made a false estimate to his vendee as to the amount of the timber on the tract, and his employees, by his directions, showed the vendee only the best part of the timber, and stated that that was the general average; it was held, that a bill would lie for the rescission of the contract of sale. *Brotherton v. Reynolds*, 164 P. S. 134; *Mahaffey v. Ferguson*, 156 P. S. 156.

214. A sale of land will be rescinded where the vendee was induced to purchase at twice its value by false representations that there was a large demand for building lots, that a railroad company

was about to build its shops in the neighborhood, that a syndicate of prominent capitalists had been formed to secure the land and that a large sum has been offered for it. *Sutton v. Morgan*, 158 P. S. 204; affirming s. c. 41 P. L. J. 47.

215. A bill lies by an administrator *de bonis non cum, testamento annexo*, to set aside a power of attorney given by the testator to the executor, and to compel the executor to account for moneys alleged to have been fraudulently appropriated to his own use while acting as attorney in fact for the decedent in his lifetime; and this, though the account of the executor has been confirmed by the orphans' court. *Fidelity Ins. Trust and Safe Deposit Co. v. Gazzam*, 161 P. S. 536; reversing s. c. 2 Dist. Rep. 569.

216. A judgment entered on a judgment note will be declared invalid, where the auditor finds that the note was signed by the obligor in the extremity of his last illness, forty-eight hours before his death, when he was entirely prostrated mentally and physically from understanding the effect of his act, that the contents of the paper was not explained to him, and the subscribing witnesses are unable to say that he made an affirmative answer when asked whether the signature was his. *Kedward v. Campbell*, 166 P. S. 365.

217. Where a mortgagor requested his mortgagee to take the land for the mortgage, and the mortgagee consented, and the tenant in possession attorned to the mortgagee, but no deed was executed to the mortgagee, and subsequently the mortgagor made a deed to the defendant, who made no inquiry of the tenant in possession, but put his deed on record; it was *held*, that a decree was properly made, requiring the vendee in the deed and his vendee to execute a release of their pretended title to the land. *Duff v. McDonough*, 155 P. S. 10.

218. Where a firm of bankers made an assignment for creditors, and they had on deposit a large amount of money belonging to a county, and prior to their

assignment they had cashed for their customers a large number of warrants drawn upon the county treasurer, a number of which were delivered as collateral security for a debt due by the bank, which was subsequently paid by the sale of its real estate; it was *held*, that the county was entitled to have the warrants surrendered and a charge entered for their amount in the account of the county treasurer with the firm. *Crawford County v. Merchants National Bank*, 164 P. S. 109.

219. Where a creditor held a life policy on the life of her debtor, whose whereabouts was unknown, and she made an arrangement with the company, under which she surrendered the policy and took a paid-up policy for twenty-five hundred dollars in lieu thereof; both parties acting on the supposition that the assured was alive when in point of fact he had been dead for ten days; it was *held*, that such an agreement having been made under the influence of a mutual mistake of fact, the plaintiff was entitled to have the original policy reinstated as of the date of its surrender. *Riegel v. American Life Ins. Co.*, 153 P. S. 134; reversing s. c. 12 C. C. 177.

220. Equity will not set aside a deed on the ground of fraud, where the means of information were equally accessible to both parties. *Johnson v. Mathues*, 4 Del. 365.

221. Equity will not rescind an executed contract where the parties have a complete remedy at law, and the interests of a third party are involved. *Travis's Appeal*, 8 Atl. 601.

222. Equity will not cancel an amicable settlement between two persons interested in an estate, each having previously taken the advice of separate counsel. *Gormly v. Gormly*, 130 P. S. 467.

223. If land bought at a treasurer's sale be sold to a good faith purchaser, the sale will not be declared void and the deed ordered to be surrendered for cancellation, simply because a county commissioner subsequently purchased a

half interest therein. *Petery's Appeal*, 129 P. S. 121.

224. Equity will not decree the cancellation of a deed, where the master finds an adequate consideration and the absence of fraud. *Bowers v. Bennethum*, 133 P. S. 306.

225. There is no special confidential or fiduciary relation between an officer of a corporation and a person from whom he purchased the stock of the corporation; a master's findings that such an officer had no knowledge, at the time of the purchase, of any movement which would tend to increase the value of the stock, and had not been guilty of any misrepresentation or concealment, would not be reversed except for manifest error. *Krumbhaar v. Griffiths*, 151 P. S. 223.

226. A bill to set aside the sale of an oil lease on the ground of inadequacy of price, will not be sustained where it appears, that at the time of the sale the land was not developed, and the weight of the testimony shows that the consideration was sufficient. *Neill v. Shamburg*, 158 P. S. 263.

227. The sale of a ground-rent was not set aside on the ground of mistake, where it appeared that the defendant owned the ground-rent, which she thought was irredeemable, and gave it to her son to deliver to an auctioneer to be sold, who so represented it to the auctioneer, who so advertised and sold it, that the plaintiff's decedent bought the ground-rent as an irredeemable one, relying upon the defendant's representation, and plaintiff took the title papers to a title company, who insured it as irredeemable, where two years and a half was permitted to elapse before the bill was filed, and it did not appear that there was any intentional misrepresentation as to the quality of the ground-rent. *Clapp v. Hoffman*, 159 P. S. 531.

228. Upon a bill for the cancellation of satisfaction of a mortgage, it was held, that a real estate title company was liable for the loss of a fund received by the solicitor of the company while acting

within the apparent scope of his duties and embezzled by him. *Independent Building & Loan Ass'n v. Real Estate Title Company*, 156 P. S. 181.

229. Undue influence in the procurement of a deed is not established by evidence of moderate solicitation though accompanied by tears. *Doran v. McConlogue*, 150 P. S. 98.

230. The mere relation of master and servant, or boarder and landlord, raises no implication of confidential relation, which the courts can consider in proceedings to set aside a conveyance. *Doran v. McConlogue*, 150 P. S. 98.

231. A voluntary deed made by a father to a daughter will not be set aside, where it appears that the deed was made to secure reasonable provision for the daughter and to equalize her share with that of the other children, that the deed was prepared at the grantor's special request and that he was mentally capable of transacting business and there is no evidence of undue influence. *Knowlson v. Fleming*, 165 P. S. 10.

232. Where an elderly woman executed a deed to her physician and it appeared that the deed was not delivered to the defendant but had been retained by the plaintiff's attorney, that the deed was signed without consideration, that plaintiff's attorney, who appeared to be also defendant's attorney, had assured plaintiff that she could revoke the deed at any time, that the effect of the deed was never properly explained to the plaintiff, and that defendant was both physician and attorney in fact of the plaintiff, and had great influence with her and influenced her to make the deed, the court decreed a reconveyance of the property to the plaintiff. *Unruh v. Lukens*, 166 P. S. 324.

233. To justify a chancellor in setting aside or modifying a written instrument on the ground of fraud, the evidence must be clear and satisfactory, but if the judge sitting as a chancellor be not fully satisfied with the evidence, he may leave the question of fraud to the jury. *Newkirk v. Scott*, 4 Del. 449.

234. Upon a bill by heirs of a grantor to set aside her deed on the ground of fraud and absence of consideration, the defendant claiming under a deed from her grantee may show that she designed her deed for the benefit of an insolvent son and made it to the defendant's grantor to protect such insolvent from the claims of his creditors. *Kyte v. Kyte*, 8 Kulp 1.

235. Equity will not decree the cancellation of a deed upon the ground of fraud, where the alleged fraudulent representations of the vendee were known by the vendor to be untrue before he made the conveyance. *Tighe v. Doran*, 7 Kulp 124.

236. Where the petitioner signed and executed a written transfer of mortgage to A, and this transfer had been sent by the attorney who had procured the loan for her, to a justice with instructions to have her execute it, and the transfer was entered of record, and the amount of the mortgage was paid by the assignee to the attorney who, however, failed to pay it over to the petitioner, the court refused to set the transfer aside; and this, though the petitioner had never received any consideration for the transfer and did not know that she had signed one, and had not authorized the attorney to make any transfer or to receive any of the money. *Himes's Petition*, 11 Lanc. 135.

237. Weakness of mind not amounting to unsoundness or imbecility, is not sufficient ground for avoiding a deed of land from father to son a short time before his death, no undue influence being shown, and the evidence establishing the fact that the father knew what he was doing. *Jones's Appeal*, 127 P. S. 102.

238. In a proceeding to set aside a deed on the ground of lunacy of the grantor, the opinion of witnesses who are not experts is not evidence unless they first testify to specific facts showing mental unsoundness. Mere difficulty of speech following an attack of paralysis is no evidence of mental condition. *Doran v. McConlogue*, 150 P. S. 98.

239. Equity has jurisdiction of a bill

praying that a conveyance of real estate be declared invalid because of the mental incapacity of the grantor or other proper reason or reasons; such a bill is not open to the objection that it is an ejectment bill and that the remedy is at law. *Williamson v. Smith*, 4 Dist. Rep. 307.

240. A voluntary deed of trust for the settlor's benefit will not be set aside simply because of the absence of a clause of revocation; it is, however, a circumstance to be taken into account of more or less weight, but where its presence would have defeated the object of the trust, its absence was held to be immaterial. *Reidy v. Small*, 154 P. S. 505.

241. Equity will not cancel a voluntary deed by a mother to a daughter, in the absence of evidence of solicitation, imposition or any wrongful action on the part of the grantee. *Simon v. Simon*, 163 P. S. 292. See *Knowlson v. Fleming*, 165 P. S. 10.

242. Where it appeared that the grantor in a deed of trust, who was *cestui que trust* for life, and the trustees, were advised by counsel that the trust was revocable at the pleasure of the grantor, and the papers were executed in that belief; it was held, that equity would order the annulment of the deed; and this, although the deed contained no power of revocation and there were *cestui qui trustent* in remainder. *Kilduffe v. Maitland*, 12 C. C. 362; s. c. 30 W. N. C. 46.

243. Where a settlor of an active trust, which is irrevocable on its face, seeks to set it aside on the ground that he was induced to create it by fraud and undue influence and without a sufficient motive, and that a power of revocation was omitted by mistake, the procedure should be by bill in equity and not by petition on the common law side of the court. *Myer's Estate*, 6 Kulp 367.

244. Where a bill was filed by the lessees of an oil lease, to have the lease cancelled and to restrain the lessors from proceeding further in an action at law to recover royalties under said lease, on the

ground of the fact that two thousand tons gross could not be mined advantageously per year, and the master found that there was plenty of ore to answer the contract and that, though poor in quality, it was not wholly unfit to be worked and could not be pronounced to be so unmerchantable, as to be a substance different from that contracted for, the court refused to cancel the lease or to issue an injunction. *Kraber's Appeal*, 2 York 55.

245. A bill praying for the cancellation of an assignment was permitted to be amended after the hearing before a master, by adding a prayer for an account. *Blood v. Ludlow Carbon Black Co.*, 150 P. S. 1.

246. Where a partner sold his interest in the partnership to his co-partner; it was *held*, that he could not maintain a bill for an account and for a cancellation of the sale on the ground of after-discovered fraud, without first returning the consideration received and putting the other parties in *statu quo*. *Lyle v. Shay*, 165 P. S. 637.

247. Upon a bill to avoid an assignment of a beneficial association for creditors, where the supreme court found the evidence so conflicting and the confusion so great, it was decreed that the whole matter should remain in *statu quo*, until the next meeting of the supreme lodge when new officers could be regularly elected by the body, which was acknowledged by both parties to be the rightful governing head of the order. *Order of Solon v. Folsom*, 161 P. S. 225. See *Comm'th v. Order of Solon*, 166 P. S. 33.

248. An assignee for creditors has merely the rights of his debtor; a bill does not lie by him to avoid a previous fraudulent transfer of the debtor's property. *Horlacher v. Bertolet*, 12 Lanc. 17.

249. Vague and unsatisfactory evidence of fraud is not sufficient to decree the rescission of a fully executed contract for the conveyance of real estate. That the grantor made a bad bargain is insufficient. *Kern v. Middleton*, 24 W. N.

C. 393; s. c. 16 Atlan. 640. See *Kern v. Simpson*, 126 P. S. 42.

250. Upon a bill to set aside and cancel a deed from the plaintiff to the defendant, who was the niece of his deceased wife and his housekeeper, the burden is upon the plaintiff to establish by clear and precise evidence such matters of fact as are essential to the granting of the relief; there is no fiduciary relation between them. *Gardner v. McConlogue*, 8 C. C. 424; s. c. 2 Northam. 167.

251. Upon a bill for a conveyance, where the defendant has by a prior conveyance put it out of the power of court to order a reconveyance, a compensation in damages may be awarded in lieu thereof, and the plaintiff may elect to treat the purchase money as the measure of damages. *Reeder v. Trullinger*, 151 P. S. 287.

252. Equity will decree a reconveyance of land, where it appears that the owners of land were induced to sell it by a false representation by the vendee that a foundry and machine shop would be immediately erected upon the property, which would greatly enhance the value of their remaining land. *Williams v. Kerr*, 152 P. S. 560.

253. A bill in equity does not lie to compel the reconveyance of shares of stock sold to the defendant under fraudulent representations made by him, where the relief sought is merely compensation in damages; in such a case there is an adequate remedy at law. *Edelman v. Latschaw*, 159 P. S. 644; affirming s. c. 9 Montg. 83.

254. Where a deed to a church conveyed more land than the parties intended and the grantee forced the grantor to resort to a bill in equity for a reconveyance; it was *held*, that the costs of the equity suit should be borne by the grantee. *Shedwick v. Prospect Methodist Episcopal Church*, 160 P. S. 57.

255. Upon a bill to compel the reconveyance of stock pledged as collateral, where the stock has been sold after the bill was filed, a court of equity has

jurisdiction to enter a decree for damages against the creditor for the conversion of the collateral. *Blood v. Erie Dime Savings and Loan Co.*, 164 P. S. 95.

256. An assignee for creditors has no standing to file a bill to compel a reconveyance of property alleged to have been fraudulently conveyed by his assignor immediately before the assignment; he is a representative of the assignor and is bound by his acts. *Jordan v. Mosser*, 9 C. C. 325.

257. Where lands had been conveyed to a trustee, to manage during the grantors' lives and after their death to convey in fee to their children without specific power of revocation; it was held, that a reconveyance could not be enforced unless the remainder-men were made parties. *Willy v. Davis*, 5 Del. 473.

258. Where three members of a church congregation purchased for the church a lot of ground, which was conveyed to them in trust for the use of the church as a cemetery, and subsequently there was a split in the congregation and the courts decided that the section represented by the plaintiffs, was the true congregation, and the other section then withdrew and formed a separate body but kept control of the cemetery; it was held, that a bill would lie by the plaintiffs for a reconveyance of the property to them, and for an account of moneys received for the sale of burial lots, and that the plaintiffs were entitled to the moneys so received during the six years preceding the suit, less the sum spent for repairs. *Seibert v. Dreisch*, 12 Lanc. 137.

XV. Dower.

259. An agreement by the husband to convey before dower attaches will, if enforced in equity, extinguish the claim for dower. *McClure v. Fairfield*, 153 P. S. 411.

See HUSBAND AND WIFE, IX.

XIX. Discovery.

260. Upon a bill of discovery in aid of an action at law, brought by a shipper against a railroad company to recover damages for loss of goods, the defendant will not be required to produce for the plaintiff's benefit a report made by the local freight agent of the company to the general freight agent, relating to the goods in controversy and intended to be sent by the general agent to counsel for use on the trial of the case. *Davenport v. Pennsylvania R. R. Co.*, 166 P. S. 480. See *Davenport v. Pennsylvania R. R. Co.*, 2 Dist. Rep. 784.

261. Where a bill avers that the defendant has received the money of the plaintiff for investment and failed to apply the money and absconded, the plaintiff is entitled to discovery and account; in such a case, if the court grants a preliminary injunction and appoints a temporary receiver with power to take possession of the defendant's books, the defendant cannot refuse to deliver the books on the ground of an improper joinder of parties or because the bill is based upon a wagering contract; his remedy is to apply for a special order of *supersedeas* and the court will order that the examination of the books shall be strictly confined to the legitimate needs of the case, so that the interests of other persons may be protected from unnecessary scrutiny. *Haught v. Irwin*, 166 P. S. 548.

262. A bill of discovery in aid of an execution which sets forth the recovery of a judgment, the amount thereof, the issuing of an execution thereon, and the return of the sheriff of *nulla bona*, sufficiently and substantially complies with the act of assembly; such averments are equivalent to an averment that the whole amount is due and unpaid. *Gould v. Loewenberg*, 2 Lack. Jur. 292.

XXI. Bills quia timet.

263. Where, in 1772, the plaintiff's predecessor granted a strip of land eight

feet wide to the county commissioners, adjoining the county jail, reserving use of the same for an open yard or garden, for the purpose that the same should "be and remain forever hereafter unbuilt on, in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to the said wall," and the commissioners in 1848 sold the jail property, to the defendant's predecessors, a new jail having been erected in another place; it was *held*, that the title of the county was a base fee, which determined upon the sale of the jail property and defendants alleging that they had succeeded to the rights of the county commissioners, a bill *quia timet* would lie to remove the cloud upon the plaintiff's title and for the cancellation of the deed of 1772. Such a bill is an independent head of equity jurisdiction and does not require any accompaniment of fraud, accident, mistake, trust or account, or any other basis of equitable intervention. *Stegel v. Lauer*, 148 P. S. 236; affirming s. c. 10 C. C. 347.

264. A mechanic's lien can be filed against an equitable title, and a sale on a judgment thereunder against the equitable owner will enable the purchaser to bring ejectment against the legal owner in possession; where an equitable owner contracted for the construction of houses and the contractor filed mechanics' liens against the buildings and lots and recovered judgment on the liens and purchased at sheriff's sale the equitable title, and thereupon in February 1887 entered into possession, and died in September 1887; it was *held*, that a bill filed by his widow and heirs in March 1888 to quiet the title was not barred by laches, and that the plaintiffs were entitled to relief. *McClure v. Fairfield*, 153 P. S. 411.

265. Where a plaintiff in ejectment, after recovering a judgment, files a bill to quiet title and to compel an extinguishment of the ground-rents and the

satisfaction of the mortgages and judgments on the property, the court will hear the whole case *de novo*. *Mawhinney v. Shallcross*, 10 C. C. 102.

See EASEMENTS.

XXIII. Creditors' bills.

266. A bill in equity lies against a corporation and the subscribers to its stock, by its creditors to ascertain the latter's claim and for a receiver to collect unpaid stock subscriptions for the payment thereof. *Bailey v. Pittsburgh Coal R. R. Co.*, 139 P. S. 213.

267. Upon a creditor's bill to charge stockholders upon their unpaid subscriptions, the administrator of a deceased stockholder domiciled and receiving his letters in another county, may properly be made a co-defendant when duly served under sec. 1 of the act 6 April 1859 (*Brightly's Purdon* 783). *Hamilton v. Clarion M. & P. R. R. Co.*, 144 P. S. 34.

268. Upon a creditor's bill to enforce payment of unpaid subscriptions, where other creditors subsequently intervene, the court may compel the intervening creditors to contribute to the expenses already incurred in raising a fund on which they seek to come, but will not exclude them from all participation in the fund until the original complainants in the bill have been paid in full. *Johnston v. Markle Paper Co.*, 153 P. S. 189.

269. Where, after the filing of a creditor's bill, to declare a purchaser at an assignee's sale a trustee *ex maleficio* as to a portion of the purchase money, the purchaser paid over the difference with interest to the assignee, the bill was dismissed, but the record costs and master's fee were equally divided between the parties, while the costs of the parties were directed to be paid by the party who made them. *Kalle v. Hest*, 154 P. S. 470.

270. If an assignment be clearly fraudulent and collusive, the assignee may be removed and the assignment itself vacated and declared void on a creditor's

bill, but this can only be done by a bill filed in the court having jurisdiction over the assignment. *Artman v. Giles*, 155 P. S. 409.

271. A trustee appointed under a will to carry on the business of the testator cannot, in the absence of express authority, make an assignment for the benefit of creditors, so he cannot confess a judgment to a creditor of the trust estate so as to give such creditor a preference over other creditors in the distribution of the trust property; in such a case the other creditors may file a creditor's bill to compel the trustee and the preferred creditors to account. *Woddrop v. Weed*, 154 P. S. 316. See *Weed's Estate*, 163 P. S. 595, 600.

272. A creditor's bill is one in which all the creditors have common equal equity upon a common fund and have or can have equal protection and redress; it cannot be brought by one creditor against other creditors. *Philadelphia Granite and Blue Stone Co. v. Douglass*, 14 C. C. 234.

273. The claim of a contractor against a city cannot be attached, and this rule prevents the subjection and appropriation of the claim to the claims of creditors of the contractor in a suit in equity; where an insolvent firm of municipal contractors had pledged, to secure loans, certain certificates received under a municipal contract, and warrants were about to be issued to pay the certificates; it was held, that another creditor could not, by a bill in equity, require the balance of warrants after the payment of the loan should be paid over to the receiver. *Philadelphia Granite and Blue Stone Co. v. Douglass*, 14 C. C. 234.

274. A corporation, incorporated for the manufacture and sale of lumber and the purchasing and selling of mills, lands, standing timber, logs and lumber, is incorporated for a general manufacturing business, and is covered by the act 29 April 1874, sec. 2, clause 18 (now amended by the act 10 June 1893, Brightly's Purdon 406). That act does not re-

peal secs. 41 and 42 of the act 18 July 1863 (Brightly's Purdon 2021), providing a method of proceeding by creditors against such a corporation; there is nothing in those sections relating to the remedy against officers of a corporation for an excess of indebtedness over the capital stock paid in, which is inconsistent with the provisions of the act of 1874, but a creditor's bill to enforce such a personal liability is premature and demurrable, which does not aver that the plaintiffs have complied with the provisions of those sections; such a bill should also aver the insolvency of the corporation or a demand for the payment of the debt and a refusal thereof by the corporation. *Wagner v. Corcoran*, 2 Dist. Rep. 440.

275. Where a creditor's bill was filed by a plaintiff, on behalf of himself and all other creditors, and it was heard on bill and answer and dismissed and there was no decree for an account; it was held, that such dismissal was no bar to a subsequent bill by another creditor, not named in the first bill, brought for himself and all other creditors and similar in all respects to the first bill. *Yost v. Cowden*, 7 Montg. 73.

XXIV. Process and service.

276. The failure to state in the bill the non-residence of a defendant is not itself sufficient to defeat an order of service upon him. Who is a "principal defendant" within the meaning of the act of 6 April 1859 (Brightly's Purdon 783). *Bolton v. Swartz*, 4 Montg. 9; s. c. *Ibid.* 198; *William Penn Building Association v. Mayer*, 45 L. I. 346.

277. There can be no valid service of process within our jurisdiction upon a foreign corporation, unless it is doing business within our limits, or has an agency or place of business here. *People's Telephone Co. v. American National Telephone Co.*, 46 L. I. 200.

278. It seems that the service of a bill in another state upon non-residents

and the service upon a resident defendant who as mortgagor is a mere stakeholder, will not give jurisdiction over the non-resident defendant. *Smith v. Kammerer*, 152 P. S. 98.

279. Where a proceeding in equity is instituted concerning property within the jurisdiction, and the bill alleges the existence of a partnership between plaintiff and defendant, whose place of business is within the jurisdiction of the court, and the plaintiff resides within the jurisdiction and the defendant without, and some of the property of the firm is in the possession of the defendant and some in that of the plaintiff, the act 6 April 1859 (Brightly's Purdon 783), authorizing service on parties out of the jurisdiction, does not apply; a partnership is not property within the meaning of that act. A bill to be within the purview of that act must be confined, at least so far as the non-resident defendant is concerned, to a prayer for a decree affecting only the property in question. *Eshbach v. Slonaker*, 1 Dist. Rep. 332.

280. Where a corporation is incorporated by this commonwealth and its principal office is located out of the state and none of the officers, upon whom process can be served reside in this state, the domicile of such corporation remains in this state, and service of a bill in equity upon such a corporation must be made by publication, as prescribed by the act 11 April 1862, sec. 2 (Brightly's Purdon 429). *Newton v. Pittston Coal Co.*, 7 Kulp 11.

XXV. Parties.

281. Every person who will be affected by the decree should be made a party to the bill. *Philadelphia v. River Front Railroad Co.*, 133 P. S. 134; s. c. 25 W. N. C. 457.

282. Courts of equity can bring before them all parties interested in the subject matter of the litigation and adjust the rights of all. *Heindel v. Southern*

Pennsylvania Mutual Relief Ass'n, 3 York 204.

283. Upon a bill to reform the acknowledgment of a deed, the court should have before it and determine the rights of all persons interested. *Manufacturers' Natural Gas Co. v. Douglass*, 130 P. S. 283.

284. If the parties be numerous or unknown, a bill may be maintained by one or more for the benefit of all, but it is bad if filed by the plaintiff in behalf of himself only. *Bishop v. Cowden*, 5 Montg. 151.

285. County commissioners in office are the proper parties to file a bill to set aside the sale by the county, of land bought at a treasurer's sale for taxes, on an averment that a former county commissioner was interested in the purchase from the county. *Petery's Appeal*, 129 P. S. 121.

286. A citizen and taxpayer of a city, and a property owner on a street about to be improved, which property would be subjected to an assessment, has a legal right to maintain a bill to set aside such contract as illegal. *Mazet v. Pittsburgh*, 137 P. S. 548; s. c. 38 P. L. J. 103; affirming s. c. 6 C. C. 599.

287. The refusal of a public officer to advertise in a certain class of newspapers is not such a violation of a private right as will authorize a bill in equity by a private citizen. In such case only the attorney-general can institute proceedings. *Mayer v. McCamant*, 8 C. C. 75.

288. A lumber exchange, authorized by a large number of owners of logs set adrift by flood, may maintain a bill against all persons jointly having such logs in their possession. *West Branch Lumbermen's Exchange v. Enterline*, 1 Northum. 269.

289. The members of a charitable organization, such as a volunteer fire company, having no title or interest in its property, cannot maintain a bill for an injunction to prevent the distribution of such property. *Hoffman v. Hartman*, 7 Lanc. 137.

290. Under the act 19 June 1871

(Brightly's Purdon 780), a street railway company has a standing as a complainant, in a bill in equity, to restrain another company from unlawfully laying tracks in a street already occupied by the complainant. *Germantown Pass. Ry. Co. v. Citizens Pass. Ry. Co.*, 151 P. S. 138; affirming s. c. 9 C. C. 638.

291. Neither simple contract creditors nor attaching creditors under the act 17 March 1869 have a standing in equity, to restrain a judgment creditor from proceeding by due course of law to obtain satisfaction of his judgment. *Artman v. Giles*, 155 P. S. 409. See *Kelly v. Herb*, 157 P. S. 41; *Meyers v. Ranch*, 4 Northam. 339; s. c. 6 Del. 106.

292. Where it appears that a street railway company has obtained no valid consent to the use of a borough street, an owner of property abutting on the street has a standing to proceed by injunction against the construction of the railway upon such street. *Thomas v. Inter-County Street Ry. Co.*, 167 P. S. 120.

293. Where a street railway company attempted to occupy a borough street, notwithstanding a veto of the ordinance of consent; it was held, that the burgess had a standing in equity to restrain the construction of the railway. *Lehigh Coal & Navigation Co. v. Inter-County Street Ry. Co.*, 167 P. S. 126.

294. The county commissioners are the proper parties to maintain a bill for an injunction to restrain the illegal occupancy or obstruction of a county bridge. *Venango County Commissioners v. Oil City Street Ry. Co.*, 3 Dist. Rep. 546.

295. The fact that a person is the agent of the owner of real estate and employed to manage it, is not sufficient to enable him to maintain an action at law or in equity in his own name as plaintiff. *Comm'th v. Wilkes-Barre Gas Co.*, 6 Kulp 328.

296. Different owners in severalty of premises along a stream may join in a bill to restrain the pollution thereof by the waters of a mine, but an averment in such a bill that the complainants have

been advised by experts that mine water contains poisonous substances is not a sufficient averment of the fact to require the defendant to answer. *Williams v. Union Improvement Co.*, 6 Kulp 417.

297. To a bill to declare railroad bonds and mortgages invalid, as issued in violation of article XVI., sec. 7, of the constitution, the bondholders must be made parties. *Harrisburg and Eastern Railroad Co.'s Appeal*, 1 Mona. 692.

298. Upon the death of a defendant the heirs should be brought in by amending the original bill, and serving a copy as amended upon the new parties; a bill of review is not the proper practice. *Cavanaugh v. Cavanaugh*, 1 Lack. Jur. 122.

299. An injunction to stay proceedings at law should go against the party, and not against the sheriff or other officer who is already under the mandate of one court, nor against an assignee for creditors, who is accountable to another court. *Artman v. Giles*, 155 P. S. 409.

300. Where a father entered into an oral contract to purchase land and directed that the deed should be made to his daughter, and before the deed was made the owner entered into a written agreement to sell the land to another person; it was held, upon a bill against the vendor for specific performance and against the first grantee to have her declared trustee of the legal title, for the second purchaser, that the grantee's father who was the real purchaser was a necessary party to the bill. *Maguire v. Heraty*, 163 P. S. 381.

301. Where a bridge spans a stream which is a boundary line between a city and a county, the city will be restrained by the court of the adjoining county from interfering with the laying of the tracks of a passenger railway company upon the portion of the bridge belonging to the adjoining county, where it appears that the consent to the laying of the railway has been given by the supervisors of the township and the commissioners of the county, and the officers of the city

have been made parties defendant to the bill. *Delaware County & Philadelphia Electric Ry. Co. v. Philadelphia*, 164 P. S. 457.

302. Where lands had been conveyed to a trustee to manage during the grantors' lives and after their death to convey in fee to their children without specific power of revocation; it was *held*, that a reconveyance could not be enforced unless the remainder-men were made parties. *Willy v. Davis*, 5 Del. 473.

303. Where A sold a tract of land to B and he subsequently sold another tract to C, and the two tracts were separated by a fifteen-feet-wide alley, which in the first deed was described as a twenty-feet-wide alley; it was *held*, in a bill by A against C to reform the latter deed, that it was neither necessary nor proper to include B as a co-defendant. *Boehm v. Bachman*, 3 Northam. 70.

304. If a bill charges unlawful conduct on the part of a corporation, but prays injunction against its officers, an omission to make the corporation itself a party is fatal. *Hoffman v. Hartman*, 7 Lanc. 137.

305. Upon a creditor's bill to charge stockholders upon their unpaid subscriptions, the administrator of a deceased stockholder domiciled and receiving his letters in another county, may properly be made a co-defendant when duly served under sec. 1 of the act 6 April 1859 (Brightly's Purdon 783). *Hamilton v. Clarion M. & P. R. R. Co.*, 144 P. S. 34.

306. In suits between street railway companies, involving conflicting claims to occupy the same highway, the local authorities, township, borough or turnpike, must be made parties to the suit. *Middletown Ry. Co. v. Middletown Electric Ry. Co.*, 16 C. C. 127; s. c. 4 Dist. Rep. 32.

307. Upon a bill against the individual officers of a church, to have them removed from office and to have the vacancies filled by a new election to be ordered by the court, the corporation itself should be

made a party to the action. *Krecker v. Shirey*, 3 Northam. 266. See s. c. 163 P. S. 534.

308. In a bill against an unincorporated association having numerous members, it is not necessary to make all the members by name parties defendant; the bill is good as to all the members named. *Manning v. Klein*, 11 C. C. 525.

309. Where an agreement is signed by an attorney-at-law on behalf of his client, he should not be made a party to an equitable proceeding founded thereon. *Burke v. Teller*, 11 C. C. 59.

310. An attorney-at-law ought not to be made a party to a bill filed against his clients where no relief can be had against him. *Fitzpatrick v. Engard*, 4 Dist. Rep. 87. See *Fitzpatrick v. Engard*, 4 Dist. Rep. 383.

311. If a party interested adversely to the plaintiff is not made a defendant, but appears for the other defendant, the court, upon adjudging him a necessary party, should permit him to be added as a defendant. *Manufacturers' Natural Gas Co. v. Douglass*, 130 P. S. 283.

312. It is no ground for reversing a decree that objections were filed after the master's report, that no issue was made as to the defendant company and that after the reference to the master, parties both plaintiff and defendant were added, but the pleadings remained unchanged. *Bailey v. Pittsburgh Coal R. R. Co.*, 139 P. S. 213.

313. Where a bill to compel the surrender of county warrants was filed by a county against a national bank, which had received the warrants as collateral for a debt due by a banking firm; it was *held*, to be proper to permit an amendment adding the name of the county treasurer as a plaintiff and the assignees of the banking firm as defendants. *Crawford County v. Merchants National Bank*, 164 P. S. 109.

314. Upon a bill to restrain a conveyance to defendants or to a corporation formed by them, where a company is chartered and a conveyance made to it

pending the litigation, it is proper to make such company a party defendant before decree. *Kennedy v. McCloskey*, 37 W. N. C. 106; reversing s. c. 10 Montg. 204.

315. Upon a bill against partners for an account, and an answer that the plaintiff's husband and not she was the partner, a subsequent agreement that the husband shall file a disclaimer, and the cause shall proceed as though no such defence had been made, will estop the defendant from subsequently denying that the plaintiff was the true party in interest. *Parker v. Broadbent*, 134 P. S. 322.

316. As to the proper parties in a bill for an account and the right to amend if necessary, see *Myers v. Bryson*, 158 P. S. 246.

XXVI. Of the bill.

317. Every averment, necessary to entitle the plaintiff to the relief prayed for, must be contained in the stating part of the bill; it cannot be supplied by inference, or by reference to some other part of the bill. *Thompson's Appeal*, 126 P. S. 367.

318. A bill in equity must state every fact necessary to give title to relief. If a plaintiff grounds his right on a contract negative in its terms, such negation must be alleged or the bill will be dismissed on demurrer. *Morck v. Pennsylvania Gas Co.*, 8 C. C. 131.

319. A bill in equity asking relief should state with distinctness and precision, the facts and circumstances upon which it relies in order to show the plaintiff's right to relief; a defect cannot be supplied by inference. *Battin v. Martin*, 10 Lanc. 209.

320. If the plaintiff have a legal right to sue, his bill will not be set aside as collusive because others may be interested and pay his costs. *Mazet v. Pittsburgh*, 137 P. S. 548; s. c. 38 P. L. J. 103; affirming s. c. 6 C. C. 599.

321. If a stockholder or a creditor brings a suit in equity, the bill must show his right to maintain the suit; such a defect can be taken advantage of on

exceptions to the master's report. *Holton v. Newcastle Northern Railway Co.*, 138 P. S. 111; affirming s. c. 8 C. C. 430.

322. A bill alleging that a board of school directors have conspired to collect a building tax for the purchase of a building, in which some of them are interested, sufficiently avers that some of them have an interest in the building and are acting together to sell it to the district. *Witmer's Appeal*, 15 Atlan. 428.

323. Where a member of an unincorporated beneficial association of barbers was expelled and a bill was filed for his reinstatement, alleging that the expulsion was because the plaintiff had caused the arrest of certain other members for violating the Sunday law; it was held, that it was not necessary that the bill should further allege that the expulsion was illegal. *Manning v. Klein*, 11 C. C. 525.

324. Where the plaintiff rests his title upon a deed, he must either annex a copy of the deed to his bill or refer to it by its place of record. *Haneman v. Pile*, 161 P. S. 599.

325. A bill in equity must aver the plaintiff's title with such certainty that the defendants may be distinctly informed of the nature of the case which they are called upon to meet. *McHale v. Easton and Bethlehem Transit Co.*, 169 P. S. 416; affirming s. c. 4 Northam. 360.

326. Unnecessary recitals in a bill should be corrected by exception and not by demurrer. *Shepp v. Norristown Pass. Ry. Co.*, 10 Montg. 41.

327. If counsel certifies that there has not been time to print the bill, the plaintiff has twenty days in which to file and serve printed copies, and the court may award an interlocutory injunction without service of a copy. *Landmesser v. Liem*, 5 Kulp 417.

328. Where a bill was filed in type-writing and proceedings were had thereon for five months, the court refused to dismiss the bill on the ground that it was not printed. *Pottsville Water Co. v. Schuylkill Navigation Co.*, 11 C. C. 635.

329. A bill in equity filed by a corpo-

ration is good without the corporate seal if it be signed by the officers and there is an allegation that the defendants have possession of the seal. *East End Reformed Presbyterian Congregation v. Milligan*, 40 P. L. J. 7.

330. The new equity rules adopted by the supreme court 15 January 1895 have all the force and effect of a positive enactment; where a bill for an injunction was not endorsed in accordance with the new rules and a preliminary injunction was granted on *ex parte* affidavits, the order granting the injunction was reversed by the supreme court. *Cassidy v. Knapp*, 167 P. S. 305; s. c. 36 W. N. C. 197.

XXVII. Multifariousness.

331. A bill will not be treated as multifarious, because it joins two good causes of complaint growing out of the same transaction, if all of the defendants be interested in the same claim of right, and the relief asked for in relation to each be of the same general character. *Bishop v. Cowden*, 5 Montg. 151.

332. Multifariousness must be taken advantage of by demurrer, plea or answer. It is too late to object at the hearing. *Citizens' Natural Gas Co. v. Shennango Natural Gas Co.*, 138 P. S. 22; affirming s. c. 7 C. C. 277; 24 W. N. C. 573.

333. Where the cause of complaint is common to all the plaintiffs, and the right is precisely the same as to each, and the complaint of all is against the same defendant for the doing of acts which affected all alike and in the same manner, and the defence set up is common to all the plaintiffs, and the testimony, proofs and decree are alike as to all the plaintiffs, a bill is not multifarious which is filed by several such plaintiffs against the common defendant. *Rafferty v. Central Traction Co.*, 147 P. S. 579; reversing s. c. 39 P. L. J. 15.

334. Where land was bought with partnership funds and with the intention to

make it part of the partnership stock, it was *held*, that as between themselves the land was held by them not as mere tenants in common but as partnership property, and where the title was taken in the name of a third person, a resulting trust arose in favor of the partnership; and it was further *held*, that a bill filed by the executrix of a deceased partner against a surviving partner and such third person, and praying as against the former for an account and as against the latter for a conveyance of the land, was not multifarious. *Baldes v. Henniges*, 7 Kulp 143.

335. A bill will not be treated as multifarious, where there is a common interest in all the plaintiffs in all the matters complained of, and a common liability alleged in all of the defendants. *Brown v. Painter*, 8 Montg. 130.

XXVIII. Amendments.

336. An amendment to a bill introducing a new cause of action is not admissible. A bill setting forth a trust and its fulfilment and praying a reconveyance, cannot be amended by setting up that the conveyance was a fraud upon marital rights and praying a cancellation. *Toomey v. Hughes*, 25 W. N. C. 66.

337. A bill for partition filed by heirs may be amended by adding the name of the widow and a prayer for other relief. *Cowan's Appeal*, 16 Atlan. 28.

338. Where a bill to compel the surrender of county warrants was filed by a county against a national bank, which had received the warrants as collateral for a debt due by a banking firm; it was *held* to be proper to permit an amendment adding the name of the county treasurer as a plaintiff and the assignees of the banking firm as defendants. *Crawford County v. Merchants National Bank*, 164 P. S. 109.

339. Upon a bill filed in the name of one who is declared to be of unsound mind, where an affidavit was filed by him that the use of his name was unauthor-

ized and that he did not desire the relief prayed for, the court amended the record by striking his name therefrom. *Craighead v. Smith*, 10 C. C. 359.

340. After replication, an amendment of the bill can only be made upon affidavit that it is not for delay, and that the matter is material, and could not with reasonable diligence have been sooner introduced in the bill. *Toomey v. Hughes*, 25 W. N. C. 66.

341. A plaintiff in a proper case will be permitted to withdraw his replication and amend his bill; and this, even after reference to and argument before a master. But in such a case the plaintiff must pay the costs of printing the answer. *Matlack v. Mutual Life Ins. Co. of New York*, 14 C. C. 188.

342. An amendment to a bill, after the examination of witnesses, will only be allowed under very special circumstances. *Brotzman v. Brotzman*, 1 Northam. 13; affirmed in *Brotzman's Appeal*, 119 P. S. 645.

343. A bill praying for the cancellation of an assignment was permitted to be amended after hearing before a master, by adding a prayer for an account. *Blood v. Ludlow Carbon Black Co.*, 150 P. S. 1.

344. After a case has been heard and determined by the master, it is too late on the argument of exceptions to add a new party defendant who has not had a hearing. *Kennedy v. McCloskey*, 10 Montg. 204.

345. Facts occurring subsequent to the filing of the bill and entitling the plaintiff to more extended relief, may be the subject of an amendment. *Shepp v. Norristown Pass. Ry. Co.*, 10 Montg. 41.

346. After a final decree the court properly disallowed a motion to amend so as to charge the defendant with owing seven thousand dollars instead of four thousand dollars. *McCullough's Appeal*, 1 Mona. 700.

347. The supreme court having affirmed a decree dismissing a bill to set aside a spendthrift trust as having been procured by fraud, an amendment will not be

allowed averring an improper exclusion of the settlor from the benefits of the trust. *Merriman v. Munson*, 134 P. S. 114.

348. As to the proper parties in a bill for an account and the right to amend if necessary, see *Myers v. Bryson*, 158 P. S. 246.

349. Amendments will be allowed to a bill praying specific performance so as to permit the plaintiff to obtain damages in case specific performance is refused. *Fitzpatrick v. Engard*, 4 Dist. Rep. 383. See *Fitzpatrick v. Engard*, 4 Dist. Rep. 87.

XXXIX. Demurrers.

350. If a defendant both answer and demur, the demurrer is overruled by the answer. *Reading v. Wanner*, 1 Wilcox 282.

351. Unnecessary recitals in a bill should be corrected by exception and not by demurrer. *Shepp v. Norristown Pass. Ry. Co.*, 10 Montg. 41.

352. A demurrer need not refer to particular sections of the bill. *Boardman v. Keystone Standard Watch Co.*, 8 Lanc. 25.

353. Where the facts stated in the demurrer do not appear with certainty upon the face of the bill, they will be considered upon demurrer, as dehors the record. *Williamson v. Smith*, 4 Dist. Rep. 307.

354. Where the facts alleged in the bill show a legal title in the plaintiff, a demurrer releases the plaintiff from establishing his title in an action at law. *Wood v. Hecksher*, 10 Montg. 178.

355. Equity will not aid a plaintiff who has been guilty of laches in prosecuting his claim, and where such laches appears on the face of the bill it may be taken advantage of by demurrer. *Battin v. Martin*, 10 Lanc. 209.

356. Where a bill to restrain the obstruction of a highway avers notice and warning to defendants, but is demurred to, on the ground of laches, the question of laches must be determined on the facts

developed by the evidence and not on demurrer. *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 P. S. 18.

XXX. Pleas.

357. The defence that a bill is collusive should be set up by plea in abatement before answer. *Mazet v. Pittsburgh*, 6 C. C. 599; affirmed in s. c. 38 P. L. J. 103.

358. A plea of *lis pendens* is a good plea in abatement to a bill in equity. *Pennsylvania Company for Ins. on Lives & Granting Annuities v. Philadelphia National Bank*, 14 C. C. 193; s. c. 33 W. N. C. 525.

359. If the defendant, instead of answering, relies upon a plea, the burden is upon him to prove the truth of the plea. *Phillips v. Crawford*, 4 Del. 18.

XXXI. Answers.

(a) Of answers generally.

360. After bill, answer and replication, an individual stockholder of the defendant corporation will not, without showing good ground, be allowed to file a separate answer. *Central Trust Co. v. Cameron Iron & Coal Co.*, 37 P. L. J. 431.

361. Under the act of 23 May 1887 (Brightly's Purdon 930), allowing a writ of foreign attachment in equity proceedings, the attachment will not be dissolved on the filing by the defendant of a formal answer. *Stewart v. Parnell*, 46 L. I. 128.

362. Upon the failure to answer a material allegation in the bill, the court will direct the defendant to make further answer. *Chestnut Hill & Springhouse Turnpike Co. v. Pennsylvania Railroad Co.*, 7 Montg. 33.

363. Where a defendant pleads to part of the bill and demurs to another part, and then answers the whole bill, the answer will be held to overrule both the plea and the demurrer. *New York, Susquehanna & Western Coal Co. v. Spencer*, 3 Dist. Rep. 694.

(b) What is a responsive answer.

364. The answer to a bill of review which alleges that the account was filed "with the actual and legal knowledge of the petitioner," must stand as conclusive of that fact, in the absence of evidence to contradict it. *Priestley's Appeal*, 127 P. S. 420.

365. To a bill averring a loan to an executor, upon a pledge of estate assets, for the purposes of the estate, an answer that the money was borrowed and used for private purposes, with the knowledge of the pledgee, is responsive. *Bell v. Farmers Deposit Nat. Bank*, 131 P. S. 318.

366. If an answer sets up a contract which it is claimed supersedes the contract stated in the bill, the burden is on the defendant to prove the second contract. If, however, the answer admits the contract, but denies the existence of certain stipulations therein, it is responsive, and the plaintiff must prove it by two witnesses or by one witness and corroborative circumstances. *Miller v. Walsh*, 1 Northam. 194.

367. If, to a petition for the reformation of a defective acknowledgment, the answer admits the facts, but sets up that a certain other part of the acknowledgment is not true in point of fact, it is not responsive and will not be considered. *Cressona Saving Fund v. Sowers*, 134 P. S. 354; s. c. 26 W. N. C. 133.

368. To a bill to restrain the use of a counterfeit union trade-mark, an answer that defendant is a member of the union and entitled to use the trade-mark is responsive. *McVey v. Brendal*, 7 Lanc. 399; s. c. 5 Ibid. 350; reversed on another point in s. c. 144 P. S. 235.

369. Where a bill to reform a defective certificate of acknowledgment avers that the wife of the grantor was examined separate and apart from her husband, but that this, by accident or mistake, does not appear in the certificate, and the answer unequivocally denies the averment, such answer is responsive to the

bill, and must stand until overcome by sufficient proof. *Hand v. Weidner*, 151 P. S. 362; affirming s. c. 2 Lack. Jur. 78.

370. An answer is not responsive which alleges as facts what the defendant could not personally know. *Riegel v. American Life Ins. Co.*, 153 P. S. 134; reversing s. c. 12 C. C. 177.

371. A responsive answer is not any the less so because of its setting forth all the facts, though some new matter may be incidentally introduced thereby. *Fidelity Title & Trust Co. v. Weitzel*, 152 P. S. 498.

372. A responsive denial of the averments of the bill is not made any less so by its setting forth all the facts; and this, though some new matter may be incidentally introduced thereby. *Seybert v. Robinson*, 13 C. C. 198; s. c. 32 W. N. C. 200.

373. Where the plaintiff filed a bill against the executrix of his mother's estate nearly eight years after the defendant's account had been filed and adjudicated, and the plaintiff averred the fraudulent appropriation by the defendant of property belonging to the estate and a neglect to include it in the account, and that the plaintiff had only become cognizant of the fact recently before filing the bill; it was *held*, that an answer which explicitly denied the averments of fraud and claimed ownership of the property, was responsive to the bill and that the burden was on the plaintiff to overcome it with two witnesses or with one witness and corroborative circumstances. *Huston v. Harrison*, 168 P. S. 136.

(c) **Effect of a responsive answer.**

374. A responsive answer can only be overcome by two witnesses, or one witness with strong corroborative circumstances. *Reed's Appeal*, 7 Atlan. 174.

375. Where an answer is responsive to the bill, it cannot be overcome by the plaintiff's testimony alone, unsupported by a second witness or by corroborative proof. *Bailie v. Bailie*, 166 P. S. 472.

376. A judgment will not be opened where the answer of the plaintiff is responsive to the petition and denies under oath every allegation therein, unless such answer is overcome by testimony of two witnesses or of one witness corroborated by circumstances equivalent to another. *Hoffman v. Jacobs*, 12 Lanc. 25.

377. A sworn responsive answer must stand unless overcome by the oath of two witnesses or by the oath of one witness and corroborative circumstances; it is not enough that the oath of the complainant stands uncontradicted by circumstances. *Smith v. Ewing*, 151 P. S. 256.

378. Loose entries in a diary and memoranda are not such corroborating circumstances as warrant the court in enforcing the rule, that the answer of a defendant may be overcome by one witness and corroborating circumstances. *Baughers Appeal*, 8 Atlan. 838; affirming *Baughers v. Conn*, 1 C. C. 184.

379. In a bill for an account of a partnership, where it had been agreed between the parties that all items of property held by defendant should be considered as partnership property, and the fact of the holding of an item of property at the date of the agreement was established; it was *held*, that the burden of proof was on the defendant and that in thus assigning the burden of proof there was no violation of the equity rule, which requires the evidence of two witnesses to overcome a responsive answer. *McCullough v. Barr*, 145 P. S. 459.

380. Upon a petition to open an executor's account, a responsive answer must be treated as conclusive until overcome by evidence. *Long's Estate*, 36 W. N. C. 331.

381. Where every substantial averment of a bill for an injunction and receivership, is denied by a responsive answer, which is not overcome or met by further proof, it is error to continue a preliminary injunction or to appoint a receiver. *Crombie v. Order of Solon*, 157 P. S. 588.

See *Order of Solon v. Folsom*, 161 P. S. 225.

382. Upon filing a responsive answer denying the allegations of the bill, a preliminary injunction will be dissolved. *McVey v. Brendal*, 7 Lanc. 399; s. c. 5 *Ibid.* 350.

383. The principle that when an answer is filed denying all the facts and equities on which relief is based, an injunction must be dissolved, is no longer of universal application. *Baltimore & Harrisburg R. R. Co. v. Hanover & McSherrystown Street Ry. Co.*, 13 C. C. 291.

XXXIV. Replications.

384. The rule of law that a plaintiff cannot use a set-off or cross-demand does not apply in equity proceedings. *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, 138 P. S. 22; affirming s. c. 7 C. C. 277; s. c. 24 W. N. C. 573.

385. If the plaintiff fail to file a replication on being so ruled, the case may be set down on bill and answer, and a replication, subsequently filed, will be stricken off. *Bishop v. Cowden*, 6 Montg. 201.

XXXV. Evidence.

(a) Of the examiner.

386. The court will not confer upon an examiner the powers of a master to pass upon the admission or exclusion of testimony. *Grattan v. Frick*, 27 W. N. C. 214.

387. Where it is alleged that irrelevant testimony is being offered before an examiner, the court will, in a proper case, appoint a master in the place of the examiner. *Hepworth v. Henshall*, 11 C. C. 251.

(b) Rule to close testimony.

388. Upon a bill to wind up a partnership, it appearing that the receiver is interposing technicalities for delay, a rule will be granted on the plaintiff to close his testimony in thirty days. *Fries v. Ennis*, 8 C. C. 113.

389. A rule to close testimony within thirty days is premature if taken before

the party has commenced to take his testimony or has had a reasonable time to begin. *Conrow v. Barber*, 29 W. N. C. 551.

(c) Effect of the evidence.

390. Upon a bill setting forth an alleged written agreement, the proof of a parol agreement to the same effect was not fatal. *Gaines v. Brockerhoff*, 26 W. N. C. 258.

391. Upon a bill against a syndicate claiming a share of the profits, the fact that the proofs show that the plaintiff was only entitled after the others had realized a specific sum is not such a variance as calls for a dismissal of the bill. *Kennedy v. McCloskey*, 37 W. N. C. 106; reversing s. c. 10 Montg. 204.

See EQUITY, XLV.

XXXVII. Masters.

(a) Appointment.

392. Though the facts alleged in the bill be admitted by the answer, a master should still be appointed to take testimony and report upon the facts. *Briston v. Tasker*, 135 P. S. 110; s. c. 26 W. N. C. 115.

393. Under sec. 13 of the act 16 June 1836 (Brightly's Purdon 775) a court of equity has power to supervise and control the election of directors of a corporation whenever it is made to appear that by means of fraud, violence or other unlawful conduct on the part of the corporators, a fair and honest election cannot be had; the court may appoint a master *pro hac vice* in any particular case. *Tunis v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 149 P. S. 70; affirming s. c. 11 C. C. 450, 452.

394. Where it is alleged that irrelevant testimony is being offered before an examiner, the court will, in a proper case, appoint a master in the place of the examiner. *Hepworth v. Henshall*, 11 C. C. 251.

(b) Duties of a master.

395. A master should take doubtful testimony offered, even if he should after-

wards refuse to consider it. *Kohlmeyer v. Kohlmeyer*, 6 C. C. 609.

396. An order appointing a master should define his duties and limit his lines of inquiry. *Spring Brook R. R. Co. v. Lehigh Coal & Navigation Co.*, 1 Lack. L. N. 31.

(c) Of the report.

397. As to the orderly composition of a master's report, see *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, 138 P. S. 22; affirming s. c. 7 C. C. 277; 24 W. N. C. 573.

398. A master's report should set forth a clear and concise finding of the material facts, unburdened by recitals of, references to, or comments upon, the evidence; this finding should be followed by an opinion upon the facts so found with citations of authority, but such opinion should be as brief as the subject will admit. *Mortland v. Mortland*, 151 P. S. 593.

399. One who attacks a master's or an auditor's report has emphatically the laboring oar. Suggestions as to the preparation of exceptions and briefs in support thereof. *Stocker v. Hutter*, 2 Northam. 53; affirmed in s. c. 134 P. S. 19.

400. Where the master reports the facts but briefly and recommends a decree, the court may, without referring back, find a full statement of the facts, and enter the decree as prayed for. *Gaines v. Brockerhoff*, 136 P. S. 175; s. c. 26 W. N. C. 258.

(d) Effect of a master's finding.

401. The findings of a master should not be reversed without an opinion. *Morgan's Appeal*, 125 P. S. 563. But see the additional light thrown upon that case by the lucid opinion of Thayer, P. J., in *Mirkil v. Morgan*, 46 L. I. 444; s. c. 25 W. N. C. 532.

402. If a master bases his report upon certain and definite testimony, there is no reason for reversing it, if he has disregarded other vague and uncertain testimony produced before him. *Perry's Appeal*, 8 Atl. 450.

403. Where the finding by a master of a fact, is a deduction from undisputed facts or from uncontradicted and credible evidence, the rule that a master's finding of fact is entitled to the same consideration as the verdict of a jury, does not apply. *McConomy v. Reed*, 152 P. S. 42; affirming s. c. 9 Lanc. 65.

404. Where the facts found by a master are merely deductions from other facts reported by him, his conclusions are simply a result of reasoning and are not entitled to the same weight as mere conclusions of fact from the evidence. *Kyte v. Kyte*, 8 Kulp 1.

405. The decision of a master on questions of fact approved by the court below will not be reversed in the supreme court. *Weaver's Appeal*, 12 Atl. 312.

406. The supreme court will not overrule both the master and the court below, upon a question of fact, on a mere doubt or hesitation as to the rectitude of the decree. *Sharpsburg Borough's Appeal*, 6 Cent. 142.

407. Where the court below overrules the master's findings, the supreme court will examine the testimony *de novo*. *Mirkil v. Morgan*, 25 W. N. C. 532. See s. c. 46 L. I. 444; 125 P. S. 563.

408. The findings of a master on questions of fact, approved by the court below, will not be set aside by the supreme court, except for clear error. *Stocker v. Hutter*, 134 P. S. 19; s. c. 26 W. N. C. 221.

409. Upon a bill to restrain the collection of taxes on money at interest, the supreme court refused to interfere with the finding of the master and the court below, that the domicile of the plaintiff was in the township where the tax was assessed and not in another state. *Kirby v. Bradford*, 134 P. S. 109.

410. The findings of fact by a master as to the mental condition of a grantor, confirmed by the court below, will not be disregarded by the supreme court except for plain mistake. *Doran v. McConlogue*, 150 P. S. 98.

411. The findings of fact by a master will not be reversed by the supreme court where they are based upon evidence suffi-

cient to submit to a jury. *Warner v. Hare*, 154 P. S. 548.

412. The findings of a master on questions of fact approved by the court below, will not be set aside by the supreme court except for clear error; and this, though the testimony be conflicting and the merits may appear contrary to the master's conclusion. *Brotherton v. Reynolds*, 164 P. S. 134. See *Citizens' Passenger Ry. Co. v. Harrisburg Passenger Ry. Co.*, 164 P. S. 274.

413. There is no special confidential or fiduciary relation between an officer of a corporation and a person from whom he purchased the stock of the corporation; a master's finding that such an officer had no knowledge at the time of the purchase of any movement which would tend to increase the value of the stock and had not been guilty of any misrepresentation or concealment, would not be reversed except for manifest error. *Krumbhaar v. Griffiths*, 151 P. S. 223.

See EQUITY, XLV.

XXXVIII. Hearing.

414. The new equity rules adopted by the supreme court 15 January 1895, have all the force and effect of a positive enactment; where a bill for an injunction was not endorsed in accordance with the new rules, and a preliminary injunction was granted on *ex parte* affidavits, the order granting the injunction was reversed by the supreme court. *Cassidy v. Knapp*, 167 P. S. 305; s. c. 36 W. N. C. 197.

415. If no such exceptions be filed, the court will not consider such points as multifariousness in the bill, that a supplemental bill sets up new matter, or that the bill being defective, it cannot be made the subject of a supplemental bill. *Holton v. Newcastle Northern Railway Co.*, 138 P. S. 111; s. c. 8 C. C. 430.

XXXIX. Exceptions.

416. It is doubtful whether the act 22 April 1874, sec. 2 (Brightly's Purdon 2023),

allowing thirty days for exceptions, applies to a trial for an equity suit under the new rules of court. *Pennsylvania R. R. Co. v. Conshohocken Ry. Co.*, 12 Lanc. 94.

XL. Decree.

417. No decree can be entered by a divided court. *Nolde's Appeal*, 15 Atlan. 777; affirming *Nolde v. Madlem*, 4 Lanc. 347.

418. A decree which finally adjudicates the merits, and leaves nothing to be done but the execution, is a final decree. *Miller v. Walsh*, 2 Northam. 69.

419. A chancellor will often consider the consequences of a decree he is asked to make, and he will withhold it where greater harm might result from making it than from denying it. *Edinboro Normal School v. Cooper*, 150 P. S. 78.

420. A bill to enjoin the construction of a railroad track on a highway, will support a decree requiring the removal of the track laid after notice of the proceedings. *Pennsylvania Railroad Co.'s Appeal*, 115 P. S. 514.

421. A prayer in a bill in equity that a conveyance be declared invalid, will not justify a decree for the possession of the land conveyed. *Williamson v. Smith*, 4 Dist. Rep. 307.

422. A bill in equity lies for an account against a corporation and the officers and directors thereof individually and for a discovery; in such a case a decree of dissolution and the appointment of a receiver who is also made a party, is not inconsistent with the relief prayed for. *Heindel v. Southern Pennsylvania Mutual Relief Ass'n*, 3 York 204.

423. Upon a bill to compel the reconveyance of stock pledged as collateral, where the stock has been sold after the bill was filed, a court of equity has jurisdiction to enter a decree for damages against the creditor for the conversion of the collateral. *Blood v. Erie Dime Savings & Loan Co.*, 164 P. S. 95.

424. Where the relief prayed for is refused, alternative or substituted relief may be given if it be of a kindred nature and based upon the case as made by the bill. *Fitzpatrick v. Engard*, 4 Dist. Rep. 383. See *Fitzpatrick v. Engard*, 4 Dist. Rep. 87.

425. Where the widow of a testator claimed certain notes as a gift, and a bill filed by the executors against her was dismissed, the court refused to strike off the decree on the petition of a creditor, where it appeared that two of his counsel had notice of the proceedings before the decree was made, and there was no proof that the decedent was insolvent at the time of the gift to his wife. *Koons v. Koons*, 148 P. S. 585; affirming s. c. 6 Kulp 317.

426. The court will grant the plaintiff's motion to dismiss his bill on payment of costs, although there is pending at the time a rule to show cause why the defendant should not be permitted to withdraw his answer and have the bill taken *pro confesso*. *Kreider v. Mehaffy*, 10 C. C. 412.

427. Where a bill in equity has been ordered by the court to be dismissed but no formal decree has been entered, after the lapse of twelve years the plaintiff will be regarded as having abandoned the suit, and there being no suit pending, a bill of revival will be set aside on motion. *Hubbell v. Lankeau*, 3 Dist. Rep. 743.

428. A decree *pro confesso* will not be opened for after-discovered evidence where it is not shown that the defendant could not have procured the evidence by reasonable diligence before the decree. *Lancaster & Susquehanna Turnpike Co. v. Kauffman*, 9 Lanc. 217.

XLII. Bills of review.

429. If it appear that the petitioner for review instructed her counsel not to appear for her at the audit, and filed no exceptions, a review will not be allowed after the lapse of a year since confirma-

tion, and an actual distribution thereunder. *Fletcher's Appeal*, 125 P. S. 352; affirming *Clothier's Estate*, 20 W. N. C. 379.

430. A bill of review which is merely the equivalent of an application to review a decision of the supreme court, will be dismissed. *Felty v. Calhoon*, 147 P. S. 27.

See ORPHANS' COURT.

XLIV. Execution.

431. A writ of assistance to put the plaintiff into possession of land, will issue whenever such possession has been decreed, or the right to it flows out of what has been established by the decree. *Church's Appeal*, 13 Atlan. 756; affirming *Kelsey v. Church*, 4 C. P. 105.

432. A court of equity will not issue an attachment for failure to comply with a decree for the payment of money, where the answer of the defendants avers their entire inability to pay and shows that no fraud on their part had been found by the master. *McCarrell v. Mullins*, 141 P. S. 513.

XLV. Costs.

(a) Imposition of costs.

433. Costs, in equity, are in the discretion of the court. In this case they were divided between the parties. *Greenmount Cemetery Co.'s Appeal*, 4 Atlan. 528.

434. Costs, in equity, are largely in the discretion of the court below; the supreme court refused to interfere with a decree where the master and the court below concurred in imposing the costs upon the plaintiff on the dismissal of his bill. *Piper v. St. Paul Trust Co.*, 140 P. S. 233.

435. The costs are always within the discretion of the chancellor, and the supreme court will not interfere unless there is a clear abuse of this discretion. *Grim v. Walbert*, 155 P. S. 147; affirming s. c. 3 Northam. 32.

436. Though the court below in dismissing a bill, imposed the costs upon the plaintiff, yet the supreme court in affirming the judgment, may relieve the plaintiff from the costs so imposed. *Swentzel v. Penn Bank*, 147 P. S. 140.

437. Though costs are largely in the discretion of the court, they cannot be withheld from a successful party unless a sufficient reason for withholding them be made apparent. *Burke v. Teller*, 11 C. C. 59.

438. In an interpleader bill to test the ownership of a mortgage bond, transferred without authority by the agent of the mortgagee, it is error to impose the costs on the mortgagee. *Yard's Appeal*, 12 Atlan. 359.

439. Where a bill is dismissed for want of jurisdiction, the costs should be imposed on the plaintiff. *Fryer v. Miller*, 8 Montg. 13.

440. Where a deed to a church conveyed more land than the parties intended, and the grantee forced the grantor to resort to a bill in equity for reconveyance; it was *held*, that the costs of the equity suit should be borne by the grantee. *Shedwick v. Prospect Methodist Episcopal Church*, 160 P. S. 57.

441. Upon a bill against a principal and agent to compel the reconveyance of land bought by the agent and obtained through his false representations, the principal will be charged with costs if he does not promptly, after the bill is filed, disavow the fraud and consent to a decree against the agent. *Williams v. Kerr*, 152 P. S. 560.

442. Agents who put themselves in a position of hostility and litigate in equity with their former principals, will be charged with the costs. *Burke v. Teller*, 11 C. C. 59.

443. The costs of a suit for dissolution and account of a partnership should, as a general rule, be paid out of the partnership assets. *Burr v. Black*, 1 Lack. Jur. 163.

444. As to the disposition of costs upon a bill for an account and the final winding

up of a partnership, see *Miller v. Walsh*, 2 Northam. 69.

445. Upon a bill by a partner for an account where the defendant denies the partnership which is found to exist, the costs of the entire suit will be charged upon the defendant. *Steiger v. Bradley*, 34 W. N. C. 123.

446. Upon a bill for an account, it was *held*, that the omission of the trustees to account every six months, as required by the original agreement, when no demand was made upon them for an account, was not such an omission as would justify the imposition of the costs upon them. *Myers v. Bryson*, 158 P. S. 246.

447. Upon a bill for an account, though nothing was found to be due to the plaintiff, the costs were put on the defendant for neglect in rendering stated accounts of his transactions. *Stocker v. Hutter*, 134 P. S. 19; s. c. 26 W. N. C. 221.

448. Where a bill is filed in the name of a joint stock company and certain of its members against another member of the association as defendant, and the supreme court orders the costs to be paid by plaintiff, the decree for costs is against the individual plaintiffs, and not against the association. *Jennings's Case*, 157 P. S. 630.

449. Where the principal of a state normal school was dismissed from office for immoral conduct, but without notice or hearing; it was *held*, that such a proceeding was irregular and unjust, but the supreme court sustained an injunction to restrain the discharged principal from assuming to exercise the office, on the ground that greater harm would result to the school and to the public service from disturbing the injunction than from sustaining it, but the injunction was sustained with a saving of all rights to the appellant to proceed at law for the collection of his salary for the remainder of the year, and the costs were put upon the winning party. *Edinboro Normal School v. Cooper*, 150 P. S. 78.

450. Where a bill was filed to correct a mistake in a deed, and the plaintiff

failed to explain to the defendant the fact of the mistake before the bill was filed, the costs were imposed upon the plaintiff, although the decree was in his favor. *Grim v. Walbert*, 155 P. S. 147; affirming s. c. 3 Northam. 32.

451. In a suit for sick benefits, if the master finds that the claimant did not receive a fair hearing in the tribunals of the order, the costs are properly put upon the defendants, though the finding be in their favor. *Taylor v. Knights of Pythias*, 4 Del. 153.

452. Where the appeal of a defendant was dismissed by the supreme court on the ground that it was brought on an interlocutory decree, and the supreme court made no order as to costs; it was held, that the common pleas might, in its discretion, impose the costs of the appeal upon the defendant; and this, although the case was finally decided in his favor. *Keller v. Swartz*, 8 Lanc. 105.

453. Upon a bill to rescind a contract where the plaintiff has been guilty of gross carelessness, the court, on a decree in his favor, will deprive him of his costs. *Sutton v. Morgan*, 158 P. S. 204; affirming s. c. 41 P. L. J. 47.

454. Where in a bill for specific performance the defendant did not rely for a defence on the refusal of his wife to join in the deed, but upon alleged fraud and misrepresentation which he failed to establish, he was properly charged with a proportion of the costs. *Harrigan v. McAleese*, 16 Atlan. 31.

455. Upon a bill for an injunction to enforce a contract for the sale of patents, the costs were divided. *Pittsburgh Brass Co. v. Adler*, 2 Mona. 235.

456. Where the plaintiff fails to sustain his bill, and he is insolvent, it is unjust to throw all the costs on the defendant by decreeing that the parties jointly pay the master's fee and costs; such a decree will be modified so as to place the master's fee and costs equally upon the parties. *Foster v. Verner*, 152 P. S. 46.

457. Where, after the filing of a creditor's bill to declare a purchaser at an

assignee's sale a trustee *ex maleficio* as to a portion of the purchase money, the purchaser paid over the difference with interest to the assignee, the bill was dismissed, but the record costs and master's fee were equally divided between the parties, while the costs of the parties were directed to be paid by the party who made them. *Kalle v. Heft*, 154 P. S. 470.

458. Where the owners of a patent licensed another to sell it at the rate of forty dollars for each article, and without authority they revoked the license, and then began selling the article at twenty-five dollars; it was held, in an action for an account, that the licensees were only obliged to account at the rate of twenty-five dollars, and that the licensors were bound to account to the licensees for the profits on the articles sold by them, and that the costs should be equally divided between the parties. *Oil Well Packer Co. v. Jarecki Mfg. Co.*, 157 P. S. 342.

459. Where a bill and cross-bill have both been dismissed, saving certain rights to the plaintiff, the court may, in its discretion, divide the costs between the parties. *Pennsylvania Schuylkill Valley R. R. Co. v. Philadelphia & Reading R. R. Co.*, 160 P. S. 232.

460. Upon a bill for an account between partners, where it appears that the proceedings had been necessary to the settlement of matters in dispute, the costs would be divided between the parties in proportion to their interests in the firm. *Wilson v. Black*, 164 P. S. 555.

(c) Examiners' fees.

461. Though an examiner's fee was fixed and directed to be paid, one-half by each party, execution to enforce payment will be refused until the final disposition of the case. *Reynolds v. Baylor*, 7 Lanc. 40.

462. Each party is in the first instance liable for the expense of the testimony taken before an examiner, and the report cannot be withheld for the purpose of

compelling payment; an examiner who has completed his report is not entitled to an order for security for his fees. *McCarthy's Estate*, 4 Dist. Rep. 205.

463. Twenty-five dollars is a sufficient compensation for an examiner who held no meeting and took no testimony. *Sailor's Estate*, 2 Dist. Rep. 489.

(d) **Masters' fees.**

464. A court of equity has the power to fix the master's fee as well as other costs and to make any necessary and proper order for their payment; an independent action does not lie by the master against the plaintiff to recover his fee, and especially is this so when no order has been made by the court of equity before its payment by the plaintiff. *Woodward v. Brace*, 139 P. S. 316.

465. The compensation of a master in equity, as respects the party who has it to pay, is costs and not a fee. *Bradley v. West Chester Street Ry. Co.*, 160 P. S. 72.

466. The supreme court will assume that a master's fee sanctioned by the court below was not unreasonable, in the absence of any evidence showing it to be clearly excessive. *Linn v. Chambersburg Borough*, 160 P. S. 511.

467. A master should not, before he has filed his report, accept his fee in whole or in part from one of the parties without the knowledge of the other or of the court. *Powell's Estate*, 163 P. S. 349.

(e) **Execution for costs.**

468. A decree in equity that defendant was guilty of actual fraud and directing him to pay the costs, will be enforced by attachment. *Wilson v. Wilson*, 142 P. S. 247.

469. An attachment cannot issue against a plaintiff to enforce a decree to pay costs incurred by his failure to sustain his bill. *Fetters v. Barker*, 11 C. C. 366.

XLVI. Receivers.

(a) **Appointment of receivers.**

470. Where every substantial averment of a bill for an injunction and receivership is denied by a responsive answer which is not overcome or met by further proof, it is error to continue a preliminary injunction or to appoint a receiver. *Crombie v. Order of Solon*, 157 P. S. 588. See *Order of Solon v. Folsom*, 161 P. S. 225.

471. Before the act 26 April 1893 (*Brightly's Purdon* 427) the court of common pleas had no jurisdiction to appoint a receiver on the motion of the commonwealth in *quo narranto* proceedings against a corporation; where a receiver was appointed and before the supreme court passed upon the validity of the appointment and the appeal from the order of another court of common pleas refusing to award to him the estate; it was held, that the receiver was not liable for the costs of the appeal. *Fraternal Guardians' Assigned Estate*, 159 P. S. 602.

472. Upon a bill for an account and dissolution of a partnership the court will not appoint a receiver, if there be no danger to the property and nothing to show the necessity or expediency of such an appointment; where the evidence was conflicting as to whether the managing partner kept proper books and it appeared that the partnership would expire in a few days by its own limitation, the supreme court refused to reverse an order refusing to appoint a receiver. *Beaumont v. Beaumont*, 166 P. S. 615.

473. A sale on execution under a confessed judgment will not be restrained by injunction except upon the clearest right and to avert irreparable injury, nor will a receiver for property so levied upon be appointed except under the same circumstances. *Philadelphia v. Dobson*, 10 C. C. 34.

474. An officer of an insolvent corporation, who has been intimately associated with the management alleged to be fraudulent, is not a proper person for

assignee and will be replaced by a receiver; the equity powers of a court of equity extend to the removal of such an assignee. *Failey v. Stockwell*, 12 C. C. 403.

475. A receiver will not be appointed for an alleged insolvent corporation where the court is not convinced that such a measure is needful and is the appropriate means of securing a proper end. *Pottsville Lumber & Feed Co. v. Kopitzsch Soap Co.*, 13 C. C. 139.

476. Under the act of 17 April 1876 (Brightly's Purdon 272) a building association, even after its charter has expired, must be regarded as having a qualified corporate existence, and a bill will lie against it for the purpose of winding up its affairs. If liquidating trustees are not appointed on such dissolution the court will appoint a receiver for such purpose. *Morrison v. Carbondale Building Association*, 1 Lack. Jur. 437.

477. A receiver will not be appointed upon a stockholder's bill where the same purpose can be accomplished by a sheriff's sale. *Griffen v. Burden*, 10 Montg. 184.

478. A stockholder or officer of a corporation is not forbidden to advance money to his company if the contract be not tainted with fraud; where such an advancement is made in good faith, he will not be restrained in the collection of his claim by the appointment of a receiver, where the bill does not allege insolvency nor ask for a dissolution. *Griffen v. Burden*, 10 Montg. 184.

479. To justify the appointment of a receiver the plaintiff must show that it is needful; and this even in a bill for an account of partnership affairs. *Miller v. Walsh*, 1 Northam. 194.

480. Equity has jurisdiction of a bill filed for the appointment of a receiver for a joint stock company. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

(b) Receivers' certificates.

481. A receiver of a railroad company will be authorized to issue certificates for

the purchase of a locomotive where the court is satisfied that such purchase is imperatively demanded for the safe and convenient operation of the road. *Taylor v. Baltimore & Lehigh R. R. Co.*, 7 York 174.

(c) Powers of receivers.

482. Upon the dissolution of a mutual fire insurance company and the appointment of a receiver, the latter, under the direction of the court, has power to levy an assessment to pay losses. *Solly v. Moore*, 11 C. C. 333.

483. The receivers of an insolvent corporation have nothing to do with the stock and internal management of the company; they are not necessary parties to a proceeding against the company by mandamus brought by a stockholder to compel an inspection of its stock list. *Comm'th v. Philadelphia & Reading R. R. Co.*, 3 Dist. Rep. 115.

484. Where the property of a corporation is in the hands of a receiver, its effects are in the custody of the court and a writ of *feri facias* cannot be executed without the consent of the court, and this rule applies to a writ of *feri facias* issued from the United States circuit court. *Taylor v. Baltimore & Lehigh R. R. Co.*, 7 York 174.

(d) Duties and liabilities.

485. A receiver who pays out money in good faith under an order of court is protected; and this, though the order be improvidently made. *Palmer v. Allen*, 136 P. S. 556; s. c. 26 W. N. C. 514.

486. If money be paid by a receiver to a party litigant under an order of court obtained by mistake or fraud, a chancellor may require the money to be refunded. *Palmer v. Allen*, 136 P. S. 556; s. c. 26 W. N. C. 514.

487. Where a receiver deposited a fund to his own individual credit in his own individual bank, so that it was indistinguishable from his private fund; it was held, that he should be surcharged with the use of the money. *Schwartz v. Key-*

stone Oil Co., 153 P. S. 283. See *Schwartz v. Keystone Oil Co.*, 164 P. S. 415.

(e) **Receivers' sales.**

488. Where the franchises and property of a railroad company have been sold at a receiver's sale, the company cannot recover a part of its road-bed by an action of ejectment on the ground of fraud in the sale. *Newcastle Northern Ry. Co. v. Newcastle & Shenango Valley R. R. Co.*, 152 P. S. 96; affirming s. c. 12 C. C. 71.

489. Upon a sale of real estate by the receiver of a corporation, the court does not possess the inherent power to deprive judgment creditors of their lien, by directing the sale free from the lien of judgments. *Lebanon Brewing Co.*, 3 Dist. Rep. 260.

(g) **Distribution.**

490. Where a receiver is ordered to pay over a sum of money in partial distribution, it is proper to require a refunding bond in double the amount of the money to be paid. *Sykes v. Thornton*, 152 P. S. 94.

See ASSIGNMENT FOR CREDITORS.
CORPORATION, XV.

(h) **Foreign receivers.**

491. The appointment of a receiver in another state will not be recognized in this state where his claims come in contact with those of citizens of this state or of citizens of other states having the right to sue in this state. *Clark Co. v. Toby Valley Supply Co.*, 14 C. C. 344.

492. Where a receiver has been appointed in this state for the property of a foreign corporation, and the Pennsylvania creditors have been paid, the assets will be awarded to a receiver appointed in the home state of the corporation in order that they may be distributed after the payment of all creditors, by the latter receiver, to the stockholders; our courts will not retain the assets for the purpose of

distributing them to Pennsylvania stockholders. *Kean v. Iron Hall*, 15 C. C. 194.

493. Where a receiver of a foreign corporation, appointed by the court of another state, has once rightfully obtained possession of personal property, the courts of this state will recognize his possession. *Lett v. Kirkpatrick*, 15 C. C. 212.

494. A writ of foreign attachment lies at the suit of a salesman, a resident of this state, against a foreign corporation for a debt due him by the corporation; and this, though the property attached be in the hands of receivers appointed by the court of another state after the creation of the debt. Our courts will not recognize the claims of a foreign receiver where such claims conflict with the rights of citizens of this state. *Lett v. Thurber Whyland Co.*, 15 C. C. 666; s. c. 4 Northam. 335.

(i) **Suits by and against receivers.**

495. A receiver of a corporation cannot bring an action in his own name unless the legal title to the property has been conveyed to him. *Wisener v. Myers*, 42 P. L. J. 166.

496. A receiver of a corporation cannot bring suit to recover an unpaid subscription to stock without leave of court, nor without showing that the collection is necessary to pay debts; it is bad practice to correct such a mistake by an order *nunc pro tunc*. *Wisener v. Myers*, 42 P. L. J. 166.

497. An action at law does not lie by a receiver of a partnership against a member thereof to recover a proportionate part of the money required to pay the firm's indebtedness, when it does not appear that the partnership accounts have been settled or that the receiver has not assets in his hands sufficient to pay the debts; where the receiver issued an attachment under the act 17 March 1869, upon an affidavit averring that the firm owed debts to a certain amount, that the defendant's proportionate share was a specified sum

and that he refused to pay the same to the receiver; it was *held*, that, as the affidavit did not aver that the assets in the hands of the receiver were insufficient to pay the debts, it did not set forth sufficient facts in regard to the nature and amount of the indebtedness and was not sufficient to sustain the attachment. *May v. Pagett*, 2 Dist. Rep. 276.

498. Where a railroad is operated by receivers, an action for negligence should be against them. No action lies against the company. *Howard v. Philadelphia & Reading Railroad Co.*, 6 C. C. 589.

499. In an action by the receiver of an insolvent insurance company, appointed by the court of another county to recover assessments, the defendants cannot set up in defence matters which are the proper subjects of adjudication in the court appointing the receiver. *Dettra v. Hoffman*, 5 Del. 321.

500. In foreign attachment the mere fact that the garnishees are receivers appointed by a federal court will not prevent a judgment against them for the amount admitted; and this, although they may have been summoned as garnishees without leave of the federal court having been first obtained. *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 167 P. S. 589; s. c. 36 W. N. C. 245.

501. The supreme court will not consider appeals from interlocutory orders requiring money to be paid to or by receivers, unless such orders are shown to have been improvidently made. *Sykes v. Thornton*, 152 P. S. 94.

(k) Compensation of receivers.

502. The court refused to disturb the allowance of fees to the receiver of a partnership and his counsel which allowance had been approved by the court below. *Kerlin v. Ewen*, 149 P. S. 58.

503. Where the estate amounted to ninety-six thousand dollars and the work was nearly all done in the first six months by a superintendent and clerk acting under the general direction of the receiver, who gave only a portion of his

time to the work, the receiver was allowed compensation for his assistants, but his claim of upwards of eleven thousand dollars for his own services was reduced to a salary of three thousand dollars for the first year with an allowance of the further sum of one thousand dollars for subsequent services. *Schwartz v. Keystone Oil Co.*, 153 P. S. 283. See *Schwartz v. Keystone Oil Co.*, 164 P. S. 415.

504. Where the compensation of a receiver is fixed on an appeal to the supreme court and he is surcharged with credits which he had improperly taken in his account, he is not entitled to any additional compensation for the distribution of the fund covered by his account, but he may be allowed compensation for necessary services rendered in distributing the fund created by the surcharge. *Schwartz v. Keystone Oil Co.*, 164 P. S. 415. See s. c. 153 P. S. 283.

XLVIII. Cross-bills.

505. A cross-bill must be confined to the subject matter of the original bill; if it embrace new matters it will be dismissed. *Datz v. Phillips*, 46 L. I. 250; reversed on another point in 137 P. S. 203; s. c. 26 W. N. C. 512.

L. Feigned issues.

506. Feigned issues are, in a special manner, within the equitable powers of the court; where an issue has been awarded on the opening of a judgment the court, if dissatisfied with the verdict, may set aside the verdict and judgment though two years have elapsed from the rendition and entry thereof. *Wilson v. Wilson*, 142 P. S. 572.

507. Where, upon a rule to open a judgment, an issue was framed to determine whether the judgment was given in part as an indemnity, and a verdict was rendered for the plaintiff; it was *held*, that such verdict was an adjudication that the plaintiff was entitled to recover, and was a bar to a second submission of

the question upon the trial of a *scire facias* to revive, which had been issued pending the proceedings to open. *Wilson v. Wilson*, 137 P. S. 269. See *Wilson v. Wilson*, 142 P. S. 572.

508. Upon an issue to try a question of fact in a case from the equity side of the court, judgment cannot be entered against the defendant for want of a plea; so, no judgment can be entered on a verdict in such a case. *Kelly v. Herb*, 14 C. C. 22.

509. Where a proceeding before a master involved the question of partnership and meetings were held for a year and much testimony had been taken, the court refused to grant an issue to try the question of partnership, on the application of the defendant. *Hinds v. Daley*, 3 Dist. Rep. 51.

LI. Supplemental bills.

510. Where a decree for an interpleader was made on the petition of the plaintiff setting forth an indebtedness to A, and that two persons claimed the money, which was subsequently paid into court; a supplemental bill by plaintiff denying any indebtedness to A, stating that the goods bought by plaintiff have been since decided to belong to B, and asking that B be made a party defendant, was properly dismissed. *Wolf's Appeal*, 7 Atlan. 163.

EQUITY OF REDEMPTION.

See MORTGAGE, XII.

ERROR.

See APPEAL AND ERROR.

ESCAPE.

1. The inspectors of the Philadelphia county prison are not liable for the escape of an insolvent debtor. *Saunders v. Smith*, 132 P. S. 180; s. c. 25 W. N. C. 286; reversing s. c. 46 L. I. 26. So the

keeper of the prison was held not to be liable where an insolvent, having been refused his discharge, went to the prison and informed the keeper of the fact, and surrendered himself, and the keeper refused to receive and detain him, when he went away, it appearing that the keeper had no record, writ or paper of any kind which bore authenticity upon its face, to justify the insolvent's detention. *Saunders v. Perkins*, 140 P. S. 102.

ESCHEAT.

1. Before there can be an escheat under the act of 26 April 1855 (Brightly's Purdon 805) it must appear that the defendant railroad company holds the title to the lands in its corporate name, or by or through a trustee; it must have either the legal or equitable title, or there can be no escheat. The penalty of the act of 1855 is removed by the act of 8 April 1881 (P. L. 9). *Comm'th v. New York, L. E. & W. Railroad Co.*, 132 P. S. 591; s. c. 25 W. N. C. 404; overruling s. c. 114 P. S. 340. This case is reaffirmed in 139 P. S. 457.

2. In the traverse of an escheat it was held that the fact that five months before his death the decedent gave to defendant a box containing a thousand-dollar registered bond and certain railroad stock, saying, "Take this and keep it for yourself," and adding that she must not open it until after his death, established a gift *inter vivos* of the bond and stock. *Comm'th v. Crompton*, 137 P. S. 138; s. c. 26 W. N. C. 475; affirming s. c. 46 L. I. 190.

3. The commonwealth claiming by escheat should proceed to contest an alleged will before the register and orphans' court. Proceedings in escheat are useless until the determination of the issue in the orphans' court in favor of the commonwealth. *Hazlett's Estate*, 37 P. L. J. 32; s. c. Ibid. 183.

4. The lands of a mining company are not liable to escheat because of the fact that a foreign railroad company, having no license to hold lands in Pennsylvania,

is the owner of the entire capital stock of such mining company. *Comm'th v. New York, L. E. & W. R. R. Co.*, 139 P. S. 457.

5. A contest to set aside a will should be prosecuted with diligence; especially is this so where the contestant is the commonwealth which claims the estate by virtue of escheat. The commonwealth was held guilty of laches where the decedent died on 31 May 1881 and the case first appeared upon the argument list in the orphans' court in May 1891. *Cardwell's Estate*, 10 C. C. 318; s. c. 28 W. N. C. 291.

6. The act 4 June 1885 (Brightly's Purdon 804), providing for the refunding of escheated deposits, is limited to the escheat of deposits in banking companies; escheated corporation dividends not claimed by the person whose money has been escheated, but by his legal representatives, cannot be refunded out of the state treasury. *Bull's Estate*, 11 C. C. 441.

7. The act 26 April 1855 (Brightly's Purdon 805), forbidding foreign corporations from holding real estate in this state does not prohibit them from holding stock of Pennsylvania corporations holding real estate; a New Jersey corporation having authority to operate a street railway and electric light plant may acquire the majority of the stock of Pennsylvania companies chartered for similar purposes. *White v. Ryan*, 15 C. C. 170.

8. Where proceedings to escheat an estate fail by reason of the discovery of the next of kin, a reasonable compensation may be allowed for the labor and services of the deputy escheator and his counsel. *Bryant's Estate*, 4 Dist. Rep. 192.

ESTATE FOR LIFE.

See DEED, VIII.: DEVISE, II.: LEGACY, III.: PARTITION.

- I. Annuities.
- II. Powers and rights of a life tenant.
- III. Execution against life estates.
- IV. Liability for charges and incumbrances.
- V. Security.
- VI. Rights of remainder-men.
- VII. Principal and income.

I. Annuities.

1. An annuity of the interest of eight thousand dollar United States bonds, the testator having in his possession at the time of his death three thousand five hundred dollars in United States notes, bearing interest at seven and three-tenths per cent, but convertible into twenty-year bonds bearing six per cent, was *held* to mean an annuity of the interest on eight thousand dollars at six per cent only. *Reighard's Appeal*, 125 P. S. 628.

2. A devise to a widow during widowhood, with a provision that his daughter should have the use of a room so long as she remained unmarried, followed by a provision that if "the said devise" should be insufficient for the maintenance of his wife and daughter "during said term," an annuity should be paid to his wife and daughter out of the rent of an ore bed; *held*, that the annuity was charged on the realty for the benefit of both and the survivor. *Brotzman's Estate*, 133 P. S. 478. See *Brotzman's Appeal*, 119 P. S. 645.

3. Upon a proceeding to compel the payment of an annuity out of real estate upon which it is charged, the orphans' court may allow interest on the arrears from the respective dates at which they accrued. *Brotzman's Estate*, 133 P. S. 478.

4. Where a widow agreed that if the income should be insufficient her annuity should abate accordingly, but that abatements should be refunded when the income became sufficient for the purpose; it was *held*, that after her death her representatives were entitled to recover the

retained annuity, the income being sufficient to pay it. *Cooper's Estate*, 147 P. S. 322; affirming s. c. 9 C. C. 641.

5. Upon a bequest of the interest of a certain sum for life, to be paid annually, and with no specific limitation over, but followed by a residuary clause, the legatee takes a life estate in the interest only, and the court will direct the executor to hold the fund during the life tenancy. *Ritter's Estate*, 148 P. S. 577.

6. Where a testator has made an absolute gift of income to his widow for life, he cannot afterwards, by a subsequent clause in his will, restrain her from disposing by will of such portions of the income as she may not have used for her support and maintenance. *Levy's Estate*, 153 P. S. 174; affirming s. c. 11 C. C. 266.

7. Where an annuity was charged on land and no demand made for payment, it was *held*, in an action for sixteen years arrearages, that the question whether a presumption that no interest on the arrearages was intended, was for the jury. *Rohn v. Odenwelder*, 162 P. S. 346.

8. Where an annuity was charged upon land, it was *held*, that the remedy of the annuitant against a subsequent vendee of the land, was an action of assumpsit, but that the judgment would be *de terris*. *Rohn v. Odenwelder*, 162 P. S. 346.

9. Where a conveyance was made by a husband and wife to their son under and subject to the payment of an annual sum to the husband during his life and of a less sum annually to the wife during widowhood, and the payment of the purchase money is provided for without interest one year after the death of the husband and the death or remarriage of the wife, such a conveyance creates a fixed lien or charge upon the land which will not be divested by a subsequent sheriff's sale. *Rohn v. Odenwelder*, 162 P. S. 346.

10. One who owns land chargeable with an annuity, but who has never covenanted to pay it, and was not the holder of the title when it became due, is not person-

ally chargeable with its payment, and where he conveys the land to another and agrees to protect his vendee from the charge of the annuity, any subsequent payments by him is in discharge of his obligation to his vendee, which is a personal obligation to him only, and does not impose any legal duty as to his vendee's successors in the title. Where such a vendor and guarantor held a claim against the annuitant for goods sold and delivered, and it appeared that a successor to his vendee in the title had been obliged to pay arrears of the annuity; it was *held*, that the latter was not entitled to be subrogated to the judgment against the administrator of the annuitant. *Clippinger's Estate*, 162 P. S. 627.

11. Where a testatrix devised her estate in trust to pay a certain annual sum to her granddaughter for and during the term of her natural life to be applied by her to the maintenance of herself and of a certain minor until the latter attained the age of twenty-one years, "and thereupon her interest in this annuity ceasing, to pay out of the principal of my residuary estate" a certain sum to the said minor, such legacy to lapse if she died before the age of twenty-one; it was *held*, that the granddaughter was entitled to her annuity for life and that it did not cease upon the payment of the principal sum to the minor. *Engle's Estate*, 166 P. S. 280; affirming s. c. 15 C. C. 26; 34 W. N. C. 355. See *Engle's Estate*, 167 P. S. 463.

12. A gift of a yearly sum to a legatee is an annuity, and is exempt from the rule which postpones interest upon legacies until the end of the year from the death. *Flickwir's Estate*, 7 C. C. 315; s. c. 46 L. I. 454.

13. Where a will provided for the payment of certain annuities during life while the annuitants remained unmarried and for the accumulation of the income above the annuities, and at the death of the last surviving annuitant the whole of the estate and accumulations was payable to certain charities, and all the an-

nuitants died except one who married and agreed to release all claims upon the estate; it was *held*, that upon the execution and delivery of the release, the estate should be immediately distributed to the charities. *Cook's Estate*, 10 C. C. 465.

14. Where an annuity was charged upon real estate specifically devised to a daughter for life and the executor applied the income to taxes and repairs instead of paying the annuity; it was *held*, that a petition filed by the annuitant praying that the life tenant be personally charged with the taxes and repairs, would not be disposed of until the filing and confirmation of an account by the executor. *Blackburn's Estate*, 10 C. C. 475; s. c. 29 W. N. C. 34.

15. Where an annuity or legacy is charged on land, the devisee on his acceptance of the land becomes personally liable for the charge thereon. *Dinsmore v. Ramsay*, 13 C. C. 119.

16. Where an annuity or legacy is charged on land and the devisee accepts the land, a proceeding against the devisee to enforce his personal liability should be brought in the common pleas, but where the proceedings are against the land itself the jurisdiction of the orphans' court is exclusive. *Dinsmore v. Ramsay*, 13 C. C. 119.

17. The question whether an annuity is a charge upon real estate is one of intention; a charge cannot be created by the mere gift of an annuity, nor will it be inferred from the fact that the testator had no personal estate; that, however, will be taken in consideration in connection with other facts in arriving at a conclusion. *Dickerman v. Edlinger*, 168 P. S. 240; s. c. 36 W. N. C. 327.

18. Where an estate is subject to the payment of an annuity and also of a fixed sum at the annuitant's death, and the original securities retained by the executor, although presently yielding an income more than sufficient to pay the annuity, are of fluctuating value, the

court will not set apart any portion of them to meet the annuity and distribute the balance. *Christian's Estate*, 13 C. C. 283.

19. Where a legacy and an annuity charged upon certain real estate are the only claims against the estate and the property is sold by the executor under a power and purchased by the legatee and annuitant, the executor will be directed to accept their receipts together with the legal costs properly to be deducted from the purchase money and to make them a deed. *Parker's Estate*, 13 C. C. 453.

20. Where a testator left his widow an annuity for life, which was payable out of both real and personal property, and a fund was set apart for its payment and the balance of the personalty was then distributed between the residuary legatees who were also the residuary devisees, and this fund afterwards proved insufficient; it was *held*, that it was not clear whether the annuity was payable in the first instance out of personalty and in the absence of an agreement by the widow not to look to the real estate in case of inadequacy, the widow was entitled to have the deficiency in the annuity made up from the rents of the undistributed real estate. *Denis's Estate*, 169 P. S. 493; affirming s. c. 16 C. C. 37.

21. Where the owner of an annuity, which was charged by will on certain real estate which was vested in her two sons, released the real estate and accepted a bond and mortgage on the same lands, and she subsequently assigned the bond and mortgage to a trustee in trust to pay her the interest during her life, and upon her death to assign them to her said sons, their heirs, executors, administrators or assigns, and the deed of assignment further set forth that it was her wish that her sons after her decease should be entitled to the principal, and that they should be placed in the same position as if the premises had never been released from the yearly charge; it was *held*, upon the payment of the mortgage after

the death of the assignor, that the fund must be treated as real estate and be distributed to the persons who would be entitled to the real estate if the release had not been executed. *Pechin v. Brooke*, 5 Del. 93.

22. Where a legatee was erroneously informed by the executors, one of whom was the owner of land charged with her annuity, that her annuity did not commence until her mother's death, and she acquiesced in the mistake and omitted to demand her annuity for seventeen years; it was *held*, that she was entitled to interest on each yearly payment from the date it became due. *Hoffman's Estate*, 3 Dist. Rep. 663.

23. Equity will not control the proper exercise of a discretion conferred upon executors; where a testator directed his executors "as soon as, in their judgment, it is the best interests of my estate" to set aside sufficient money to secure an annuity, which was to have precedence over all other legacies, and the executors did not set aside the money, the court refused to compel them to do so, or to pay other legacies which were made payable after the setting aside of the annuity fund. *Young's Estate*, 4 Dist. Rep. 293.

24. An annuity taken by a widow in payment of a statutory indebtedness does not abate with general bequests. *McDaniel's Estate*, 47 L. I. 534.

25. Upon the death of a life tenant, his annuity is not apportionable. *Dubbs v. Watson*, 3 Northam. 135.

26. Where a testator gave to his nephew an annuity, and bequeathed all his personal property to his wife; it was *held*, that the primary fund to pay the annuity was the real estate, and that the intention of the testator to exempt his personal estate from the payment of the annuity and to charge it upon his land was clear. *Nathan's Estate*, 36 W. N. C. 184.

27. Where A and his wife conveyed land to B, subject to an annuity to the grantors, and the principal after their death to their heirs, of whom B was one,

and the land was sold under execution to C, who conveyed it to D, and upon the death of A, who survived his wife, an attachment execution was issued against B, including D as garnishee, to recover B's share of the principal; it was *held*, that B's right to any part of the principal was merged in his estate and passed to the sheriff's vendee and from him to D, and there was no indebtedness of D to B. *Smith v. Hartman*, 5 York 55.

28. An annuity to be paid only in the event of the net income of the property coming to the testator's wife and children, being not less than fifteen hundred dollars per annum, cannot be paid if such remainder is less than fifteen hundred dollars per annum. *Gamble's Estate*, 8 York 113.

29. Upon annuities to a wife and children, if the amount of the wife's annuity is fixed at a specific sum, it will not abate in case of a deficiency to pay all; otherwise, where the amount of such annuity is not specifically limited. *Gamble's Estate*, 8 York 113.

II. Powers and rights of a life tenant.

30. A life tenant may purchase the premises at a sale on a mortgage, though the same be foreclosed by reason of his own default in the payment of the interest. *Fidelity Ins. T. & S. D. Co. v. Dietz*, 132 P. S. 36.

31. A lease by a life tenant cannot extend beyond the termination of the life estate. *Standard Paint Co. v. Prince Manufacturing Co.*, 133 P. S. 474; s. c. 26 W. N. C. 94.

32. Upon a bequest of personal property, such as crops, farm stock and implements, for life, with remainder of "all my remaining property," it was intended that she might use so much of the principal as might be necessary for her support. *Gold's Estate*, 133 P. S. 495; s. c. 25 W. N. C. 523.

33. A devisee for life who, as executrix, is given the power to sell real estate, may

execute a mortgage to bind the remaindermen. *McCreary v. Bomberger*, 151 P. S. 323; reversing s. c. 11 C. C. 68.

34. Where a testator gave and bequeathed to his wife all his property, real, personal and mixed during her natural life, and after her decease all the remainder to A to hold the same to his heirs and assigns forever; it was held, that the widow was entitled to keep and enjoy the personal estate for her life and what was left after her death was to go to A. *Reichard's Estate*, 4 Northam. 281.

35. Where a testator left to each of his children an undivided interest for life, to be forfeited on withdrawal from the family, a child by so withdrawing forfeits her life estate only. The fee, being undisposed of, passes under the intestate laws. *Bell v. Fulton*, 1 Atlan. 579.

36. An absolute devise to the widow is cut down to a life estate by a subsequent direction to executors to sell, pay debts "and the remainder of my money to be equally shared among my children." *Geiger's Appeal*, 1 Mona. 547; s. c. 24 W. N. C. 264.

37. Where a testamentary trustee to pay income to the testator's wife, with remainder to his children, under an order from the life tenant, made advances to the remainder-man for his accommodation and maintenance, to be reimbursed from subsequently accruing income in excess of the amount, the life tenant, by agreement with the remainder-man, was entitled to receive; and at the death of the life tenant there had not been a sufficient excess of income to cover such payments; it was held, that the trustee would not be surcharged with the difference. *Lippe's Estate*, 149 P. S. 228.

38. A life tenant has the right to insist upon the sale of unproductive securities and the investment of the proceeds for the purpose of producing income. *Christian's Estate*, 13 C. C. 283.

39. An annual legacy to a wife and daughter, dependent on the opinion of other children that a previous devise is

insufficient for the former's support, does not vest until such an opinion is formed, and it seems there should be a previous request. *Brotzman v. Brotzman*, 1 Northam. 13.

III. Execution against life estates.

40. A sale of a life estate under a *levari facias* upon a mortgage given by the life tenant, without notice to the life tenant and without leave of court, passes a good title to the purchaser. The act of 24 January 1849 (Brightly's Purdon 850) has no application to a sale under a mortgage. *Datesman's Appeal*, 127 P. S. 348.

41. Where a life estate and remainder are sold together under a mortgage for the debt of the life tenant, and there remains a surplus, the same may be distributed in two ways: either the life estate may be valued and each receive their share in cash, or the surplus may be treated as real estate, and its investment directed until, with its accumulations, it reaches the value of the land, and then award the interest to the life tenant, and at his death the *corpus* to the remaindermen. *Ibid*.

42. Upon a sheriff's sale of the entire estate, a life tenant is not entitled, out of a surplus in the hands of the sheriff, to an amount expended for trifling permanent improvements without the consent of the remaindermen. *Ibid*.

43. A sheriff's sale of a life estate will be set aside where the record fails to show that the court directed the writ; and this, though, in fact, the court did so direct. *Conard v. Edwards*, 7 C. C. 342.

44. Where a life interest in real estate is levied on, and the defendant fails to give written notice to the plaintiff, the failure of the inquest to make an appraisal of the yearly value is no ground for setting aside a subsequent sale. *Ibid*.

45. Upon an application for a writ of *venditioni exponas* to sell a defendant's life estate, the notice required by the act 24 January 1849 (Brightly's Purdon 850)

may be served upon his attorney in the suit. *Goodell v. Ehresman*, 11 C. C. 400.

46. Where a deceased wife's real estate was sold for the payment of her debts, and the balance of the purchase money was charged on the land during the husband's life, the interest to be paid to him as curtesy; it was *held*, that his interest might be sold under execution without an order from the court for the issuing of the writ or ten days' notice of the application therefor or ten days' notice of the sale. *Diller v. Groff*, 11 Lanc 73.

47. Sequestration of a life estate under the act 24 January 1849 (Brightly's Purdon 850) is unnecessary where there is adverse possession in hostility to it; or where the debtor claims to hold in fee; or where the creditor has reasonable ground to believe that the debtor owns in fee. In such cases the land may be sold on an ordinary execution. *Lawrence v. Keener*, 149 P. S. 402.

48. Where the whole property of the defendant in an execution is a life estate, which has been appraised at less than three hundred dollars and set apart to him, the court will not, subsequently, grant a writ to sequester the rents, issues and profits of the same property. *Sener v. Scherff*, 10 C. C. 529.

49. Where a debtor has an estate for life and assigns it for creditors, the court will not appoint a sequestrator upon the petition of a lien creditor, and will not, upon the petition of such a lien creditor, set aside the sheriff's sale of such life estate under another judgment, especially where the petitioner is a volunteer and purchased his judgment eighteen months after the assignment and almost two months after the issuing of the writ of *venditioni exponas*, and with full knowledge of both of those facts. *Landis v. Erisman*, 3 Dist. Rep. 241.

50. Where a sequestrator of a life estate was appointed under the act 13 October 1840 (Brightly's Purdon 849) and at the time he took possession the defendant was in its apparent possession; it was *held*, that the appointment would not be

revoked upon his affidavit that he was merely holding the property as the agent for a third person. *Edgerton v. Sullivan*, 2 Lack. Jur. 126.

51. A judgment creditor may proceed by a writ of *venditioni exponas* against a life estate without the appointment of a sequestrator, but he is not bound to do so, and has the right, if he so desires, to sequester the returns from the estate. *Gaige v. Reynolds*, 2 Lack. Jur. 170.

IV. Liability for charges and incumbrances.

52. Upon the death of a life tenant, the taxes for the current year will be apportioned between him and those entitled in remainder. *Crump's Estate*, 13 C. C. 286.

53. Where a life tenant enjoyed the income of real estate for only about one-fifth of the year; it was *held* to be inequitable to charge her with the taxes and water rents for the whole year; such charges as between a widow and remainder-men will be apportioned. *Fest's Estate*, 28 W. N. C. 415.

54. Where a remainder-man voluntarily paid the taxes and repairs on the premises in the possession of the life tenant who had neglected to pay them; it was *held*, upon a distribution of the estate of the life tenant, that the remainder-man was entitled to recover for taxes and repairs so paid. *Shue's Estate*, 5 York 25.

55. Assessments for municipal benefits and other improvements, manifestly for the general good, ought to be borne by the estate and not thrown upon the life tenant. *Van Dusen's Estate*, 11 C. C. 201; s. c. 29 W. N. C. 573.

56. The cost of the construction of a sewer and connection therewith is not chargeable to a life tenant, but is payable out of the principal of the estate. *Tragbar's Estate*, 12 C. C. 635.

57. Where a drain connecting a dwelling-house with a sewer for the first time was put in by the compulsory order of

the bureau of highways; it was *held* to be a permanent improvement, for which the life tenant was not liable. *Bradley's Estate*, 14 C. C. 672; s. c. 35 W. N. C. 340.

58. It is the duty of a life tenant to pay interest on incumbrances; the executor cannot be allowed credit if he do so. *Geiger's Appeal*, 1 Mona. 547; s. c. 24 W. N. C. 264.

59. Where a widow took a life estate in lieu of dower; it was *held*, that repairs to the realty which were ordered by the trustees without notice to the life tenant, and which were in the nature of betterments, would be charged against the estate where it appeared that the life tenant was seventy years of age and that her share of such expense, according to the Carlisle tables, would be minute. *Griffith's Estate*, 12 C. C. 614; s. c. 32 W. N. C. 62.

60. Where a testator bequeathed a house to his widow, and directed his executor to devote the income of his farm to her comfortable support until her death, when it was to go to his son-in-law, and after her death, he directed "the balance of my estate (after all charges have been paid, including payment of all my wife's or widow's funeral expenses, etc., as of mine)," to be distributed; it was *held*, that such direction did not admit or authorize the payment by the executor for nursing, attendance and produce furnished to, and boarding, the widow, out of the principal of the estate. *Koehler's Estate* 10 Lanc. 171.

V. Security.

61. A life tenant giving security under the act of 24 February 1834 (Brightly's Purdon 619) is not a trustee. His representatives are not entitled to expenses. *Rieff's Appeal*, 124 P. S. 145; affirming *Rieff's Estate*, 22 W. N. C. 62.

62. If the trustees have active duties to perform, it is an active trust, and the *cestui que trust* for life is not entitled to

the principal under the act of 17 May 1871 (Brightly's Purdon 619), even with the consent of the children entitled in remainder. *Sims's Estate*, 130 P. S. 451.

63. Upon a devise of all the real and personal property to a wife during her natural life, or so long as she remains my widow, to be applied by her for her own proper use and for the maintenance and education of the minor children, with power in the executors to sell, if necessary for that purpose, and a further provision that after death or remarriage all the remaining part be sold and disposed of, and the proceeds divided among the children, where the widow was one of the executors; it was *held*, that she took the right of possession and use of the personal estate as widow and legatee and not as executrix, that she was not confined to the income, nor could she have been required to give security, and on her death the surviving executor was chargeable only with such personal estate as was then remaining. *Heppenstall's Estate*, 144 P. S. 259.

64. Where a testator empowered his daughters to sell the real estate devised to them; it was *held*, that he virtually made them trustees of his estate, and that distribution should be made to them, subject to the trusts contained in the will, without requiring security. *Gormley's Estate*, 154 P. S. 378.

65. Where an executor pays over a fund to a life tenant, who has not been required to give security, he is protected by the decree of the orphans' court. *Gormley's Estate*, 154 P. S. 378.

66. Uncut timber descends as real estate, and if the guardian of minor heirs cuts and sells the timber, and pays over one-third of the proceeds to the widow, he will be surcharged with the amount thus paid, and the orphans' court has jurisdiction to compel the mother either to pay back the money to the guardian or enter security for the payment of it at her own death. *Mulholland's Estate*, 154 P. S. 491.

67. Where a testator gave his estate to trustees to pay the income to his wife for life, and further directed that his wife should be entitled to the possession without being required to give security, and might use or occupy for her own purposes; it was *held*, that she was entitled to use the principal when the income was insufficient for her support, and could demand such principal without giving security. *Martin's Estate*, 160 P. S. 32; affirming s. c. 2 Dist. Rep. 232.

68. Where a father bequeathed to his daughter personal estate during her lifetime, and absolutely should she leave issue at her decease, and otherwise he gave and bequeathed one-half of the unexpended balance of the bequests to her, to his son after her decease, "she to have the sole benefit and control thereof during her lifetime, with full privilege and authority to dispose of the remaining one-half of the unexpended portion of the bequests to her aforesaid in such manner as she may deem proper"; it was *held*, that the legatee was entitled to the absolute use of the fund during her lifetime without security. *Hughes's Estate*, 9 Montg. 176.

69. A tenant for life, who is also executrix, will not be required to enter security to protect the interests of remainder-men. *Bourguignon's Estate*, 28 W. N. C. 315.

VI. Rights of remainder-men.

70. A deed by a tenant for life and remainder-man in fee, vests a good title in fee in the grantee. *Dorsey's Appeal*, 2 Cent. 591.

71. If a widow, to whom is devised, *inter alia*, a Schenley leasehold for life, renews it in her own name and bequeaths it to two of her children, the renewal enures to the benefit of herself and all her husband's children. *Franks's Estate*, 38 P. L. J. 190.

72. As to whether a remainder-man, who pays taxes on unseated land allotted to a widow as her dower, which she refused to pay, may recover the same

from her, see *Billings v. Billings*, 135 P. S. 199.

73. A contingent remainder can only be conveyed by a devise; a deed purporting to convey it, unless executed and delivered after the contingency happens, operates only as an estoppel of the remainder-man. A conveyance of the most remote of several contingent remainders to a life tenant will not merge the life estate into a fee to the destruction of the intermediate remainders. *Stewart v. Neely*, 139 P. S. 309.

VII. Principal and income.

74. Under a deed of trust to collect and distribute "net income," rents or royalties derived from a lease of coal in unopened mines, are to be regarded as income, and payable to the distributee for life. *Bedford's Appeal*, 126 P. S. 117.

75. The oil product of a farm leased for oil purposes is income. A life tenant is entitled to work previously opened mines to exhaustion. *Woodburn's Estate*, 138 P. S. 606; s. c. 27 W. N. C. 305.

76. Where a testatrix declared that coal rent should be considered principal in the disposition of her trusts; it was *held*, that such rents could not be treated as income. *Sharps's Estate*, 6 Kulp 467.

77. As between the widow and heirs, oil severed will be treated as income, but oil in place as part of royalty. *Clever's Estate*, 40 P. L. J. 358; s. c. 154 P. S. 481.

78. The testator being the owner of stock in a joint stock association formed for the purpose of dealing in land, a dividend derived from the sale of land, which, subsequent to his death, was discovered to be of great value, belongs to the tenant for life as part of the income. *Oliver's Estate*, 136 P. S. 43; s. c. 26 W. N. C. 392; affirming s. c. 24 Ibid. 139.

79. Where the stock of a corporation is bequeathed in trust for life, with remainder over, and the corporation after the testator's death declares a stock dividend, representing earnings capitalized in

his lifetime, such new stock will be held to be principal and not a part of the income; and this, though the market value of the original shares be unaffected by the new issue. *Smith's Estate*, 140 P. S. 344; affirming s. c. 8 C. C. 323.

80. The price realized by the sale of a privilege, incident to the ownership of stock, to subscribe to the bonds of another corporation whose stock is to be given as a bonus to the subscriber, is not income from the stock, to which the privilege is incident. *Thomson's Estate*, 153 P. S. 332; modifying s. c. 11 C. C. 198; 48 L. I. 147.

81. Where an unincorporated association was organized to buy land and lay out streets and lots upon it, and sell the lots at such prices as to yield profit, and the title was made in trustees, who rendered accounts and declared dividends, the original capital stock remaining unimpaired; it was *held*, that as between the life tenant and remainder-man of the stock such dividends were income and not principal. *Thomson's Estate*, 153 P. S. 332; modifying s. c. 11 C. C. 198; 48 L. I. 147.

82. As between a tenant for life of stocks and the remainder-men, the only profits to which the former is entitled, as owner of the income, are such as have accrued since the death of the testator; whatever at that time was principal or assets of the company, remains principal until the death of the tenant for life without reference to mere change of form or to increase of value. *Thompson's Estate*, 9 C. C. 639.

83. Earnings on stock in a building association subscribed for by the testator in his lifetime, the instalments upon which were paid by his executor until maturity, less legal interest to the time of the death of the testator on sums paid by him in his lifetime, were *held* to be income and distributable as such. *Elton's Estate*, 12 C. C. 79; s. c. 30 W. N. C. 275.

84. Interest due a testator is apportionable; that which accrues prior to

his death belongs to the principal of his estate, although it is not actually paid until after his death. *Patterson's Estate*, 15 C. C. 520.

85. Where trustees purchased land on foreclosure and held the land and sold it at an advance; it was *held*, that the net profits belonged to the *corpus* of the estate and did not go to the tenant for life. *Park's Estate*, 42 P. L. J. 307.

ESTATE IN FEE.

See CONSTRUCTION: DEED, VIII., IX.: DEVISE.

ESTATE TAIL.

See DEED: DEVISE, III.

1. The act 27 April 1855 (Brightly's Purdon 810), converting estates tail into estates in fee simple, is not retroactive. *Karchner v. Hoy*, 151 P. S. 383.

2. A devise of a farm to the testator's son "and if he should die leaving no lawful heirs" the whole to descend to his brothers and sisters, etc., gave an estate tail to the devisee, such an estate becoming operative prior to the act of 27 April 1855 (Brightly's Purdon 810), may be barred by deed in accordance with the provisions of the act of 16 January 1799 (Brightly's Purdon 809). *Cochran v. Cochran*, 127 P. S. 486. See *Titzell v. Cochran*, 10 Atlan. 9.

3. Under the act 20 June 1883 (Brightly's Purdon 811), which provides that persons claiming under tenants in tail may bar the same by a conveyance in fee simple; it was *held*, that a will was such a conveyance. *Martin's Estate*, 11 C. C. 245; s. c. 30 W. N. C. 461.

ESTOPPEL.**I. Who are bound by an estoppel.**

- (b) Purchasers.
- (c) Heirs, devisees and legatees.
- (d) Tenants.
- (e) Married women.
- (g) Principal and agent.
- (h) Corporations and stockholders.
- (i) Landowners in road cases.

II. By matter of record.**III. By deed.****IV. By matter in pais.**

- (a) General principles.
- (b) What amounts to an estoppel.
- (c) What does not amount to an estoppel.
- (d) Admissions of title.
- (e) Declarations.
- (g) Certificate of no defence.
- (h) Acquiescence.

I. Who are bound by an estoppel.**(b) Purchasers.**

1. Where a judgment note recites that it is given for purchase money of real estate, the defendant is estopped from establishing his right to the exemption, by proof that part of it was given for an individual debt. *Hawbicker's Estate*, 6 C. C. 570.

2. If a vendee permit the property to remain in his vendor's possession, he is affected by any subsequent sale by his vendor to any person taking possession, and also by the declarations of his vendor made while he held possession. *Shannon v. Minney*, 130 P. S. 280. See *Miller v. Browarsky*, *Ibid.* 372.

3. The vendee of a cow being estopped by her conduct from setting up her title against the plaintiff, such estoppel does not affect the title of a subsequent *bona fide* purchaser from her. *Shannon v. Minney*, 130 P. S. 280.

4. Upon the sale of a refrigerator, it was *held*, that an agreement between the seller and purchaser, that the refrigerator should not become part of the realty

but remain the personal property of the seller, could not affect the title of a mortgagee without notice. Upon the trial of an interpleader between the mortgagee who purchased at sheriff's sale and the seller who subsequently purchased under his judgment; it was *held*, that the mortgagee was not estopped from claiming the refrigerator as realty, because, by rule of court, he was compelled in his declaration to describe it as goods and chattels. *Frank Malting Co. v. York Manufacturing Co.*, 12 Lanc. 213.

(c) Heirs, devisees and legatees.

5. In order to estop heirs from recovering land sold under a mortgage, executed without authority by their ancestor's administrator, it must be shown that they knowingly received the purchase money. *Spencer v. Jennings*, 139 P. S. 198.

6. A person who accepts a benefit under a will is estopped from asserting a claim repugnant to its provisions. *Tompkins v. Merriman*, 155 P. S. 440; affirming s. c. 6 Kulp 543.

7. Where a testator devised three-fourths of a tract of land to his son, with power of appointment by will to the son's son, or upon failure of appointment by will, to the son's sons, excluding daughters, and there was no disposition made of the remaining one-fourth of the tract and there was no residuary clause in the will, and the son took possession of the whole tract and devised it equally to all his children including his daughters, and after his death his six children made a parol partition and each child went into possession of his or her purpart and held it for more than twenty-one years; it was *held*, that the daughters had acquired a good marketable title by the estoppel of the sons and the statute of limitations, *Spaulding v. Ferguson*, 158 P. S. 219.

8. Where one of the heirs of the testator was not made a party to an issue *devasavit vel non*; it was *held*, that the fact that he appeared as a witness did not estop him from subsequently instituting pro-

ceedings by appeal from the register on his own behalf to set aside the will. *Miller's Estate*, 159 P. S. 562; reversing s. c. 40 P. L. J. 200. See *Miller's Estate*, 166 P. S. 97.

9. Where a devisee under a will elects to take and retain exclusive possession thereunder of a specific portion of the realty; he is estopped from denying the exclusive title of another devisee to another portion of land also so occupied by him. *Martin's Estate*, 11 C. C. 245; s. c. 30 W. N. C. 461.

10. One who elects to accept a benefit under a will is estopped from setting up a claim repugnant to it; a legatee, who accepts his legacy, cannot claim realty as heir at law on the ground that as to the latter the will is invalid. *Barber's Estate*, 14 C. C. 167.

11. A widow and heir are not estopped from inheriting from a deceased husband and father by reason of the fact that the widow has been convicted as accessory after the fact to his murder and the son has been convicted of having murdered his father for the purpose of getting immediate possession of his estate. *Carpenter's Estate*, 170 P. S. 203; affirming s. c. 1 Lack. L. N. 159.

12. Where a judgment given by the decedent and his two sisters and subsequently marked to the use of his sisters, was a first lien against the undivided interest of the decedent in a farm which had belonged to his deceased father, and the second lien thereon was a mortgage executed by the decedent, his mother, brother and two sisters, and execution was issued on the mortgage, but before the sale the parties agreed that the sum of sixty-five hundred dollars should be the appraised and ascertained value of the farm, and the farm was bought at a sheriff's sale by an outside party for fifty dollars and conveyed to the brother and two sisters for one dollar; it was held, on the distribution of the estate, that the two sisters were estopped by said agreement from claiming a dividend on their judgment out of the funds of the estate, it ap-

pearing that the decedent's share of the said valuation of sixty-five hundred dollars was sufficient to extinguish their judgment. *Drennen's Estate*, 10 Lanc. 221.

13. Where a testator devised his property to be held for a particular purpose for more than six years, and a creditor, for the purpose of enabling the executor to carry out the provisions of the will, did not press his claim, but waited until the final consummation of the testator's purpose; it was held, that the devisees and heirs were estopped from setting up the statute of limitations against such creditor. *Young's Estate*, 2 Northam. 365.

14. Where a legatee under a will receives the legacy bequeathed to him therein, and signs a release through mistake and without a full knowledge of the contents of the will, and such release was obtained by the false and fraudulent representations of the executor, the legatee will not be estopped thereby from petitioning the court for an issue to test the validity of the will. *Getz's Estate*, 3 York 50. See *Getz v. Getz*, 1 York 137.

(d) Tenants.

15. A tenant is estopped from denying his landlord's title; and this, though he claimed title to the land and the execution of the lease was procured by the landlord by an assertion of title in himself and a threat of eviction. *Harrisburg School District v. Long*, 10 Atlan. 769.

16. Upon the rule that a tenant is estopped from denying his landlord's title, see note to *Killoren v. Murtaugh*, 5 Atlan. 770.

See LANDLORD AND TENANT.

(e) Married women.

17. A married woman is not estopped by acts or declarations which would estop her, were she a *feme sole*. *Stivers v. Tucker*, 126 P. S. 74.

18. A contract of a married woman in relation to her real estate, void under disability of coverture, cannot be validated by estoppel. *Cryan v. Ridelsperger*, 7 C. C. 473.

19. A married woman joining in a deed for land claimed by her husband, is not thereby estopped from asserting a title in herself subsequently acquired. *Moore v. Tyler*, 1 Mona. 529; s. c. 17 Atlan. 216.

20. After a wife has joined her husband in an assignment of real estate for the benefit of creditors, a sale by the assignee, and a distribution to creditors, she is estopped from asserting a resulting trust in herself. *Jennings v. Longdon*, 11 Atlan. 212.

21. That a wife joined with her husband in a deed for a portion of land, held in his name, does not estop her from setting up a resulting trust in the remainder as against her husband's creditors. *Hay v. Martin*, 14 Atlan. 333; s. c. 13 Cent. 217.

22. A *feme sole* trader giving a certificate of "no defence" as to her mortgage, is estopped thereby. *Hedden's Appeal*, 17 Atlan. 29.

23. Where land was bought with the wife's money, but the deed was taken without her knowledge in her husband's name, and upon her discovery of the mistake she promptly insisted upon a conveyance to herself, the property could not be sold for a debt of the husband contracted during the time which the property stood in his name; but it seems that if she allowed the title to remain in her husband until he contracted the debt, she would be estopped as against that creditor from denying her husband's title. *Young v. Senft*, 153 P. S. 352.

24. Where a woman married again, four years after being deserted by her husband but under a reasonable supposition that he was dead; it was held, that she was not thereby estopped, upon discovering that her second marriage was prior to the death of her first husband, from electing, as his widow, to take against the will of her first husband. *Johnson's Estate*, 10 C. C. 461.

25. Where a deed was made by a married woman without the joining of her husband, and a purchase money mortgage given by the grantee; it was held, that

while the title of the grantee was void under the deed, yet she was estopped by her mortgage from denying her title, and this estoppel operated as against her judgment creditor, who had obtained a judgment against her subsequent in date to the second deed of conveyance to her, executed by the original grantor and her husband. *Hirsch v. Tillman*, 13 C. C. 251.

(g) Principal and agent.

26. One who told his son that if a petition for macadamizing a street was presented, to sign it, who was told by his son that he had signed it, and who failed to disavow his son's act, is estopped from afterwards setting up his son's want of authority to sign. *Brown v. Philadelphia*, 5 Cent. 699.

27. The real owner of a property and business, who permits another to hold himself out as the ostensible owner, is estopped from denying the authority of such agent. *McCracken v. Hamburger*, 8 C. C. 167; affirmed in s. c. 139 P. S. 326.

28. The form in which evidence is given being adopted upon the suggestion of opposing counsel, the latter's client is estopped from complaining of it. *Rees v. Schuylkill River E. S. Railroad Co.*, 135 P. S. 629; s. c. 26 W. N. C. 500.

29. A party to a suit is not estopped from alleging an instruction as to the construction of an instrument, for error, by the fact that on the trial his counsel made a verbal statement, when offering the agreement, that such was the proper construction. *Hoffman v. Bloomsburg & Sullivan R. R. Co.*, 143 P. S. 503; s. c. 157 P. S. 174.

30. An agent is not estopped by his acts from showing the truth as to the condition of his account with his principal, where the position of the principal was in no way prejudiced by the agent's conduct. *Stewart v. Parnell*, 147 P. S. 523.

31. Where the agents of a fire insurance company refused payment, giving a specified reason, this does not estop the

company from setting up other reasons upon the trial. *Welsh v. London Assurance Corporation*, 151 P. S. 607.

32. Where land was appropriated for an overhead bridge across a street, and the owner's agent entered into an agreement with the city as to the price, and the owner also owned the land on the opposite side of the street by a different title; it was *held*, that the agreement as to the price did not estop the owner from recovering consequential damages for the injury done to his other land by the construction of the bridge. *Beaver v. Harrisburg*, 156 P. S. 547.

33. The mere holding of a judgment by a vendor of real estate against his vendee, to secure part of the purchase money, does not confer an insurable interest; but where the agent of the insurance company advised a holder of a policy, when about selling the property, to retain the policy and that he would still have an insurable interest; it was *held*, that the company was estopped from denying its liability in an action upon the policy. *Light v. Countrymen's Mutual Ins. Co.*, 169 P. S. 310; s. c. 36 W. N. C. 454.

(h) Corporations and Stockholders.

34. If a purchaser or pledgee of regularly issued (but fraudulent) stock advances money on it or parts with anything of value for it, the corporation is bound by way of estoppel to indemnify him to the extent of his expenditure; but if he has simply taken it for a pre-existing debt, he has no claim which he can enforce against the corporation. *Kisterbock's Appeal*, 127 P. S. 601.

35. A stockholder of a corporation, though he may be estopped from questioning the validity of its bonds and mortgage, by reason of having accepted and disposed of one of the bonds, is not thereby barred of his right to object to the validity of the sale of its property in this state under foreclosure proceedings in another state. *Pittsburgh & State Line Railroad Co.'s Appeal*, 4 Cent. 107; affirming

Rothschild v. Pittsburgh & State Line Railroad Co., 1 C. C. 620.

36. Where two members of a joint stock company granted to the association the coal under certain land, reserving royalties, and the grantors assigned the grant to the plaintiff, who brought suit for the royalties against the members of the company as general partners; it was *held*, that the assignors being members of a company who contracted among themselves that their liability should be limited to the stock subscribed, they, and the plaintiffs claiming under them, were estopped from alleging that the association was defectively organized and the liability general. *Egbert v. Kimberly*, 146 P. S. 96.

37. In an action against a stockholder to recover assessments on stock, made while he was a director, the defendant is estopped from setting up want of notice of the assessments. *Spellier Electric Time Co. v. Geiger*, 147 P. S. 399.

38. Where an owner of stock has, by a power of attorney signed in blank, conferred upon another all the indicia of ownership, he is estopped from asserting his title to the stock as against a third person who has, in good faith, purchased it for value from the apparent owner; but this rule does not obtain where there are circumstances to put the purchaser on inquiry. *Ryman v. Gerlach*, 153 P. S. 197.

39. Where the defendant's property was destroyed by fire from the sparks of a locomotive, and he collected from the plaintiff a portion of a fire policy on the property, and after the money was paid to him the defendant collected a large amount from the railroad company, for the damage caused by the fire, and it appeared that the defendant had requested the plaintiff to join in the litigation against the railroad company, but plaintiff had refused to do so and assured the defendant that he was welcome to all he could collect; it was *held*, that the plaintiff could not recover back the money paid on the

policy. *Aetna Ins. Co. v. Confer*, 158 P. S. 598.

40. Where the property of a corporation is in the hands of a receiver, it cannot be taken in execution under a judgment against an agent or partner of a corporation, on the ground that the corporation, by permitting the agent or partner to do business in his own name, was thereby estopped from denying that he was a partner; in such a case, the judgment creditor should apply to the court which appointed the receiver and ask the discharge of the property out of custody, so that he may proceed against it. *Thompson v. McCleary*, 159 P. S. 189.

41. A failure to record the certificate of incorporation "in the office for the recording of deeds in and for the county where the chief operations are to be carried on," as required by the act 29 April 1874 (Brightly's Purdon 408), will render the incorporators personally liable to persons who deal with them without the knowledge of the incorporation; in such a case the mere acceptance of a note from the incorporators in the corporate name, after the party dealing with them has performed his part of the contract, will not operate by way of estoppel. *Guckert v. Hacke*, 159 P. S. 303.

42. Where the president of a bank accepts for discount the promissory notes of a corporation, knowing them to have been executed in fraud of the corporation, the bank is estopped from asserting that the notes were issued in the exercise of an apparent authority in the treasurer to issue notes. *Millward-Cliff Cracker Company's Estate*, 161 P. S. 157.

43. Where some of the goods of an insolvent debtor were sold at sheriff's sale and bought in by certain creditors, who formed a company to resell them, and the president of the new company agreed that other goods of the debtor, pledged to another creditor, should be stored in the new company's store and should not be levied on; it was held, in a sheriff's interpleader, that another creditor corporation, of which the president of the new com-

pany was also president, could not levy upon such goods so as to defeat the rights of a creditor to whom they were pledged. *Tradesmen's National Bank v. Indiana Bicycle Co.*, 166 P. S. 554.

44. The refusal of a fire insurance company to pay the loss on a specified ground, estops it from asserting other ground relieving it from liability, of which it had full knowledge, where the insured has incurred expense and brought suit in the belief that the only objection was that stated. *McCormick v. Royal Ins. Co.*, 163 P. S. 184.

45. Where the by-laws, application or policy of a mutual life insurance association contain no reference as to the terms upon which a member might be reinstated after forfeiture of membership, but in the assessment notice it was stated that no reinstatement could be made or payment received except upon condition that the assured was alive and in good health, and plaintiff failed to pay several assessments and was served with the usual notice and he paid all the past assessments and furnished proof that he was in good health and subsequently paid other assessments, which were received without objection or condition; it was held, that the action of the company estopped it from asserting a forfeiture of plaintiff's membership. *Comm'th v. Provident Life Association*, 163 P. S. 374.

46. Where the question was whether a fire insurance company had approved additional insurance, and it appeared that the policy provided for the written consent of the company, approved at a regular meeting of the board of directors, and that the plaintiff told the secretary that he intended to take out additional insurance, and was told to meet the board of directors and have it fixed; that when he reached the office of the company the meeting of the board had adjourned, and only three of the six directors were present, but of this he had no knowledge; that one of the directors handed the policy to the president, who said he knew all about it, and di-

rected the director to write the necessary consent on the policy and this was done, but the president did not sign it and there was no formal action by the directors; it was *held*, that the company was estopped from denying its approval of the additional insurance. *Stauffer v. Penn Mutual Fire Ins. Ass'n*, 164 P. S. 199.

47. Where a policy of accident insurance provided that suit must be brought within a year, and the company by its conduct and promises to pay misled the plaintiff, and caused him to expend time, labor and money in following up his claim, the company was held to be estopped from setting up a defence of failure to bring suit within the year. *Harold v. People's Mutual Accident Ass'n*, 12 C. C. 454.

48. Where the charter of a fire insurance company provided that the assent of the company to an assignment of a policy must be endorsed thereon; it was *held*, that the company was not estopped from setting up such a provision by the fact that the assignee notified the secretary of the assignment and said, "as long as this policy lays in the office before it expires, will it be all right if anything occurs?" to which the secretary replied, "yes"; and this, although the company retained the deposit made when the insurance was effected, but the assignee had actual knowledge of the requirement and made no effort to comply with it. *Hensler v. Fire Ins. Co.*, 3 Northam. 318.

(4) Landowners in road cases.

49. A landowner who lays out a street through his property and dedicates it to public use, is not estopped thereby from recovering damages for a change in its grade made by the municipal authorities. *Jones v. Bangor*, 144 P. S. 638.

50. A lot owner who joins in a request to grade a street, is not thereby estopped from claiming compensation for an injury to his property done by the grading; so, the municipality is not relieved by the fact that the plaintiff's purchase of the

property was made with the knowledge and understanding on the part of both vendor and vendee that the street would eventually be made to conform to the new grade. *Jones v. Bangor*, 144 P. S. 638.

51. Where a landowner petitions to councils to pave a street upon which his land abuts, he is estopped from subsequently denying the power of councils to do the paving. *Harrisburg v. Baptist*, 156 P. S. 526.

52. A petitioner for a jury of view to open a street, who alleges that such opening will greatly benefit a particular section of the city, is not thereby estopped from denying the right of the city to assess benefits upon the property lying within that section. *Walnut Street*, 10 C. C. 173.

53. A jury of view will be appointed to assess damages for opening a street even after the street has been in actual use; the owner by merely permitting the use of the land for a period less than the period of limitation, is not thereby estopped from claiming damages for the taking of the land. *Musgrove Street*, 10 C. C. 180.

54. One who signs a petition to city councils asking for the passage of an ordinance for the paving of a street and who permits the work to be done without objection, is estopped from denying the authority of the city to do the work. *Chester v. Pennel*, 6 Del. 61.

II. By matter of record.

55. A plaintiff having, upon the order of the court below, exercised its election as to which of three judgments it would enter, is estopped from complaining of the order on error. *Scranton Building Association v. Rauck*, 13 Atlan. 840.

56. One who held an assignment of a partnership interest and a judgment note for the same sum, who entered judgment on the note and sold the partnership interest at sheriff's sale and was awarded the proceeds, was estopped from claiming any interest by virtue of his assignment;

and this though he gave notice of it at the sale. *Van Stavoren's Appeal*, 12 Atlan. 499. See *Wetherald v. Shupe*, 109 P. S. 389.

57. If, in an answer under oath to a rule to open a judgment, the plaintiff avers that two of the defendants are sureties only, he is estopped on the trial from proving in their absence that the other defendant declared that he and one of the others were joint borrowers. *Fyan v. Cessna*, 10 Atlan. 29.

58. A garnishee in attachment execution, who fails to make full, direct and true answers to the interrogatories, is estopped from afterwards, in a collateral proceeding, setting up a state of facts different from that disclosed in his answers. *Baker's Appeal*, 3 Atlan. 766.

59. One who, in an action of ejectment, sets up a devise as a defence, is not thereby estopped from setting up an ademption of a legacy charged on the devise by the will. *Spier's Appeal*, 5 Cent. 679.

60. The plaintiff in an attachment execution, having attempted to prove a specific contract between the defendant and garnishee, is estopped from denying the validity of the contract as fraudulent against creditors. *Sayers v. Kent*, 3 Cent. 610; s. c. 1 Atlan. 442.

61. Where the mortgagor, in a *scire facias sur mortgage*, declined to defend with terre tenants against usurious interest, and repudiated of record any such defence, and after judgment was obtained against the terre tenants, voluntarily confessed judgment to the mortgagee, and the judgment against the terre tenants was subsequently reversed; it was held, that the mortgagor was estopped from joining with the terre tenants in proceedings to open the judgment confessed and from defending in a subsequent trial against the amount of the claim alleged to be usurious. *Stayton v. Graham*, 139 P. S. 1.

62. The mere omission by the mortgagor, at the request of the mortgagee, to set up the defence of usury in a proceed-

ing to determine whether the mortgage was a first or second lien, will not estop the mortgagor from subsequently setting up the defence of usury. *Reap v. Battle*, 155 P. S. 265; affirming s. c. 6 Kulp 423.

63. In a proceeding to determine the damages occasioned by the construction of a railroad, where the claimant was an assistant assessor for the year in which the railroad was located, and in said assessment the land was valued at five thousand three hundred and one dollars, while the damages claimed were twenty-three thousand dollars; it was held, that while the assessment was admissible as evidence of much weight, it did not operate as an estoppel, and it was not error to permit the claimant to testify that he took no part in the assessment and that it was much lower than the real value of the land. *Smith v. Pennsylvania, S. V. R. R. Co.*, 141 P. S. 68.

64. Averments in a bill in equity, which are immaterial to the relief sought, cannot operate as an estoppel. *Lash v. Spayd*, 141 P. S. 360.

65. Where a rule to strike off a judgment was made absolute and the plaintiff, with leave, afterwards withdrew the note from the files and again entered judgment thereon; it was held, that he was not thereby estopped from alleging error in the order striking the original judgment from the record. *Volkenand v. Drum*, 143 P. S. 525; reversing s. c. 6 Kulp 153.

66. If the real owner of a judgment have execution issued and property sold thereon as the property of the judgment defendant, he will be estopped thereafter from setting up that the defendant had no title to the property when it was sold. *Rapp v. Crawford*, 146 P. S. 21.

67. Where the estate of a life tenant is sold under execution without notice and leave of court, as required by the act 24 January 1849 (Brightly's Purdon 850), the life tenant defending in ejectment against one holding under the sheriff's vendee is not estopped from alleging the invalidity of the sale, by the fact that

the proceeds were applied in discharge of the judgment. *Henry v. McClellan*, 146 P. S. 34.

68. Where a widow, who is entitled to a life estate in her husband's land, joins in partition proceedings which result in a decree fixing her interest at one-third for life, and no appeal is taken, she is estopped from denying the validity of a payment of owelty, made under the decree by one of the heirs to another. *Donaghy's Estate*, 152 P. S. 92.

III. By deed.

69. One who claims as an heir of his father, and puts in evidence a deed from his father to a third person, is not thereby estopped from attacking its validity on the ground that it had been obtained by fraud. *Parry v. Parry*, 130 P. S. 94.

70. Devisees of a life estate with a power of disposition in the survivor, with no devise over, can consent to the exercise of the power at any time, and all joining in the deed, the survivor would be estopped from asserting a right contrary to it. *Myers v. Bentz*, 127 P. S. 222.

71. In an action of ejectment, where the plaintiff put in evidence a deed from "M. R. late M. B. divorced"; it was held, that a proceeding in equity in which the defendant was a plaintiff and wherein a final decree was entered establishing the validity of the same deed and the fact of the divorce decided, was properly admitted in evidence together with the deed, and, further, that the defendant was estopped from alleging that the deed was obtained by fraud. *Bennethum v. Bowers*, 141 P. S. 105.

72. Where a person witnesses a deed, there is no presumption that the description was read to him, and such witnessing will not estop him from asserting his title to the land thereby conveyed. *Wahl v. Pittsburgh & Western Ry. Co.*, 158 P. S. 257.

73. In an action of ejectment, the defendant is not estopped from setting up title under a will by which the land

was devised to her, by the fact that she accepted a deed from the testatrix for the same land some years after the will was made. *Kirkpatrick v. Heydrick*, 161 P. S. 447.

74. Where a deed reserves a right of way for all occupiers of lots bounding upon it, the grantee who accepts the deed is estopped from denying such right. *Ehret v. Gunn*, 166 P. S. 384; affirming s. c. 35 W. N. C. 291.

75. A mortgagor who has obtained the mortgage money, is estopped from setting up that the officer who took the acknowledgment was not competent to take it. *Adam v. Mengel*, 8 Atlan. 606.

76. A mortgage voluntarily executed by a grantee to a third party, but at the request of the grantor to secure the latter's debt, is a valuable consideration in support of the deed; and this, although the mortgage is binding upon the grantor by way of ratification of the original deed and also by way of estoppel. *Doran v. McConlogue*, 150 P. S. 98.

77. Where a mortgage provides that the state tax shall be paid by the mortgagee, the mortgagee will not be estopped upon a *scire facias* from collecting such state tax by the mere fact that he has given a receipt for interest to date. *Williams v. Graver*, 152 P. S. 571.

78. Where a receipt was given for more than was actually received, the giver was not estopped from recovering the excess. *Schroeder v. Waters*, 15 C. C. 561.

79. A release by a natural gas company, of its right to damages for injury to its pipe line, by the removal of underlying coal, may operate as an estoppel against a claim by the owner of the coal for such damages, but such release will be ineffective as against the coal owner's right to compensation for the risk of injuries to the mine in the operation of the pipe-line. *Davis v. Jefferson Gas Co.*, 147 P. S. 130. See *Wallace v. Jefferson Gas Co.*, 147 P. S. 205.

IV. By matter in pais.

(a) General principles.

80. One party is estopped by declarations by which the other party was not misled and upon which he did not rely. *McKnight v. Bell*, 135 P. S. 358; s. c. 26 W. N. C. 281.

81. A plaintiff cannot be estopped by his acts and declarations of an equivocal character, when nothing was done or suffered by the defendant on account of them. *Kline v. McCandless*, 139 P. S. 223.

82. A party cannot set up an estoppel where he has not been misled by the action of the other party. *Sensing v. Boyer*, 153 P. S. 628.

83. A liability on a contract which is based on the principles of estoppel, does not necessarily imply a liability to be sued in ejectment in which the defendant's actual possession of the premises must be proved. *Lowenstein v. Ecker*, 155 P. S. 304.

84. Estoppel cannot take place where the truth of the facts is made the very issue to be tried, by the party to be estopped. *Paup v. Hullubush*, 2 York 51.

85. The subject of estoppel *in pais* is discussed in a note to *Swayze v. Carter*, 3 Atlan. 709.

(b) What amounts to an estoppel.

86. A clear certificate of search for registered taxes, furnished a purchaser by the receiver of taxes for the city of Philadelphia, estops the city from collecting taxes omitted from the certificate. *Philadelphia v. Anderson*, 142 P. S. 359; reversing s. c. 8 C. C. 417. *Philadelphia v. Glanding*, 8 C. C. 367.

87. Upon a bill against partners for an account and an answer that the plaintiff's husband and not she was the partner, a subsequent agreement that the husband shall file a disclaimer and the cause shall proceed as though no such defence had been made, will estop the defendants from subsequently denying that the plaintiff

was the true party in interest. *Parker v. Broadbent*, 134 P. S. 322.

88. If a juror be excused with the defendant's consent and another substituted, the defendant is estopped from claiming irregularity. *Comm'th v. Fritch*, 9 C. C. 164.

89. A water company taking land under its right of eminent domain, has a right to remove the timber and dispose of the same, and where the landowner appears before the viewers and makes claim for the bark and timber standing on the land, he will be held to be estopped from afterwards setting up a claim of title thereto. *Degen v. Meadowbrook Water Co.*, 3 Lack. Jur. 233.

90. Where a depositor had three accounts in a bank, one individual, one as trustee and one as a partnership account, and he deposited checks which were drawn to his order individually and endorsed them for deposit to his credit individually, but the deposit slips apportioned the amounts to the different accounts and he drew on the various accounts as though the deposits were regularly made in each case; it was held, that he was estopped from afterwards asserting that the bank acted without authority in paying the checks upon the accounts other than his individual account. *Rennison v. People's Nat. Bank*, 8 Montg. 46.

91. Where the evidence in ejectment disclosed the fact that one of the plaintiffs induced the defendant to buy the tract of land to which he, the plaintiff, claimed title by a prior grant, the court directed a compulsory nonsuit as to him under the act 31 March 1823 (Brightly's Purdon 712), and a verdict was subsequently rendered for the other plaintiff who was not a party to the fraud. *Foust v. Northern Central Railway Co.*, 5 York 34; s. c. 4 Del. 496. See *Foust v. Northern Central Ry. Co.*, 5 York 35.

92. Where land was equitably converted by will and a plaintiff levied, condemned and sold a legatee's interest as land; it was held, upon a distribution

of the proceeds, that the plaintiff was estopped from denying that it was land and the proceeds were awarded to a prior lien creditor. *Wolf v. Porter*, 7 York 194.

(c) What does not amount to an estoppel.

93. An executor who has put in his inventory a bank account standing in decedent's name, is not estopped from proving that the money was his own. *Eichhorn's Estate*, 7 C. C. 433; s. c. 24 W. N. C. 364.

94. An executor who includes a judgment in his inventory is not thereby estopped from setting up a claim to its ownership. *Stewart's Estate*, 137 P. S. 175; s. c. 26 W. N. C. 553; affirming s. c. 1 Lack. Jur. 225.

95. Presenting a claim for services to an executor does not estop the plaintiff from recovering at a greater rate before a jury. It is a question to be considered by the jury. *Russell v. Pratt*, 7 C. C. 662.

96. Remainder-men were not estopped from bringing trespass for cutting timber against a purchaser from a former tenant by the curtesy, by reason of their, after the latter's death, having claimed, used and conveyed certain other land, which their father, the former tenant by the curtesy, had taken in exchange for the first conveyance. *Fairchild v. Dunbar Furnace Co.*, 128 P. S. 485.

97. Where the defendant under a judgment, which was a lien only on plaintiff's land as terre tenant, levied upon other property of the plaintiff, and the plaintiff, in ignorance of his rights, claimed the benefit of the exemption law, and goods to the value of three hundred dollars were set apart for him and the remainder were sold by the sheriff, and the plaintiff bid or induced his friends to buy-in other articles at the sale; it was held, that there was nothing in plaintiff's conduct to estop him from recovering the value of the goods in an action of trespass for the wrongful levy; and it was further held, that the measure of damages as to such articles as were bought by the plaintiff,

was not their value but the loss he sustained in buying them. *Sensinger v. Boyer*, 153 P. S. 628.

98. Where a street was opened and the damages assessed and paid in conformity with the act 14 June 1887, and pipes for natural gas were laid in the street by permission of the city in 1889, and the act of 1887 was declared unconstitutional in 1891 (see *Whitney v. Pittsburgh*, 138 P. S. 401); it was held, that a bill would not lie to restrain the gas company from maintaining its pipes in the street. It seems, however, that the plaintiff was not estopped by reason of the payment by him of assessed benefits. *King v. Philadelphia Company*, 154 P. S. 160.

99. One who purchases a leased piano from the bailee takes no title to the same, and a failure to mark the bailor's name on the piano will not estop him from recovering. *Miller Piano Co. v. Parker*, 155 P. S. 208.

100. Where tenants in common accept the proceeds of a tax sale of the estate in common, in ignorance of the fact that the estate has been bought by one of their own number, they will not be estopped from subsequently avoiding the deed to the purchaser. *Tanney v. Tanney*, 159 P. S. 277; affirming s. c. 41 P. L. J. 43.

101. Overseers of the poor will be compelled by mandamus to obey an order of relief; that a pauper received relief on the promise that he would leave the district voluntarily, which he afterwards refused to do, will not estop him from maintaining his remedy by mandamus. *Armstrong v. Overseers of Berwick*, 10 C. C. 337.

102. Where an assignment for creditors was made to a creditor, and at the sale of the assigned property the assignor purchased articles to the amount of \$202.08, and he was employed by the assignee to manage the estate and claimed \$298.24 as compensation for his services, and he presented his claim to the assignee and they agreed in writing that the assignor's claim should not be objected to by the assignee before the auditor, but that the assignee

should retain \$202.08 in payment of himself as assignee and pay the balance to the assignor; it was *held*, that such agreement did not estop the assignee from retaining the balance as part payment of his individual claim against the assignor. *Strickhouser's Estate*, 2 York 114.

(d) Admissions of title.

103. Where the plaintiff and defendant had dissolved partnership and the defendant had agreed to convey to the plaintiff all the partnership property; it was *held*, in a bill for specific performance as to certain lands, the title to which was in the name of the firm, that the defendant could set up a prior interfering survey of which he was one of the owners. He was not estopped from making such defence by reason that he, before the purchase by the firm, had assured the plaintiff that their grantors had a good title, and that upon a subsequent survey it was discovered that he was one of the owners of a prior interfering survey, as to which he had subsequently remained silent. *Thompson's Appeal*, 126 P. S. 367.

104. One who has received payment as a lien creditor, out of the funds realized by a sheriff's sale of real estate, is estopped from subsequently asserting that he was the equitable owner of the premises as a vendee under articles of sale. *Onwake v. Harbaugh*, 148 P. S. 278.

105. Where a person is shown a promissory note held by a bank, and admits his signature as maker to be genuine, although he knows at the time it is a forgery, he will not be estopped in a suit upon the note from setting up the fact that the note was forged. *Second Nat. Bank v. Wentzel*, 151 P. S. 142.

106. A declaration by the maker of a judgment note to an intended purchaser, that it is good and will be paid, followed by an offer to pay the holder about the time of its maturity, will operate to estop the maker from instituting proceedings to open the judgment. *Humphrey v. Tazier*, 154 P. S. 410.

107. Where a distiller issued a warehouse certificate to defendants that he held whiskey on storage, and the defendants sold the whiskey and endorsed the certificate to the order of the purchaser, and the purchaser then sold the whiskey to the plaintiff and endorsed the certificates to him, and after the last sale the defendants attached the whiskey as the property of their own vendee; it was *held*, that they were estopped by endorsing the certificates from objecting to the plaintiff's title; it was not decided whether such a certificate is within the warehouseman's act 24 September 1866 (*Brightly's Purdon* 165). *Rosenham v. Batjer*, 154 P. S. 544.

(e) Declarations.

108. A husband who, in an action of trespass by his wife, testifies that the land is hers, is estopped from claiming damages himself as owner, in another suit. *Lord v. Meadville Water Co.*, 135 P. S. 122; s. c. 26 W. N. C. 110.

109. One who gives a notice at a sheriff's sale, upon which creditors appear to have acted, is estopped from subsequently setting up a state of facts inconsistent with such notice, and to the injury of such creditors. *Heistand v. Williamson*, 128 P. S. 122.

110. Where a contract to sell land is insufficient under the statute of frauds, a notice by the vendor that he will not convey, and that he will consider the plaintiff a trespasser, will not prevent a recovery by the vendee of his expenses incurred after the notice, if it appear that the vendor withdrew the notice or encouraged the vendee to believe that the original contract would be carried out. *Holt-house v. Rynd*, 155 P. S. 43.

111. Where a plaintiff presented a bill for five hundred dollars to the administrator of his father-in-law, for boarding the decedent, and said that if the claim was settled without trouble he would take the five hundred dollars, and after the refusal of the administrator to pay the bill, he presented a second bill for nine

hundred and eighty-four dollars; it was *held*, that he was not concluded by the first bill, which, with the conversations relating to it, was for the jury. *Perkins v. Hasbrouck*, 155 P. S. 494.

112. Where a person becomes possessed of property under a bill of sale, and the title to the property is claimed by another, and the vendee is induced to part with the possession of the property at the instance of the claimant in consideration of a note endorsed by him; it was *held*, that the latter will be estopped from asserting a defence in an action on the note, that it was a trick or artifice by which the vendee was deceived into parting with his property. *McClain v. Smith*, 158 P. S. 49.

113. A person is not estopped from insisting that a testatrix was of sound mind in August 1885 because he had testified in a will contest that she was *non compos* in February 1886 and for several years before. *Eichert v. Schaffer*, 161 P. S. 519.

114. An attaching creditor who has given notice that the goods would be sold subject to his attachment, is estopped from ruling the money into court after the sheriff has distributed the fund. *Tisch v. Raisch*, 7 Kulp 131.

115. Where an assignor for creditors had, before the assignment, paid off certain instalments of an amount charged against his real estate, and his wife claimed to be subrogated to the lien for said instalments upon the allegation that they had been paid with her money; it was *held*, that the evidence not being sufficient to establish a resulting trust in her favor, she was a mere volunteer and not entitled to subrogation; and it was further *held*, that she, having declared to a subsequent lien creditor before he advanced his money that the land was unincumbered, was estopped, upon distribution of the assigned estate, from asserting to the contrary. *Müller's Estate*, 8 Lanc. 145.

116. Where a distribution is made by executors in good faith in accordance

with the agreement of the widow, she is estopped from afterwards contesting such distribution. *Risher's Estate*, 40 P. L. J. 131.

117. Where a decedent was surety on a note, it was *held*, that his estate was not discharged and the holder of the note was not estopped from asserting his claim against the surety's estate by reason of the fact that when he was paid another claim, he stated that that was all the claim he held against the estate, there not having been a settlement of the estate upon the faith of such statement. *Strominger's Estate*, 6 York 140.

118. Where a married woman obtained insurance upon a stock of goods and the policy did not state her sex or her Christian name, her agent representing "Mr. F." as a successful business man and the company believed that it was insuring the property of a man of business; it was *held*, that there was such fraud as would justify the company in disaffirming the contract even after a loss where the fraud was not discovered until after the fire; it was further *held*, that the company was not estopped from setting up the defence by the fact that, pending negotiations, the wife made out proofs of loss and sent them to the central office and received a reply addressed "R. F., Madam" and calling her attention to a defect in the proof but not admitting liability; such reply did not justify the court in submitting the question of waiver to the jury. *Freedman v. Fire Association*, 168 P. S. 249; s. c. 36 W. N. C. 353.

(g) Certificate of no-defence.

119. A *feme sole* trader giving a certificate of "no defence" as to her mortgage, is estopped thereby. *Hedden's Appeal*, 17 Atlan. 29.

120. Where a purchase money mortgage is made by two persons and an assignee of the mortgage before taking it inquires of one of the mortgagors and is assured that the mortgage is all right, such mortgagor is afterwards estopped from denying the validity of the mort-

gage, but such estoppel does not operate as against the other mortgagor. *Work v. Darby*, 13 C. C. 269.

(h) Acquiescence.

121. A secured creditor who advises a general assignment and stands by and suffers a settlement at fifty cents on the dollar, is estopped from asserting the balance of his claim against the assignee. *Cran's Appeal*, 9 Atlan. 282. See *Robb v. Van Horn*, 150 P. S. 508.

122. Giving a note with full knowledge that the goods are of less value than represented, estops the maker from setting up a failure of consideration. *Graham v. Hull*, 8 C. C. 202.

123. A non-releasing creditor, who participates in a transaction with his debtor and other releasing creditors, by which a *chose in action* is transferred by the debtor to the latter, is estopped from subsequently attaching the said *chose in action* in the hands of the person owing the same. *Boyd v. Smith*, 128 P. S. 205.

124. A plaintiff who does not object to the entertainment at dinner of arbitrators by the defendant, is estopped from moving to set aside the award on that account. *Bean v. Hunsberger*, 7 Montg. 17.

125. Where an agreement of composition was to be void if not signed by all the creditors, and the debtor's property was placed in the hands of a trustee for sale and distribution, a creditor was not estopped from treating the agreement as void for non-compliance of the condition, by reason of his neglect to give such notice at the sale. *Artman v. Truby*, 130 P. S. 619.

126. To establish title by *estoppel in pais*, *encouragement* in improvements is only necessary where the party is ignorant; but knowledge creates duty to speak, and where that exists, silence or *acquiescence* is enough to estop. *Logan v. Gardner*, 136 P. S. 588; s. c. 26 W. N. C. 497. See *Logan v. Gardner*, 142 P. S. 442.

127. It is beyond the scope and power of the cashier of a private bank (himself a partner) to enter credits upon the bank-

book of a depositor without any check, bill or note being presented for discount; but if he enter the credits on the books of the bank, and the depositor be permitted to draw the money, the bank is estopped from setting up the want of authority in their cashier; otherwise as to credits not entered on the books of the bank though duly entered on the depositor's pass-book. *Williams v. Dorrier*, 135 P. S. 445.

128. One who shares in the distribution of the assets of an estate, is estopped from subsequently claiming that certain of the assets were her personal property. *Patterson v. Dushane*, 137 P. S. 23; s. c. 27 W. N. C. 41.

129. Where the agent of a railroad company procured the grant of a right of way and knew at the time that another than the grantor was the real owner; it was *held*, that such real owner was not estopped from asserting his title, though, by words or silence, he may have encouraged the execution of the grant and allowed the company to construct and operate its road for years without objection. *Richards v. Buffalo, N. Y. & P. R. R. Co.*, 137 P. S. 524.

130. In replevin for timber alleged to have been sold conditionally to defendant's assignor for creditors, it was *held*, that the fact that plaintiff was present at a creditors' meeting and did not then assert his title, did not amount to an estoppel. *Collins v. Houston*, 138 P. S. 481.

131. Where a fire policy gave the company the right to elect within thirty days after the completion of the proofs of loss, whether to rebuild or pay the loss, and the proofs were returned for correction to the assured who, after some delay, made the correction asked for, without objection; it was *held*, that he was estopped from saying that they were complete as originally supplied. *Kelly v. Sun Fire Office*, 141 P. S. 10.

132. Where a bailee's personal property was seized as the property of the bailee at the suit of the latter's creditors and

sold to innocent purchasers; it was *held*, that the bailors, who gave no notice of their claim until nearly two years after the sale, might be estopped from asserting their title. *Greenhoe v. College*, 144 P. S. 131.

133. Where an oil and gas lease was made for the term of one year and as long as oil or gas was found in paying quantities, and the lessee drilled a well during the year, but failed to develop in paying quantities; it was *held*, in trespass against the lessee for entering to prosecute further drilling after the year had expired, that if the lessor, before the alleged trespass, encouraged and allowed the expenditure of money and labor in operations on the lease on the basis of its continuance, he was estopped from asserting that the lease was then at an end. *Riddle v. Mellon*, 147 P. S. 30.

134. Where a creditor assists in the organization of a joint-stock company by his debtors and others, and subsequently, as arranged beforehand, receives the bonds of the company in payment of the indebtedness, he is estopped from alleging a defective organization so as to hold the members liable as general partners. *Allegheny Nat. Bank v. Bailey*, 147 P. S. 111.

135. Silence is equivalent to acquiescence, only when there is a duty to speak. *Koch's Estate*, 148 P. S. 159.

136. Where buildings are erected upon a public street, the persons erecting them must be conclusively presumed to know that they are wrong-doers, and in such a case nothing short of acts of encouragement will estop an adjoining owner from complaining of the erection. *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 P. S. 18.

137. Where a vendor of land brought an equitable ejectment which resulted in a conditional verdict which was complied with by the defendant and a deed made to him; it was *held*, that the acceptance by the parties of the verdict and deed was a final settlement between them, and that thereafter all the vendee's rights and

privileges, under the original article of agreement, ceased. *Bascon v. Cannon*, 158 P. S. 225.

138. Where a person who has a claim to land, sees another enter into possession under the belief that he was taking a clear title, and sees him expend a large sum of money in improvements and gives no notice of his claim, he, and those claiming under him, are estopped from setting up his title as against such other person. *Wahl v. Pittsburgh & Western Ry. Co.*, 158 P. S. 257.

139. Parties who appear and contest upon an application for the incorporation of a borough, are estopped from subsequently objecting to the form of published notice of intention to apply for incorporation. *Taylor Borough*, 160 P. S. 475.

140. Where a wife's will was read to her husband and she left everything to her children, and she gave him a check for two hundred and fifty dollars, which he accepted, and expressed himself satisfied with the will in his wife's presence before she executed it; it was *held*, that he was estopped from claiming against the will. *Osmond's Estate*, 161 P. S. 543.

141. Where the plaintiff and his father were tenants in common of one farm and the plaintiff held title to an adjoining farm, and the father, being ill, proposed to make a will by which the plaintiff should retain the second farm and release the first farm to his sister, and the plaintiff acquiesced in this arrangement and persuaded his father that a will was not necessary, and the father died without leaving a will and the plaintiff's sisters remained in possession of the first farm and made valuable improvements; it was *held*, that the plaintiff was estopped from asserting any title to the land in the possession of his sisters. *Lewis v. Baker*, 162 P. S. 510.

142. Where it was sought to surcharge an administrator with a debt alleged to be due by the decedent's son to his father, which the accountant had failed to collect, and it appeared that the only evidence of

the debt was contained in a ledger of the decedent which was not a book of original entry, and the son disputed the debt and was silent while the question of his indebtedness to the estate was discussed; it was *held* to be error to surcharge the accountant with the amount of the alleged debt, and it was further *held*, that the presence and silence of the son at the audit did not justify the court in setting off the alleged debt against his share of his father's estate. *Huston's Estate*, 167 P. S. 217.

143. Where a defendant was improperly convicted of peddling, before a justice who refused to take bail, and the defendant then paid the fine under protest and in order to save himself from going to jail; it was *held*, that such payment was under duress and did not estop the defendant from contesting the proceedings on *certiorari*. *Comm'th v. Horn*, 12 C. C. 284.

ESTREPEMENT.

See WASTE.

EVICITION.

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EVIDENCE.

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- (a) Leading questions.
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- (c) Refreshing the memory of a witness.
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LI. Credibility of witnesses.

- (a) General principles.
- (b) How a witness may be discredited.
- (c) How a witness may be sustained.

LII. Sufficiency of evidence.

I. General principles.

1. An allegation of fraud offers a wide door to the admission of evidence. *De Wolf v. McNabb*, 1 Atlan. 440; *Pfeil v. McCallin*, Ibid. 654.

2. Where pertinent evidence is within the control of a party whose interest it would be to produce it, and without satisfactory explanation he fails to produce it, the jury may draw an inference that the evidence would be unfavorable to him. *Hall v. Vanderpool*, 156 P. S. 152.

II. Of what the courts will take judicial notice.

3. The court will take judicial notice of the days of the week. An almanac, though not offered in evidence, may be used by counsel to show that a certain day of the month came on Sunday. *Wilson v. Van Leer*, 127 P. S. 371.

4. Upon *certiorari* to a justice's judgment for a penalty, the court will take judicial notice of the divisions of the county into boroughs and townships. *Stroudsburg Borough v. Brown*, 11 C. C. 272.

5. Where the court has knowledge that a town elects municipal officers and acts as

a *de facto* corporation, it will take judicial notice of the fact that it is a municipal corporation. *Monongahela City v. Monongahela Electric Light Co.*, 12 C. C. 529.

6. The public seal of a state is recognized by the law of nations and is presumed to be known by all courts of all other states by whom the law of nations is recognized. *Moul's Estate*, 1 York, 185.

7. The courts will not take judicial notice of a city ordinance; an ordinance must be pleaded like any other matter of fact, and its terms specifically set out; a mere reference to it in pleading is insufficient to bring it before the court. *Comm'th v. Chittenden*, 13 C. C. 362.

IV. Foreign laws.

8. The invalidity of a marriage of a minor in Ohio may be shown by its statutes and laws. *Easley v. Comm'th*, 11 Atlan. 221.

9. In an action by a wife for trespass as to her personal property in this state, where she is a non-resident, the laws of her state affecting the question of her ownership and her right to sue for trespass in her own name will be assumed to be the same as our own, unless shown by competent evidence to be different. *Bolinger v. Gallagher*, 144 P. S. 205.

10. The construction of a statute of another state by the courts of that state, may be shown either by one familiar with, or by the published reports of, the decisions made by such court, or both methods may be used in the same case. *Bollinger v. Gallagher*, 163 P. S. 245. See s. c. 170 P. S. 84.

11. The laws of another state must be proven as any other fact, and may be shown by a printed volume of its statutes; when this is not done, the presumption is that the laws of such other state are the same as the laws of this state. *Overseers of Braintrim v. Overseers of Windham*, 10 C. C. 250.

12. Foreign laws cannot be proved by an *ex parte* certificate of counsel learned in the law of the foreign country, but not

made under official authority. *Coleman's Estate*, 13 C. C. 81.

13. In a proceeding in this state, foreign law is a question of fact, and may be assumed to be as set forth in an answer to a petition. *Harlan's Estate*, 16 C. C. 51.

14. An action may be brought on a judgment of another state notwithstanding an appeal has been taken from such judgment in such state; such appeal can only be a *supersedeas* to an execution; whether it is a *supersedeas* to an execution in this state depends upon the law of the state in which the original judgment was entered, which may be proved by a printed copy of the statutes. *Wood Harvester Co. v. Berry Mower & Reaper Co.*, 6 Del. 101.

15. The great seal of the Cherokee Nation, attached to a paper purporting to be a copy of a law of said nation, is in itself a sufficient authentication of such a paper to make it admissible in evidence; and this, notwithstanding the absence of evidence of the authority of the certifying officer. *Moul's Estate*, 1 York 185.

See CONFLICT OF LAWS.

JUDGMENT, VI. (g).

V. Records.

16. The record of the conviction of a third person of adultery with the plaintiff in an ejectment, is not evidence against her, she not being a party to the criminal proceedings. *McKendry v. McKendry*, 131 P. S. 24.

17. The exemplification of a record under the act of congress of 26 May 1790 is not admissible, where the judge's certificate fails to set forth that the attestation of the clerk is in due form. *Dimmick v. Leath*, 5 Kulp 255.

18. An exemplification certifying "that among the records in the office of the clerk of the orphans' court it is thus contained," is not admissible in evidence. *Larned v. Sharpe*, 5 Montg. 31.

19. In a suit by a distributee of a decedent's estate against one who has received the plaintiff's share from the executor,

upon papers fraudulently obtained from the plaintiff, the orphans' court record showing the dismissal of the plaintiff's exceptions to the credit taken by the executor, is inadmissible in evidence, it appearing that the money was paid in good faith and without notice of the fraud. *Brooks v. First Presbyterian Church*, 135 P. S. 137.

20. The records and proceedings for specific performance under and by virtue of which defendant acquired title are admissible in evidence in ejectment, and parol evidence is not admissible to contradict the record in order to show that one of the plaintiffs had no guardian. *Cochran v. Sanderson*, 151 P. S. 591.

21. The record of a trial is inadmissible in evidence where the stenographer's notes do not appear and the only evidence of their loss is the testimony of the stenographer's successor, that she could not find the notes, without stating that she had made search for them anywhere. *Susquehanna Mutual Fire Ins. Co. v. Mardorf*, 152 P. S. 22.

22. It is not necessary that the acts of a municipal corporation must be proved by its records or some written document. *Bohan v. Avoca Borough*, 154 P. S. 404.

23. Assessment books and tax receipts cannot prove title in ejectment, but they are some evidence of claim and are more or less efficient as a basis of inference. *Irwin v. Patchen*, 164 P. S. 51.

24. Where a jury in the common pleas decided in an issue *devasavit vel non* that the paper was not intended as a will, and the judgment on the verdict was sustained by the supreme court, as there was no question raised upon which they could reverse it, the court being of the opinion, however, that the paper was testamentary, but no return was made to the orphans' court from the common pleas and no final decree was made by the orphans' court vacating the probate, and subsequently the contestants brought an action of ejectment against the proponent; it was *held*, that the court below improperly admitted in evidence the record of the

common pleas, but as the view of the supreme court on the whole case would prevent the orphans' court from ever making a decree vacating the probate, the supreme court, in reversing the judgment for plaintiffs, refused a new *venue*. *Tozer v. Jackson*, 164 P. S. 373. See *Jackson v. Tozer*, 154 P. S. 223.

25. The authenticated records of a lunacy proceeding in a foreign state will be received as proof of lunacy in this state. *In re Linton*, 29 W. N. C. 550.

26. In an action of slander, the township assessment books are not evidence of the defendant's circumstances. *Mitchell v. Hendrix*, 3 York 5.

X. Certificates of public officers.

27. A certificate of the registrar-general of Scotland must have some evidence to show by what authority it was given; it does not prove itself. *Simpson's Estate*, 4 Del. 129; s. c. 1 Lack. Jur. 193.

28. The certificate of a justice that an oath was duly administered, though not conclusive, is not to be overturned except upon clear proof to the contrary. *O'Day's Contest*, 5 Kulp 491.

29. Where proof of an assignment for creditors in a foreign state consisted of a certified copy of the act and warrant of confirmation of the trustee of the sequestered estate showing that the trustee had power to recover the effects of the estate, and the certificate of the consul that the act and warrant was evidence of the title of the trustee to the property wherever situate, and such proof was admitted by agreement of counsel, it was not error to refuse to strike it out. *Long v. Girdwood*, 150 P. S. 413; affirming s. c. 28 W. N. C. 299.

30. In an action for personal injuries alleged to have been caused by the failure of defendant to provide a proper fire escape, a certificate issued by the board of fire escapes after the fire is not admissible in evidence. *Sewell v. Moore*, 166 P. S. 570.

XII. Maps, surveys and photographs.

31. Upon the question of public user of a borough street, a map not proven by the surveyor who made it, nor accompanied by the original draft, was held to be improperly admitted in evidence. *Comm'th v. Switzer*, 134 P. S. 383; s. c. 26 W. N. C. 46.

32. Where a civil engineer who has made a map for the plaintiff, which is offered in evidence, testifies in chief to its correctness, and to the location of certain objects marked upon it, he may be cross-examined as to other points and distances of the locality upon the same map. *Derk v. Northern Central Ry. Co.*, 164 P. S. 243.

33. Where a bill was filed by a city to restrain the maintenance of a private fence, as an obstruction to a dedicated public street, and there was no evidence of dedication other than that the street was called for in certain lithographic maps and in certain unrecorded contracts, and it appeared that the land, over which the street was claimed to run, had been conveyed by the owner in lots according to a recorded plan whereon the alleged street did not appear; it was held, that the bill for an injunction was properly dismissed. *Scranton v. Thomas*, 141 P. S. 1; affirming s. c. 2 Lack. Jur. 1.

34. A topographical survey made under the act 23 May 1889 (Brightly's Purdon 1571), is conclusive of nothing, and is of no authority until finally confirmed by the proper court. *York v. Wilhelm*, 5 York 17.

35. Upon the trial of one of several defendants for the larceny of money from a bank, the photograph of one of the other defendants is admissible to prove the fact, in connection with other testimony, that the defendant stole the money, while the original of the photograph occupied the attention of the bank officer. *Comm'th v. Connors*, 156 P. S. 147.

36. In an action for damages for the

castration of plaintiff's colt; it was held, that photographs were admissible to show the present appearance of the colt. *Conrad v. Richter*, 13 C. C. 478.

XIII. Deeds.

37. An ancient deed from one in whom no title is shown, to a person under whom the plaintiff claims, is admissible to exhibit color of title, when followed by proof of actual possession for the statutory period. *Olewine v. Messmore*, 128 P. S. 470.

38. Where an ancient deed was executed by a committee and it came from the proper custody, and it appeared that possession had been taken and held under it and rent paid under it; it was held, that its recital was *prima facie* evidence that the committee was duly appointed and duly authorized to lease the land. *Providence School Fund v. Jessup*, 6 Kulp 251.

39. A certificate of acknowledgment to a deed dispenses with the common-law proof of execution; and this, notwithstanding a notice that proof of execution would be required. *Sutherland v. Ross*, 140 P. S. 379; affirming s. c. 6 Montg. 203. See s. c. 160 P. S. 29.

40. Where a deed is admitted without objections, it must speak for itself, and if, when examined, it does not corroborate the stenographer's notes of the alleged statement of counsel as to its effect, such statement noted will not overcome the language of the deed. *Thompson v. Ridelsperger*, 144 P. S. 416.

41. Where a deed was offered in evidence as the deed of Samuel S. Jenkins, and it was signed and acknowledged by him; it was properly admitted, though in one of its clauses the name of the grantor appeared as Samuel S. Jones. *Jenkins v. Jenkins*, 148 P. S. 216.

42. Where land was conveyed to a married woman, and the deed provided that after her death the land should vest in her two sons, subject to the payment by them of eight hundred dollars to

the mother's representatives, and subsequently the mother divided the land between her two sons and put them in possession; it was *held*, in an action of assumpsit to enforce the charge on the land, that the deed, and the writing signed by the mother at the time she divided her property between her sons, were properly admitted in evidence and that the plaintiff was entitled to recover. *Wulb v. Snyder*, 155 P. S. 167.

XV. Proof of written instruments.

43. Where a proper but unsuccessful search is made for a subscribing witness to a paper, who has no fixed residence at the time the case is down for trial the first time, it is not necessary to make a second search when the case is subsequently down for trial. *Gallagher v. London Assurance Corporation*, 149 P. S. 25; reversing s. c. 5 Kulp 467.

44. Whether, instead of placing the subscribing witnesses on the stand or accounting for their absence, a paper may be proved by calling the party who executed it, was not decided. *Gallagher v. London Assurance Corporation*, 149 P. S. 25; reversing s. c. 5 Kulp 467.

45. A court may make a rule allowing a written instrument, on which suit is brought, to be admitted in evidence without proof of execution, when such execution has not been denied or notice given that such proof would be required. *Medary v. Cathers*, 161 P. S. 87; affirming s. c. 8 Montg. 123.

46. In an action upon coupons, where no affidavit has been filed denying proper execution as provided by rule of court, evidence will not be admitted that the coupons were not properly executed. *Roberts v. Iron Car Equipment Co.*, 161 P. S. 348.

47. In an action upon coupons, it is not necessary to prove the execution of the mortgage, particularly where a rule of court providing for an affidavit denying the execution of a writing sued upon has not been complied with. *Conshohocken*

Tube Co. v. Iron Car Equipment Co., 161 P. S. 391.

48. Where one of the parties to a written instrument testifies to the fact of the execution by himself and the other party, and that both the subscribing witnesses are dead, and that he had some acquaintance with the handwriting of one of the witnesses from having seen him sign for him, and that he had seen some of the handwriting of the other witness, who wrote the paper in question, which the witness signed, the evidence is sufficient to justify the admission of the paper. *Irwin v. Patchen*, 164 P. S. 51.

49. In Philadelphia, under the rules of court, where the plaintiff files a copy of the instrument in writing sued upon, and the defendant does not deny by affidavit its execution, formal proof at the trial is not necessary. *Brock v. Watson*, 10 C. C. 182; s. c. 28 W. N. C. 273.

50. Where a written instrument is in the possession of an adverse party, its contents cannot be proven by parol, without a previous notice to produce the paper. *Hummer v. Laucks*, 8 York 38.

51. If an alteration or interlineation of an instrument is of such a character that it will be presumed to have been made before execution, it is entitled to be read in evidence; it is for the other side to attack it. *Weaver v. Painter*, 3 Cent. 259.

See ALTERATION.

EVIDENCE, XVII., XXXVI.

XVII. Handwriting.

52. Upon an issue to ascertain the genuineness of a signature, the plaintiff's case cannot be made out by merely producing the paper when it is over thirty years old, and having it admitted as an ancient document. *York Trust, Real Estate & Deposit Co. v. Kindig*, 7 York 149.

53. An expert may testify as to his belief whether a signature be natural or feigned, simulated or forged; but such testimony will not overcome the positive testimony of persons testifying from their own

knowledge of the transaction. *McKinney v. Nolf*, 9 Cent. 804.

54. An expert cannot state his conclusions from a comparison of a genuine signature and the one in suit; such comparison must be made by the jury. *Ibid.*

55. The competency of a witness to testify to handwriting is a matter clearly for the court, there being no evidence raising any question as to the truth of the facts stated. *Wilson v. Van Leer*, 127 P. S. 371.

56. A witness was permitted to testify to the handwriting of a testator to a will, though he had seen him write his name but twice to letters thirty-two years before, and once on a check twenty-three years before. *Ibid.*

57. Where a witness has testified that he saw a signature of the defendant, which the defendant admitted to be genuine, he is competent to give his opinion as to the genuineness of the defendant's signature upon the note in suit. *Second Nat. Bank v. Wentzel*, 151 P. S. 142.

58. Evidence as to the genuineness of a paper may be corroborated by a comparison, to be made by a jury or auditor, between it and other well-authenticated writings of the party; but mere experts will not be permitted to make the comparison and then to testify to their conclusions from it. *Rockey's Estate*, 155 P. S. 453.

59. Under the law of this state all comparison of handwriting must be for the jury; an expert as to handwriting must testify from an inspection of the alleged signature itself, and not from a comparison of the same with genuine signatures, nor from any previous acquaintance with the handwriting of the testator; he cannot show the essential characters of the genuine signatures and the essential characters of the disputed signatures, and by the measurement of spaces and angles demonstrate conclusions therefrom. *Miles's Will*, 4 Dist. Rep. 179.

60. Upon the trial of an indictment for forgery, the duty of comparing the genuine signatures with the alleged forgery is

exclusively for the jury. *Comm'th v. Stokes*, 4 York 187.

61. In an action upon a bond of a testator, where the testator's signature to the bond is denied, the heirs and legatees of the testator are competent witnesses to testify concerning the genuineness of his signature; they may testify to a present opinion based on a test paper and compared with a mental exemplar formed from previous opportunities of observation, such evidence not being in the nature of matters occurring in the lifetime of the testator, but of a fact existing after his death. *York Trust, Real Estate & Deposit Co. v. Kindig*, 7 York 149.

62. Upon an allegation of a forged signature, if the court leave the genuineness to the jury, it is not error to call the attention of the jury to the paper and ink, and that the signature is forced and cramped as an imitation and not genuine. *Hulett v. Patterson*, 8 Atlan. 917.

63. Where the issue is one of forgery in an issue to determine the genuineness of a judgment note; it is competent for the defendant to show that the plaintiff had in her possession, a few days before the entry of the judgment, other notes bearing the signature of the same maker, but in blank as to dates and amount; and where the plaintiff testified that the note was signed on a Thursday and that she knew it was a Thursday because she had looked at the almanac, it was proper to ask her on cross-examination why she looked at the almanac. *Thomas v. Miller*, 151 P. S. 482; s. c. 165 P. S. 216.

64. Where the issue is whether certain papers are forged or not, evidence is admissible of the forging of other papers of the same kind in order to demonstrate the means and the individual by which the forgery was effected; evidence is admissible to show that the desk of the alleged forger contained a genuine signature of the alleged maker torn from his ledger, and that in the same desk were other completed and partly completed signatures imitating the genuine signatures, and such signatures are admissible.

Pennsylvania Company for Insurance on Lives and Granting Annuities v. Philadelphia, Germantown & Norristown R. R. Co., 153 P. S. 160; affirming s. c. 11 C. C. 482.

65. In an action for deceit the scienter must be proven; where the defendant certified to the correctness of a signature of a check, which was in fact forged, and he testified that he had seen the depositor write and was familiar with his signature, and that his statement to the cashier was based upon the belief founded upon such knowledge; it was *held*, that letters of the depositor were admissible in evidence, as the resemblance of the genuine writing to the forgery went directly to the question of defendant's good faith. *Lamberton v. Dunham*, 165 P. S. 129.

66. Upon a claim upon a promissory note against a decedent's estate, where the signature of the decedent is proven by a witness who saw him sign it and its genuineness was testified to by a daughter of the decedent and her husband, and the only testimony to the contrary is that of expert witnesses; it was *held*, that the evidence was sufficient to warrant a finding that the notes were genuine. *Patterson's Estate*, 166 P. S. 119.

67. Upon an issue as to the genuineness of a paper, it was *held* to be no ground for a new trial that some of the test papers bore date long after the date of the bond in suit, or that many of the witnesses became acquainted with the testator's signature at a comparatively recent date. *York Trust, Real Estate & Deposit Co. v. Kindig*, 7 York 149.

68. Upon a question of simulated handwriting, a composite photograph of several genuine signatures cannot be put in evidence for the purpose of comparison with the disputed signature. *Vanderslice v. Snyder*, 4 Dist. Rep. 424.

XVIII. Proof of lost instruments.

69. A party claiming under a lost deed from a married woman must prove that

it was properly acknowledged under the statute. *Logan v. Gardner*, 136 P. S. 588; s. c. 26 W. N. C. 497. See *Logan v. Gardner*, 142 P. S. 442.

70. In ejectment, where the plaintiff claimed title under deeds to his ancestor alleged to have been lost and unrecorded, and no effort was made to find and produce them; it was *held*, that evidence of the contents of the deeds was inadmissible. *Heller v. Peters*, 140 P. S. 648.

71. Where the plaintiff testified that he had written and mailed a letter to the defendant and had received a reply from defendant's son, on his behalf, which was lost, and the son was present in court and there was no proof of his authority to write the answer or of the receipt of the original letter by the defendant; it was *held*, that proof of the contents of the lost letter was properly rejected. *Yost v. Mensch*, 141 P. S. 73.

72. Where a note had been made for the accommodation of the payee and the indorser, and suit is brought upon it against the maker, the note not being produced, the maker is entitled to protection against the possibility of the note being found thereafter in the hands of an innocent holder for value; but this protection can be given by restraining execution until indemnity is given. *West Philadelphia Nat. Bank v. Field*, 143 P. S. 473.

73. Where the note in suit had been surrendered upon the receipt of another note which was forged, and the defendant, when spoken to concerning the note in suit and his signature thereto, had replied that the note was all right; it was *held*, that the evidence was sufficient to warrant the jury in finding that defendant's signature was genuine. *West Philadelphia Nat. Bank v. Field*, 143 P. S. 473.

74. In an action to enforce the specific performance of a written contract which is lost, the precise terms of the whole agreement must be proved by the most clear and indisputable evidence. *Van Horn v. Munnell*, 145 P. S. 497.

75. Where secondary evidence of a lost deed is offered and received without objection, it cannot afterwards be objected that the loss of the deed had not been shown. *Lehigh Valley Coal Co. v. Ward*, 149 P. S. 119.

76. The contents of a lost deed may be proved by parol, in an action to recover a charge on the land created by the deed. *Gorgas v. Hertz*, 150 P. S. 538.

77. The supreme court will not reverse the ruling of the trial judge as to the sufficiency of the search for a lost deed, unless the proof is manifestly insufficient. *Gorgas v. Hertz*, 150 P. S. 538.

78. The record of a trial is inadmissible in evidence where the stenographer's notes do not appear and the only evidence of their loss is the testimony of the stenographer's successor, that she could not find the notes, without stating that she had made search for them anywhere. *Susquehanna Mutual Fire Ins. Co. v. Mardorf*, 152 P. S. 22.

79. An order refusing to open a judgment will not be reviewed by the supreme court, where the plaintiff's testimony is not brought up with the record; where such testimony has been lost or mislaid, it must be supplied in the proper way. *Humphrey v. Tozier*, 154 P. S. 410.

80. Where a paper enumerating certain bank stock to be levied upon, was placed in the hands of the sheriff at the time a writ of execution was issued, and the sheriff made the levy but left the stock in the possession of the debtor, and the list of stock was lost; it was *held*, upon the distribution of the assigned estate of the debtor, that parol evidence was admissible to prove the contents of the paper which was lost. *Braden's Estate*, 165 P. S. 184.

81. Where the stenographer, who took the evidence, died before writing out his notes, and no one was able to translate the same; it was *held*, upon appeal, that the evidence might be supplied in the same way that lost or destroyed records are supplied. *Walter v. Sun Fire Office*, 165 P. S. 381.

82. To establish a lost paper, the contents must be proved by evidence so complete and accurate that no doubt shall be left of its character and scope; where the witness was unable to give the date of the instrument or the name of the subscribing witness, and did not know the handwriting of any of the parties and could not say whether she learned the amount which the paper purported to represent from an inspection of the document or from the declarations of a decedent; it was *held*, that the contents were not sufficiently proven. *Bolton's Estate*, 14 C. C. 575.

83. In order to convert into a mortgage a deed absolute on its face and executed prior to the act 8 June 1881 (Brightly's Purdon 651), where the defeasance, though in writing, is not recorded, or to create a parol secret trust as against such deed, the evidence must be clear, precise and indubitable; the plaintiff's testimony alone contradicted by the defendant is not sufficient; where an attempt was made to set aside such a deed on the ground of an alleged written agreement between the sheriff's vendee and the debtor, which had been subsequently lost; it was *held*, that the plaintiff could not give his opinion as to the legal effect of such an agreement unless he could recollect all its contents and the exact terms upon which a reconveyance was to be made. *Burr v. Kase*, 168 P. S. 81; s. c. 36 W. N. C. 284.

84. Where a deed had been lost, it was *held*, that the testimony of one witness stating the delivery of the deed to him duly executed, and corroborating testimony of other witnesses as to the deed being in his possession, were sufficient preliminary proof to admit the proving of the contents of such deed. *Brandt v. Spahr*, 3 York 163.

85. A petition for the proof of a lost deed under the act 28 March 1876 (Brightly's Purdon 650) should set forth the names of all the parties in interest, the character of their interest, their residences if known, and if unknown

should state that fact, and the proof of the contents should disclose the terms of the conveyance and identify the property to a degree sufficient under the statute of frauds, in a memorandum of sale. *Good's Petition*, 1 Dist. Rep. 569.

86. Where a building contract provided that the contractor should allow the net value of the material of an old building which was torn down, the said value to be reckoned at the amount stated in the bid, and the bid was in writing, but had been lost or destroyed by the defendants, and there was no written evidence of the amount the contractor had agreed to allow for the old material; it was *held*, that he might show that his bid was in excess of the amount stated in the contract, and that he wrote below his bid that he allowed the excess for the old building. *Lilly v. Person*, 168 P. S. 219.

87. As to secondary evidence of the contents of lost instruments, see note to *Love v. Dilley*, 4 Atlan. 293.

See EVIDENCE, XV., XXXVI.

XXII. Accounts and inventories.

88. Where upon a contract for grading, the plaintiffs kept no books, but rendered bills upon surveyor's estimates; it was *held*, that the last bill for a "balance due" was properly admitted as *prima facie* evidence of the amount due. *Buckley v. Maryland Paving Co.*, 132 P. S. 572; affirming s. c. 4 Del. 137.

89. In an action of account render by the principal against the executor of an attorney, a statement of the attorney's accounts relating to his client's business in his own handwriting is admissible for the plaintiff, and it need not be shown to have been communicated by the attorney to the plaintiff or his agent. *Johnston v. McCain*, 145 P. S. 531.

90. On the taking of an account as to the value of a partnership interest sold to plaintiffs at a sheriff's sale, an inventory of stock taken just before the sale, proved only by the testimony of a witness who found it in the partnership's

safe two years after the sale, is inadmissible. *Crawford v. Shriver*, 139 P. S. 239.

XXIII. Book entries.

91. A book, though it contains entries copied from a temporary order book, is, if otherwise competent, admissible as a book of original entries. *Nulton v. Baum*, 9 Cent. 797.

92. A book containing memoranda or statements of amounts due, though not offered as a book of original entries, may be received as corroborative of parol evidence. *Charles v. Bishoff*, 1 Atlan. 572.

93. A copy of a book of original entries, verified and filed with the statement, may be made by rule of court *prima facie* evidence of the plaintiff's claim. *Nulton v. Baum*, 9 Cent. 797.

94. A claim against a decedent's estate may be proven by the decedent's own entries in the books of the claimant, showing that he, the decedent, had taken money of the claimant without right. *Roberts's Appeal*, 126 P. S. 102.

95. A book account of an executor against the estate, running back forty years, not being one of the original entries, is not admissible to prove a claim against the estate. *Geiger's Appeal*, 1 Mona. 547; s. c. 24 W. N. C. 264.

96. The discharge of a debt cannot be shown by entries of payments by the debtor in his own books, which the other party never saw, nor had the opportunity of seeing. *Haines's Appeal*, 2 Cent. 341. See note to *Rockhill v. Rockhill*, 14 Atlan. 762.

97. In a suit by a bank against an officer and stockholder, its books, of which the defendant had in his power the inspection and supervision, are evidence against him. *Montgomery v. Exchange Bank*, 5 Cent. 261.

98. In a suit by an administrator against an administrator, a son and heir at law of the plaintiff's intestate is a competent witness to prove that a book was one of his father's books of original entry, and that

certain accounts therein are in his father's handwriting. *Keener v. Zartman*, 144 P. S. 179.

99. An account of a year's farming by the plaintiff's intestate made up the year thereafter and entered on a blank page of an old copy book containing no other accounts and signed by the defendant's intestate, was *held*, to be not such a book entry as is admissible on the part of the defendant as evidence of set-off or payment. *Keener v. Zartman*, 144 P. S. 179.

100. In an action by the superintendent of a corporation for a balance of salary, where he testified that the general manager agreed that his salary should be ten thousand dollars but directed that his salary be credited on the books at seven thousand dollars, and that the other three thousand dollars should be charged to the expense account kept at the general office; it was *held*, that the book entries and accounts kept under his own supervision were strong proof of a contract to serve at a salary of seven thousand dollars, but that they did not in any proper sense constitute a written contract which could not be varied or affected by parol evidence. *Chapin v. Cambria Iron Co.*, 145 P. S. 478.

101. Entries in a firm's books showing credits of dividend after the alleged withdrawal of a partner, may be explained by the testimony of book-keepers, that they were made as a matter of book-keeping so as to gradually cancel the indebtedness of the partner. *McConomy v. Reed*, 152 P. S. 42; affirming s. c. 9 Lanc. 65.

102. Where an employee is shown to have accepted wages from week to week for a period of months at a rate in accordance with his own returns of time, the jury should not be permitted to disregard the necessary conclusion that he was to be paid according to time; the books and accounts between the employer and the employee are usually the best evidence obtainable of the contract. *Webb v. Lees*, 149 P. S. 15; s. c. 153 P. S. 436.

103. Where it was desired to show a change of proprietorship of a hotel by the

fact that the new proprietor used a new register; it was *held*, that the register itself should be produced in evidence and that parol evidence of the change of register was incompetent. *Grauley v. Jermyn*, 163 P. S. 501.

104. In a suit on a mechanic's lien by an administrator, where the defendant offered declarations of the plaintiff's decedent, that the claim was paid; it was *held*, that it was inadmissible for the plaintiff to prove an account book of the decedent showing another account, with an entry of payment, for the purpose of establishing that his declarations referred to the latter account and not to the one in suit. *Bowers v. Overfield*, 10 C. C. 273.

105. In an action by a wife for the levy and sale of her property on an execution against her husband, she must show that the property was hers, that it was paid for by her and was the product of the earnings of her individual business; in such an action the books, business sign and government returns are evidence to be considered upon the question of ownership. *Smith v. Aze*, 14 C. C. 532.

XXIV. Letters.

106. A letter is not admissible in evidence simply on proof that it was received by mail, the witness having no knowledge of the signature. *Sweeney v. Ten-mile Oil and Gas Co.*, 130 P. S. 193.

107. Letter-press copies of letters are inadmissible in the absence of proof that the originals were either mailed or received. *Huckenstein v. Kelly*, 139 P. S. 201; s. c. 38 P. L. J. 227.

108. The letter containing the alleged libel being sufficiently proved, and being complete in itself, it was of no importance that the envelope containing the letter was also admitted without sufficient evidence of its authenticity; the error was harmless. *Aspell v. Smith*, 134 P. S. 59.

109. In an action against a newspaper proprietor for libel, the proprietorship being denied, the testimony of the de-

fendant cannot be corroborated by a letter written by him to a third party at a previous time. *Crooks v. Bunn*, 136 P. S. 368; s. c. 26 W. N. C. 527; 47 L. I. 444.

110. In an action against two upon an alleged joint contract, a letter by one defendant to the other is admissible on the question of ratification. *Zoebisch v. Rauch*, 133 P. S. 532.

111. Where a seller undertook to replace defective parts and with the buyer's consent entered into a contract with another maker to supply them, the seller was entitled to a reasonable time to so supply them, and the contract between the seller and the third party was admissible in evidence, but not a letter from the latter to the buyer. *Muskegon Curtain-Roll Co. v. Keystone Manufacturing Co.*, 135 P. S. 132.

112. In an action against a corporation for salary, a letter written by the general manager to another officer of the company more than two months after the contract of employment, was held to be inadmissible, being no part of the *res gestæ*. *Chapin v. Cambria Iron Co.*, 145 P. S. 478.

113. In an action for rent, where the lessee alleges a parol agreement of the lessor to accept a surrender, a letter by the lessor inconsistent with such agreement is admissible in evidence. *Harvey v. Gunzberg*, 148 P. S. 294.

114. The depositing in the post-office of a properly addressed prepaid letter raises a natural presumption founded on experience that it reached its destination in due course of mail, but this *prima facie* proof may be rebutted by showing that it was not received. *Whitmore v. Dwelling House Ins. Co.*, 148 P. S. 405; *Jensen v. McCorkell*, 154 P. S. 323; affirming s. c. 2 Lack. Jur. 45.

115. A letter signed by defendant and received in due course in reply to a letter to him, and followed up by a visit from the person named in the letter as one who was to be sent on behalf of the defendant, is admissible in evidence. *Roe v. Dwelling House Ins. Co.*, 149 P. S. 94.

116. In an action for damages for breach of a contract to purchase stock, the acceptance by plaintiff of defendant's offer to purchase, alleged to be contained in a letter written by the plaintiff to defendant, which is not produced, is not proven by a letter from the defendant to plaintiff acknowledging the receipt of a letter from plaintiff "concerning stock" and containing a withdrawal of the offer and a suggestion that it might be renewed later. *Corser v. Hale*, 149 P. S. 274.

117. In an action on a building contract, where the defendant pleaded delay in the performance, and the plaintiff replied that the delay was caused by the defendant's delay in putting in a railroad siding; it was held, that a letter written by the plaintiffs to the defendants shortly after the execution of the contract, complaining of defendant's neglect, was admissible in evidence. *Huckestein v. Kelly*, 152 P. S. 629.

XXV. Receipts.

118. One who claims to be a *bona fide* purchaser for value, against an asserted trust or fraud, must prove the payment of the consideration; the receipt in his deed is not even *prima facie* evidence in such a case. *Ball v. Campbell*, 134 P. S. 602; s. c. 26 W. N. C. 330.

119. Where a judgment note was given to secure any sums previously advanced or which might be thereafter advanced, it was held, that checks and receipts showing payments of various sums of money both before and after the date of the judgment note, but not specifying on what account they were paid, were insufficient of themselves to establish an indebtedness, but having been admitted in evidence, the defendant might show that, prior to making the said payments, his decedent had deposited moneys in plaintiff's hands for investment or safe-keeping, and it was then for the jury to say whether the payments were made on account of such deposits. *McCain v. Peart*, 145 P. S. 516.

120. Where a creditor accepted from his debtor a certain amount in cash and the remainder in notes of third parties, and gave a receipt for the gross sum, and the creditor denied that he accepted the notes as an absolute payment; it was *held*, that the receipt was some evidence of the debtor's intention that it was a payment, but that it was a very feeble proof in support of such contention. *Shepherd v. Busch*, 154 P. S. 149.

121. A widow's receipts for arrearages of her dower, specifying the years for which it was given, extinguishes her title to dower for the years specified, and she will not be allowed to participate in the distribution of a fund arising from a sheriff's sale of the land, on which the dower is charged. *Fassett v. Frost*, 167 P. S. 448; s. c. 36 W. N. C. 272.

122. A receipt in full is *prima facie* evidence of a settlement and satisfaction of all demands of the kind referred to in it, but it is open to explanation by the party who has given it. *Leim v. Kaufman*, 15 C. C. 539.

123. Where a receipt was given for more than was actually received, the giver was *held* not to be estopped from recovering the excess. *Schroeder v. Waters*, 15 C. C. 561.

XXVI. Depositions.

124. The deposition of a witness, whose residence is in another state, may be read in evidence upon the trial of the cause, without showing an attempt to serve the witness with a subpoena. *Williams v. LeBar*, 8 Lanc. 182.

125. A deposition of a defendant will not be admitted, upon the trial of a case in Luzerne county, in the absence of evidence that his actual residence is more than forty miles from the county seat. *Keller v. Lahaugh*, 11 C. C. 633.

126. Depositions may be taken anywhere within the state, but they cannot be used upon the trial of the cause if the witness lives within forty miles, unless a subpoena has been taken out and

the witness duly subpoenaed or could not be found. *Bibbey v. Metropolitan Life Ins. Co.*, 3 Dist. Rep. 234.

127. Upon the trial of an issue *devastavit vel non* in the common pleas, the deposition of an infirm witness taken in the orphans' court on the application for the issue, was admitted in evidence. *Commonwealth Title Ins. & Trust Co. v. Gray*, 150 P. S. 255.

128. A deposition will not be rejected because a witness refused to answer a clearly incompetent question. *Burrows v. Davis*, 6 Lanc. 398.

129. The supreme court will not reverse for an error in the admission of a deposition, which, when read, was not prejudicial to the objecting party. *Depew v. Depew*, 2 Cent. 611.

130. Where portions of a deposition are competent, the admission of the whole deposition over a general objection is not error. *Martin v. Kline*, 157 P. S. 473.

131. Where the deposition of a witness has been taken, for the purpose of being read on the argument of a rule to open the judgment, it may also be read on the trial of the issue upon proof that the witness is dead or that he resides more than forty miles from the county seat. *Turner v. Laubagh*, 6 Kulp 368; s. c. 5 Del. 57.

132. Where the deposition of a party to a judgment was taken upon a petition to open the same after notice to the opposite party; it was *held*, that such deposition was admissible in evidence on the trial of an issue ordered to try the validity of the judgment; and this, although the party has since died and the other party cannot now testify to matters occurring in the lifetime of the witness whose deposition is offered. *Steele v. Nichols*, 3 Dist. Rep. 517.

133. Upon a trial for murder, evidence is admissible of the testimony of a deceased witness, taken before the committing magistrate in the presence of the accused and his counsel, the witness having been cross-examined by the coun-

sel for the accused, although the defendant had waived a hearing. *Comm'th v. Keck*, 148 P. S. 639. See *Comm'th v. Cleary*, 148 P. S. 26.

134. Where the defendant is dead at the time of the trial, the plaintiff's deposition taken in the defendant's lifetime is only admissible for the plaintiff as a whole. *Thomas v. Miller*, 151 P. S. 482.

See EVIDENCE, XXX. (b).
PRACTICE, X.

XXVII. Affidavits.

135. In a suit on a mortgage, under a rule of court in Allegheny county, by an administratrix, the affidavit of claim, so far as it was not denied, is admissible in evidence. *Schupp v. Schupp*, 2 Atlan. 870.

136. An affidavit and bill in equity admitted in evidence as an admission of one of the parties, may be properly sent out with the jury. *Kline v. First National Bank*, 15 Atlan. 433.

137. A plaintiff who puts in evidence an affidavit of defence of defendant to a former action on the same contract of sale, without disproving its averments, is bound by its averments; and if it set forth a payment of the contract by notes, his remedy is confined to an action on the notes unpaid, and a verdict should be directed for the defendant. *McCord v. Durant*, 134 P. S. 184.

XXVIII. Admissions in pleading.

138. Where a rule of court provided that material averments in the statement which were not denied by affidavit, should be taken as admitted; it was held, in an action for the price of chattels where the affidavit of defence did not deny the sale, delivery or price of chattels as averred, that it was error to refuse a plaintiff's offer of the statement and affidavit as evidence of such sale, delivery and price. *Neely v. Bair*, 144 P. S. 250. See s. c. 127 P. S. 417.

XXIX. Admissions, declarations and confessions.

(a) Proof of declarations.

139. Oral evidence of declarations or admissions should be clear, positive and specific to establish a claim against a decedent's estate. *McCann's Appeal*, 9 Atlan. 48.

140. The whole of an admission must be taken together; but this rule does not apply if the circumstances render improbable that which is said in avoidance of a conceded fact. *Roberts's Appeal*, 126 P. S. 102; *Newman v. Bradley*, 1 Dall. 240.

141. A witness will not be permitted to testify to alleged declarations made by a party in the suit, where he is unable to identify the party as the person who made the declarations. *Mason Fruit Jar Co. v. Paine*, 166 P. S. 352.

(b) Declarations in absence of other party.

142. Declarations of defendant in the absence of plaintiff are not admissible against the latter. *Kurtz v. Haines*, 15 Atlan. 716.

143. Upon a collateral inquiry as to the validity of a judgment, the same cannot be affected by declarations of the defendant not made in the presence of the plaintiff. *Kline v. McCandless*, 139 P. S. 223.

144. A claim against a decedent's estate cannot be established by declarations of the claimant made in the absence of the decedent. *Mueller's Estate*, 159 P. S. 590.

145. In ejectment by executors where the land in question had been devised to testator's son upon his paying to the estate a certain amount per acre, and there was evidence that the son refused to accept and the land was sold under a judgment against the son, it was held, that it was the duty of the purchasers to have made inquiry as to the condition of the title, and if such inquiry would have led to the knowledge of the refusal to accept, they were con-

cluded. It was further *held*, that the son was a competent witness to prove that he had never accepted the devise; that the rights of the plaintiffs should not be prejudiced by the declarations of the son, made in the absence of the parties interested; and that one of the defendants, called to testify to the declarations of the devisee, was rendered incompetent by the fact that certain residuary devisees of the testators were dead at the time of the trial. *Tarr v. Robinson*, 158 P. S. 60.

(c) Declarations against interest.

146. Declarations against interest are to be taken as true, and construed most strongly against the declarant. *Gabler's Appeal*, 5 Cent. 314.

147. A claim of set-off in one case can be offered in evidence against the same party in another case, as a previous declaration upon the same subject. *Limbirt v. Jones*, 136 P. S. 31; s. c. 26 W. N. C. 326.

148. In an action for the price of an article, where the defendant denies all indebtedness, evidence is admissible that when the same claim was presented before a justice of the peace, the defendant claimed a set-off to a portion of the claim. *Livingston v. Stevenson*, 163 P. S. 262.

149. Where it was averred that a judgment was transferred to the defendant for the purpose of collection; it was *held*, that his statements as to the purpose of the assignment made before and after the assignment were competent as admissions by him; and this, though not at the time communicated to the plaintiff. *Schwartz v. Hersker*, 140 P. S. 550.

150. Where the note in suit had been surrendered upon the receipt of another note which was forged, and the defendant, when spoken to concerning the note in suit and his signature thereto, had replied that the note was all right; it was *held*, that the evidence was sufficient to warrant the jury in finding that defendant's signature was genuine. *West Philadelphia Nat. Bank v. Field*, 143 P. S. 473.

151. In an action on a bond given by the defendant to her father, since deceased, where it was alleged that in release of payment he had voluntarily destroyed the bonds in his lifetime, and a close confidential relation between them was not denied, and there was strong evidence of extreme weakness bodily and mentally; it was *held*, that the burden was on the defendant to show that the transaction was righteous and conscientious and that the obligee had acted intelligently, deliberately, and freely; and this, though the disorder was merely temporary and not operative at the particular time, and it was competent for the plaintiff's executors to prove declarations of the obligee, before his capacity was questioned, to the effect that he had intended the bonds should be paid. *Smith v. Loafman*, 145 P. S. 628.

152. In trespass for tearing down a fence, the declarations of the defendant, after being remonstrated with, that he was determined to tear down the fence, are admissible to show malice and ill-will and for the purpose of enhancing the damages. *Kennedy v. Erdman*, 150 P. S. 427.

153. Where the bonds of a railroad company were found sealed in an envelope, after the testator's death, and addressed to the company; it was *held*, that such sealing was a declaration against testator's interest as to the ownership of the bonds, and indicative of an intention to deliver them to the rightful owner. *Philadelphia Trust Co. v. Philadelphia & Erie R. R. Co.*, 160 P. S. 590.

154. Upon the question whether a purchaser was insolvent when he made a purchase, evidence is admissible of his declarations as to his prior insolvency after his goods were levied upon. *Perlman v. Sartorius*, 162 P. S. 320.

155. Where a statement in *assumpsit* avers a debt for money loaned, and in the same count sets forth a copy of the note given for the debt, the note may be treated at the trial as the real cause of action, and where the defence is an al-

leged fraudulent alteration of the amount of the note, evidence is admissible that plaintiff, at the time, was borrowing a larger sum from a third party and that he had declared to defendant's family that nothing was due him, and that he did not mention the debt when the inquiry was made at the inquest of lunacy held over the debtor. *Winters v. Mowrer*, 163 P. S. 235.

156. The uncontradicted testimony of third persons that one, who claims as a creditor of the estate, declared to them that the sum claimed by him was a contribution to a partnership between him and the decedent, is sufficient to support a finding that such partnership existed. *McNeilan's Estate*, 167 P. S. 473; affirming s. c. 16 C. C. 46; s. c. 1 Lack. L. N. 107.

157. In an action of debt the declarations of the defendant to a stranger to the contract are admissible in evidence. *Raber's Estate*, 5 York 202.

(d) Declarations in favor of declarant.

158. Adverse possession may be shown by the declarations of the party claiming it, as well as by the understanding of his neighbors. *Kennedy v. Wible*, 11 Atlan. 98.

159. In an action by a niece against her uncle's estate to recover under a contract alleged to have been made with her uncle, declarations of the plaintiff made prior to the death of her uncle as to the existence of the contract, are not admissible under the act 11 June 1891 (Brightly's Purdon 819). *Thomas v. Miller*, 165 P. S. 216.

(e) Declarations of decedents.

160. Upon an allegation of forgery and a disagreement between experts on the subject, the validity of the note against a decedent's estate may be sustained by his admissions and declarations. *Fox's Appeal*, 11 Atlan. 228.

161. A trust in favor of a minor child can be established in a suit against the administrator of the mother by her dec-

larations that the money "belonged to the boy." *Guckert v. Seidel*, 2 Mona. 45.

162. Upon a claim for nursing a decedent, a recovery may be had upon a *quantum meruit*; so, a contract to pay may be established by the declaration of the decedent, proved by a disinterested witness, that "Betsey is very kind to me. I have promised her that she shall be paid by my executors when I am gone, for waiting on me." *Harrington v. Hickman*, 148 P. S. 401.

163. In a suit on a mechanic's lien by an administrator, where the defendant offered declarations of the plaintiff's decedent that the claim was paid; it was *held*, that it was inadmissible for the plaintiff to prove an account book of the decedent showing another account with an entry of payment, for the purpose of establishing that his declarations referred to the latter account and not to the one in suit. *Bowers v. Overfield*, 10 C. C. 273.

164. Declarations of a testator not made in the presence of the person sought to be charged by them, are not admissible. *Stewart's Estate*, 15 C. C. 380.

165. Claims for services against a decedent's estate, not presented as a legal demand until after the death of the alleged debtor, will have every intendment and presumption made against them. The declarations of the decedent amount to nothing, when confronted by the due bills of the claimant found in the hands of the decedent. *Koecker's Estate*, 47 L. I. 505.

166. Upon a claim by a widow against a deceased husband's estate for money loaned, where she has established by other evidence her possession of a separate estate, the declarations of the decedent as to the receipt of the money are admissible in evidence in support of the claim. *Heilman's Estate*, 1 York 181.

(g) Of administrators.

167. In replevin against an administratrix personally for property not included in her inventory, her declarations

tending to show that the property belongs to the plaintiff are not evidence. *Swab v. Miller*, 9 Atlan. 667.

168. In a proceeding in the orphans' court to enforce specific performance of a decedent's contract, the estate is not bound by an admission of the administrator, without personal knowledge, of a payment of purchase money. *Dowie's Estate*, 135 P. S. 210.

(h) Of persons having a joint interest.

169. Upon a charge of conspiracy the declarations of one of the parties are admissible against the other, only after proof of the bargain or agreement. *Holton v. New Castle Railway Co.*, 138 P. S. 111; s. c. 8 C. C. 430.

170. A combination to defraud creditors between a debtor and a transferee cannot be established by the declaration of one party in the absence of the other. *Hager v. Weiss*, 5 Montg. 121.

171. If, upon distribution of the proceeds of a sheriff's sale, a judgment confessed for the arrears of a dower charge be attacked by other creditors as fraudulent and collusive, the fraud and collusion cannot be established by casual declarations of the plaintiff and defendant, not made in each other's presence, the same being denied by both parties under oath. *Kintzel v. Kintzel*, 133 P. S. 71.

172. On the trial of an issue to test whether a confessed judgment was in fraud of the plaintiff in the issue, the acts and declarations of the defendant in the judgment, made in the absence of the plaintiff in the judgment (and defendant in the issue), are not admissible against the latter. *Wolf v. Kohr*, 133 P. S. 13.

173. Where the lessors in an oil lease were an adult and a guardian of certain minors, a declaration by the guardian in relation to the lease that the same was ended and void and the lessors had no claim thereunder, could not relieve the assignee of the lease from liability for failure to perform the covenants of the lessee. *Springer v. Citizens Natural Gas Co.*, 145 P. S. 430.

174. In an action to hold several persons liable as partners, the declarations of some of the defendants, as to the partnership, are not evidence as to the others. *Walker v. Tupper*, 152 P. S. 1.

175. Upon the trial of an attachment execution where the plaintiff claims that the defendant owes the garnishee money, and it appears that the garnishee held a judgment against the defendant which had been opened and upon the trial of which a judgment had been entered in favor of the defendant, and upon which trial the defendant had claimed that the note then in suit had never represented a real debt; it was held, that declarations, written or oral, of either the defendant or the garnishee which tended to show that the judgment did represent a real debt were admissible in favor of the plaintiff. *Sommer v. Gilmore*, 160 P. S. 129. See *Palmer v. Gilmore*, 148 P. S. 48.

176. Where the lessees of an oil and gas lease were not tenants in common, but joint grantees of a right or privilege, and were bound jointly to perform the covenants of the contract; it was held, that the declarations and acts of two of the lessees were binding upon the third. *Hooks v. Forst*, 165 P. S. 238.

(i) Of agents and attorneys.

177. The authority of an agent cannot be proved by his declarations. *McInnes v. Rittenhouse*, 1 Mona. 657; s. c. 16 Atlan. 818; *Kaufman v. National Transit Co.*, 2 Mona. 36.

178. Upon the trial of a *scire facias sur mortgage*, statements of a conveyancer who negotiated the loan and embezzled the fund that he was acting as agent for the mortgagee, are not admissible to establish such agency. *Pepper v. Cairns*, 133 P. S. 114; s. c. 25 W. N. C. 562.

179. Where it is proposed by a defendant to prove declarations by plaintiff's son-in-law, there must be an offer to show that the defendant was acting at the time for the plaintiff, and the offer should embrace at least the substance of the

declaration. *Long v. North British Insurance Co.*, 137 P. S. 335.

180. Where a decedent intrusted most of his collections to his son-in-law, and the administrator sought to charge the son-in-law with moneys alleged to have been received and unaccounted for; it was *held*, that assertions by the defendant after decedent's death that he wished there was some one who knew something about the affairs of the deceased, and that he himself knew nothing about them whatever, were irrelevant and inadmissible. *Knapp v. Griffin*, 140 P. S. 604.

181. In an action for damages for injuries caused by an explosion resulting from natural gas being forced at an extraordinary pressure through the main before the plaintiff's plumbing was in a condition to keep it from his house; it was *held*, that declarations of a lineman made to a person about connecting with the pipe line, that the gas had been stopped off and that there would be no danger of making a connection, were admissible against the company. *Baker v. Westmoreland & Cambria Natural Gas Co.*, 157 P. S. 593.

182. In a suit against an alleged principal by the son of the alleged agent; it was *held*, that the declarations of the plaintiff's mother, made before her death, denying her agency, but not made at the time she made the contract with plaintiff and not made to plaintiff at any time nor in his presence, were not admissible against him. *Harrington v. Bronson*, 161 P. S. 296.

183. Where a claimant against a decedent's estate was the father-in-law of the decedent, and it appeared that the decedent had purchased the house and the claimant took the cash part of the purchase money to the company employed to examine the title and asserted to the officers that he was advancing it by way of a loan; it was *held*, that such an assertion on his part was not admissible in evidence as part of the *res gestæ* for the purpose of establishing the loan. *Muller's Estate*, 13 C. C. 183.

184. In an action of account render by the principal against the executor of an attorney, a statement of the attorney's accounts relating to his client's business in his own handwriting is admissible for the plaintiff, and it need not be shown to have been communicated by the attorney to the plaintiff or his agent. *Johnson v. McCain*, 145 P. S. 531.

185. An admission of counsel unintentionally made, will not be permitted to defeat a party's rights. *Nesbitt v. Turner*, 155 P. S. 429; affirming s. c. 7 Kulp 41.

186. In an action by an attorney-at-law to recover a fee, a statement made by the plaintiff's attorney in the absence of his client, to the effect that the plaintiff did not claim the fee, is inadmissible against the plaintiff. *Smith v. Eyre*, 161 P. S. 115.

(k) Of grantors and assignors.

187. In replevin for a piano by a daughter against her mother, evidence is admissible of the declaration of plaintiff's deceased father showing a gift to the plaintiff. *Swab v. Miller*, 9 Atlan. 667.

188. In a feigned issue under the sheriff's interpleader act, the title of the plaintiff cannot be defeated by the declarations of his assignor. *Widdall v. Garsed*, 125 P. S. 358.

189. If the vendee permit the property to remain in his vendor's possession, he is affected by any subsequent sale by his vendor to any person taking possession, and also by the declarations of his vendor made while he held possession. *Shannon v. Minney*, 130 P. S. 280. See *Miller v. Browarsky*, Ibid. 372.

190. Where the insanity of a grantor, as found by inquest, antedated his deed, it was competent for the grantees in ejectment against them, to prove his declarations fifteen months before, that he intended to execute the deed to them. *Rice v. Rice*, 127 P. S. 181.

191. Declarations made by a grantor in his own interest in the absence of his grantee are not admissible against the

title of the latter's devisee. *Parry v. Parry*, 130 P. S. 94.

192. In trespass for the obstruction of a way, an admission of a predecessor in title during his ownership, that he had no right to close a way, is competent evidence against a subsequent owner of the servient tenement. Conversations before the obstruction between the owner of the servient tenement and her lessee, in which the lessee expressed his opinion in answer to her inquiry, that the way could not be closed, is competent evidence upon the question of damages, although not competent upon the character of the way. *Bennett v. Biddle*, 150 P. S. 420.

193. Where the evidence established that the defendant tore down plaintiff's fence with a strong hand after being remonstrated with; it was held, that loose conversation between the defendant and plaintiff's predecessor in title, to the effect that the fence was to be removed to a compromise line, were inadmissible in mitigation of damages. *Kennedy v. Erdman*, 150 P. S. 427.

194. In an action on a promissory note given in payment for lands, where the maker claims that he was induced to buy the lands by fraudulent representations, a written statement made by the vendor at the time of the sale as to the value and character of the land, is admissible in evidence. *Martin v. Kline*, 157 P. S. 473.

195. In an action of ejectment, the declarations of a person while holding title are admissible in evidence against those holding under him. *King v. Wible*, 10 C. C. 521.

196. Declarations of the vendor not made in the presence of the vendee, will be admitted, unless the offer indicate that they were adverse to the vendor's title, or calculated to establish fraud between the vendor and vendee. *Neal v. Cochran*, 4 Del. 15.

197. Where two parties claim title to personal property under the same person, the latter's declarations are evidence against himself and all who claim under

him, if made before the title vests in the party against whom the declarations are offered. *Silfies v. Laubach*, 4 Northam. 196; s. c. 5 Del. 477.

198. The parol declarations of a person having the legal title to land, that it actually belongs to another, followed by a conveyance for the benefit of such other person, are competent evidence to rebut a presumption of fraud or undue influence, which in view of the relations of the parties and the age and infirmity of the grantor might otherwise arise from the absence of a money consideration. *Kyte v. Kyte*, 8 Kulp 1.

199. In all cases of alleged gift, the proof must be of an actual gift perfected by delivery and not simply of an intention to give; where such proof rests upon the declarations of the donor, such declarations must be unequivocal. *McCarty's Estate*, 4 Dist. Rep. 453.

(l) Of grantees.

200. The statements of a purchaser at the time of the execution of the deed to his son are, upon distribution of the former's estate, evidence to show that he paid the purchase money and the deed was put in his son's name "for safety" from creditors. *Gillespie's Estate*, 7 C. C. 305; s. c. 46 L. I. 444.

201. In an action against the purchaser of the business and assets of a firm, the testimony of other firm creditors is admissible to show that the defendant has paid their claims. *Elton v. Perkinpine*, 1 East 635.

202. The *ante litem motam* declarations of the builder of a saw mill are evidence on the question of fixture or no fixture where the other evidence on the subject is conflicting. *Benedict v. Marsh*, 127 P. S. 309.

(m) Of mortgagees.

203. The legal effect of the satisfaction of a mortgage cannot be destroyed by the declarations of the mortgagee, made after the satisfaction, that she intended to make the mortgagor pay the principal and in-

terest of the mortgage. *Safe Deposit & Trust Co. v. Kelly*, 159 P. S. 82.

(n) Of trustees and centui que trusts.

204. The admissions of a trustee as to the fact of his trust are binding upon him, though made to a stranger. *Hicken v. McGlathery*, 47 L. I. 36.

205. Declarations, when receiving money, evincing an intention to take it in trust, repel the presumption of personal acquisition and fix a trust upon the fund. *Buck v. Henderson*, 4 Cent. 697. See *Henderson v. Buck*, 3 Lanc. 371.

206. Query, whether in an action of ejectment, the declarations of a defendant are admissible, that he bought the land at an orphans' court sale and had taken title in his son's name in order to defeat creditors. *Silliman v. Haas*, 151 P. S. 52.

207. Where a son acting for his father, who is the plaintiff in the execution, purchases real estate at sheriff's sale for an inadequate price, pays the purchase money out of his own pocket, and the father, by his subsequent conduct, shows that he had knowledge of the whole transaction, the son will not be declared a trustee *ex maleficio*; the declarations of the father after the sale claiming the land as his own are inadmissible as evidence of a trust. *Evans v. McKee*, 152 P. S. 89.

(o) Of lessors.

208. In a suit for rent where the lessee was not to be liable if the premises were destroyed by fire not caused by his negligence, the plaintiff's proofs of loss are evidence for the limited purpose of showing his admissions that the fire was not caused by negligence. *Philadelphia T. S. D. & Ins. Co. v. Purves*, 12 Cent. 659; s. c. 13 Atlan. 936.

209. In an action for rent, where the only question was as to the terms of the contract, it was incompetent for the defendants to prove the custom of the lessor in renting the building, his declarations as to his custom, or the usages of his assignee as to renting in like cases. *Arrott*

Steam Power Mills Co. v. Way Mfg. Co., 143 P. S. 435.

210. In an action for rent where the lessee alleges a parol agreement of the lessor to accept a surrender, a letter by the lessor inconsistent with such agreement is admissible in evidence. *Harvey v. Gunzberg*, 148 P. S. 294.

(p) Of judgment debtors.

211. A judgment being confessed for a valuable consideration, the rights of the plaintiff cannot be affected by the declarations of the judgment debtor. *Farren v. Mintzer*, 14 Atlan. 267; s. c. 13 Cent. 74.

212. In an effort to show that a confession of judgment in ejectment was fraudulent as to creditors, the acts and declarations of the defendant in ejectment, after the transaction, are insufficient to connect the plaintiff with the alleged fraud. *Bell v. Throop*, 140 P. S. 641.

213. A judgment note cannot be invalidated by the loose declarations of the debtor that he confessed the judgment to defraud creditors. *Drake v. Hayes*, 2 Lack. Jur. 297.

(q) Of strangers.

214. Where plaintiff in malicious prosecution, who was arrested for trespass, testified that he had leased the lot in question from a third person, he could not be contradicted by evidence of the declarations of such third person to the contrary. *McElroy v. Meredith*, 12 Atlan. 171.

215. In an action by a father for the death of his minor son, declarations by the son, some time after the accident, as to how he received his injuries, are inadmissible against the father. *Bradford v. Downs*, 126 P. S. 622.

216. In a suit against a constable for wrongful levy on plaintiff's property, evidence is not admissible for the defendant that a year after the levy the defendant in the execution (the plaintiff's father) claimed compensation as owner upon a fire policy. *Bennethum v. Long*, 13 Atlan. 778.

217. In a suit against a boom company for damages resulting from an ice jam, negligence cannot be established by the declarations of a former president of the company as to why the piers were originally built below the surface of the water. *Shaw v. Susquehanna Boom Co.*, 125 P. S. 324.

218. In a suit for a share of profits under a contract to divide equally the expense of making heaters, and the profits on the same, where it was the duty of the defendant to furnish and put up the heaters, it was *held*, that declarations of persons for whom work was done by defendant, as to their dissatisfaction, was not evidence to charge him with the amount of their unpaid bills on the ground of his negligent performance of the work. *Halberstadt v. Bannan*, 149 P. S. 51.

(r) Of witnesses.

219. Upon the trial of an appeal from an assessment of damages and benefits, the report of the viewers is admissible in evidence to show that one of the viewers called as a witness had signed the report making an entirely different estimate of the effect of the improvement on plaintiff's land from that to which he testified at the trial. *Dawson v. Pittsburgh*, 159 P. S. 317.

220. In an action against a firm for the price of goods alleged to have been sold the firm, where judgment was entered by default against one partner and the other partner defended on the ground that the goods were not purchased by the firm, but by his co-partner, and contributed by the latter to the firm, where the manager of the firm's business testified that the goods had been purchased by the firm, it was *held*, that a statement of the business prepared at the time of dissolution, in which the price of the goods claimed was charged to capital stock, was admissible in evidence as affecting the credibility of such manager. *Frack v. Gerber*, 167 P. S. 316; s. c. 36 W. N. C. 230.

See EVIDENCE, LL.

(s) Of husband and wife.

221. Where a husband purchases property with his wife's money and takes the title in his own name, there is a resulting trust in her favor. That she joined in a deed of a portion of the land does not estop her from setting up such trust as to the balance. So her title cannot be divested by her husband's declarations, but the trust may be established by the declarations of both at the time of the purchase. *Hay v. Martin*, 14 Atlan. 333; s. c. 13 Cent. 217.

222. Upon the trial of a sheriff's interpleader, where the claimant is the wife of the defendant in the execution, the latter's declarations adverse to his wife's claim are not admissible in evidence. *Martin v. Rutt*, 127 P. S. 380.

223. In a suit by a widow for the death of her husband, the defendant, on the question of damages, may prove that decedent said he was tired of life, that he did not want to live, that his life had been a failure, and his family a failure. *Disbrow v. Nester Township*, 8 Atlan. 912.

224. The declarations of the wife in an action for divorce as to ill treatment made at a time so distant from the occurrence as not to be a part of the *res gestæ*, are not admissible in evidence. *Cain v. Cain*, 140 P. S. 144; affirming s. c. 6 Montg. 34.

225. In ejectment by a husband claiming as tenant by the curtesy, his deceased wife's declarations are admissible for the purpose of disproving the alleged wilful and malicious character of their separation. *Hart v. McGrew*, 11 Atlan. 617.

226. From the mere fact of a husband's reception of his wife's money, the law raises a presumption that he received it for her use, and the burden is on him or his heirs to prove a gift. Such a gift cannot be established by his declarations not made in the presence of his wife. *Wormley's Estate*, 137 P. S. 101; s. c. 27 W. N. C. 13.

227. An agreement to cohabit as husband and wife followed by public recognition will constitute a marriage. Such a mar-

riage cannot be contradicted by the husband's declarations to the contrary made in his wife's absence. *Moore's Estate*, 9 C. C. 338; s. c. 48 L. I. 4.

228. Where the plaintiff in ejectment claimed as heir-at-law of a husband, in whom was the legal title, and the defendant claimed under a trust in the wife by reason of her money having gone into the land, it was *held*, that the record title which had existed for twenty-one years could not be disturbed by proof of mere casual declarations of the husband made after the purchase, that his wife's money went into the land and that it belonged to her. *Crawford v. Thompson*, 142 P. S. 551.

229. Where a husband pays for land with his wife's money, and takes the title in his name, his declarations that he was acquiring the land for his wife are admissible in favor of the wife in a subsequent action in the assertion of her equitable title under a resulting trust. *Light v. Zeller*, 144 P. S. 570; *Light v. Zeller*, 144 P. S. 582.

230. Where a husband held title to lands purchased with his wife's money, it was *held*, that his acts and declarations after he acquired title indicating his ownership of the land were not binding upon the wife; she could not be *held* responsible unless she had actively participated in them. *Light v. Zeller*, 144 P. S. 582.

231. Where a husband gave to the plaintiffs, trustees for his wife and her children, a bond, conditioned to pay the interest to his wife or to the plaintiffs in trust for her, annually during her life, and on her death to pay the principal to her children; it was *held*, in an action by the trustees on the bond that the wife was the sole owner of the interest on the fund, and her positive and definite declaration *ante mortem litem* was admissible and sufficient to show in defence of the action that she had made a gift of the interest to defendant. *Galt v. Smith*, 145 P. S. 167.

232. Where real estate standing in the name of the husband has been sold at sheriff's sale as his property, and in ejectment against him, he sets up a resulting

trust in favor of the wife, who died intestate before the sheriff's sale, he cannot testify as to what his wife said about the ownership of the land while he was in possession of it with her, nor is evidence admissible of her declarations to a third person. *Lawrence v. Keener*, 149 P. S. 402.

233. In an action on a life policy where the beneficiaries are the widow and children, evidence that the assured after the date of the policy filed an application for a pension in which he made statements inconsistent with the statements to the company, are inadmissible. *Hermany v. Fidelity Mutual Life Ass'n*, 151 P. S. 17.

234. The declarations of a husband against his wife's interest are not admissible in evidence. *Evans v. Evans*, 155 P. S. 572.

235. Where a deposit was in the name of a wife, it was *held*, that a testamentary paper in her handwriting to the effect that the deposit really belonged to her husband, was competent evidence of his ownership; and this, although when the paper was found the signature was torn off; and where it further appeared that the wife had declared that the money belonged to her husband and that she had taken charge of it because he was not much of a business man, it was *held*, that such evidence was sufficient to rebut any presumption of a gift. *Gracie's Estate*, 158 P. S. 521; affirming s. c. 41 P. L. J. 9.

236. Where purchasers at a sheriff's sale under a judgment against a husband bring ejectment, and the husband is the defendant and claiming possession under a title which he alleges to be that of his wife, evidence is admissible of acts and declarations of the husband against interest, although not made in the presence of his wife; and in such a case the plaintiff may also show that the property was assessed in the name of the husband. *Miller v. Baker*, 160 P. S. 172.

237. The declarations of a husband made in the absence of his wife are not admissible against the wife. *Leedom v. Leedom*, 160 P. S. 273.

238. In an action of ejectment against husband and wife brought by a stranger, the declarations of either of the defendants are evidence as against the interests of both; query, whether the wife is a competent witness in such a case to rebut the presumption of law, that the land belongs to her husband. *Phillips v. Hanby*, 5 Del. 102.

239. In divorce proceedings, adultery cannot be established by the mere admissions or declarations of the respondent, unsupported by other proof or corroborating circumstances. *Quick v. Quick*, 6 Kulp 137; s. c. 8 Lanc. 117.

240. Where a widow made a claim against her deceased husband's estate of money due before marriage, and it was shown that the day before their marriage she burned the note and said she had given him the amount, but it was further shown by the declarations of the husband made just before his death, that he still owed her the money; it was *held*, that an auditor's finding in favor of the claimant would be sustained. *Young's Estate*, 10 Montg. 93.

241. Upon the trial of an issue concerning the validity of a judgment given by a husband to his wife, it was *held*, to be incompetent for the wife to prove by her counsel, certain declarations made by her in his office in the absence of the contesting creditor, showing the existence of an indebtedness to her from her husband. *Schwartz v. Schwartz*, 5 York 35.

See EVIDENCE, XXXV., XLIII.

(f) Confessions in criminal cases.

242. The prisoner and his father being indicted separately for murder, and there being no direct evidence of his participation in the crime, a declaration by him three weeks after the murder that "it would take all pop's got to clear him" was inadmissible. It simply showed a knowledge had after the fact. *Comm'th v. Clark*, 130 P. S. 641.

243. A confession given voluntarily or without threats or the promise of benefit

is not made inadmissible because afterwards reduced to writing and sworn to. *Ibid*.

244. Inculpatory admissions of a defendant, if complete in themselves, are admissible, though the witness did not hear and could not give the whole conversation. *Comm'th v. Taylor*, 129 P. S. 534.

245. Upon a trial for conspiracy, testimony under oath of the defendants in a former trial may be read as their admissions and declarations. *Comm'th v. Doughty*, 139 P. S. 383; s. c. 38 P. L. J. 261.

246. Upon a trial for murder, where the evidence showed that the deceased was strangled, it may be shown that the prisoner showed certain witnesses a peculiar grip by which he claimed he could easily "shut anybody's wind off." *Comm'th v. Crossmyer*, 156 P. S. 304.

247. Upon a trial for murder it is error to refuse to charge that if the jury believe the testimony of certain witnesses "that the deceased made declarations at the time of the shooting and subsequently thereto, that the shooting was accidental and contradictory of his dying declarations," such declarations are to be taken into consideration of the jury, and if true, there should be an acquittal. *Comm'th v. Silcox*, 161 P. S. 484.

248. A voluntary confession of guilt will not be excluded unless some inducement was held out to prompt to falsehood, and of this the trial court is the judge in the first instance, and its rulings will not be set aside but for manifest error. *Comm'th v. Johnson*, 162 P. S. 63.

249. Upon the trial of an indictment for conspiracy, the admissions or declarations made by one conspirator after the conspiracy has come to an end as to acts previously done by the other, are not admissible in evidence against the other. *Comm'th v. Sterling*, 10 Lanc. 41.

250. Where a defendant was convicted of arson mainly on his own confession, it was *held*, that a new trial would not be granted merely upon proof that defend-

ant was in the habit of boasting that he had committed various crimes, when such boasts were utterly false. *Comm'th v. Rose*, 1 York 125.

251. Upon the trial of an indictment for arson, where the commonwealth proved a confession by the defendant that he committed the offence for which he was being tried, and that he also set fire to another house, it was *held*, that the defendant could not contradict the latter portion of his confession by proof of an alibi at the time of the latter fire. *Comm'th v. Rose*, 1 York 125.

252. A deliberate and voluntary confession of guilt is among the most weighty and effectual proofs in the law. *Comm'th v. Manock*, 1 York 169.

253. The subject of confessions of crime is considered in a note to *McClain v. Comm'th*, 1 Atlan. 48.

XXX. Hearsay.

(a) Admissibility of hearsay evidence.

254. In an action on a promissory note given in payment for oil leases, where the defendant claims that the sale was made by means of false representations as to productiveness, a statement of an oil company showing the production of the lands is not competent evidence where such statement is unaccompanied by proof of its correctness. *Smalley v. Morris*, 157 P. S. 349.

255. Evidence is not admissible of conversations between third persons in the absence of the party to be affected by them; but this rule does not apply to cases where the subject matter of the conversation is already within the knowledge of such party. *Shue v. Fuhrman*, 1 York 62.

256. In matters of general public interest as to which there is no inducement to collusion for a particular end, the declarations of deceased witnesses made before the controversy arose as to reputation in ancient things and ancient documentary evidence, may be received.

Old Eagle School Property, 36 W. N. C. 348.

(b) Evidence given on a former trial.

257. Where an action was brought by a husband and wife in right of the wife for personal injuries to her, it was *held*, in a similar action by the husband for injuries to him at the same time, where the husband died before trial, that the husband's deposition read in evidence on the prior trial was inadmissible on behalf of the plaintiff, his administratrix. *Fearn v. West Jersey Ferry Co.*, 143 P. S. 122.

258. Where it is shown that a witness whose deposition was read upon a former trial, though residing in the county, is aged and infirm, the admission of his deposition is subject to the lawful discretion of the trial judge. *Thornton v. Britton*, 144 P. S. 126.

259. In an action on a fire policy, the depositions of a witness taken on a former trial and relating to the condition of the company prior to 1884 is properly rejected where the last action is founded upon assessments which were not made until after the year 1884. *Susquehanna Mutual Fire Ins. Co. v. Mardorf*, 152 P. S. 22.

260. Where a husband testifies that his wife is too ill to attend court, her testimony taken at a former trial of the case may be admitted. *Perrin v. Wells*, 155 P. S. 299.

261. Where a suit has been brought against a decedent in his lifetime, notes of the testimony of an interested witness, then duly taken, may be given in evidence in support of a claim against the decedent's estate. *Dunlevy's Estate*, 10 C. C. 454.

262. The third section of the act 23 May 1887 (Brightly's Purdon 816), making it competent upon a second criminal trial to read the notes of examination of a witness at a former trial, where it appears that the defendant was present at the former trial, and the witness is either dead or out of the jurisdiction, is not unconstitutional. *Comm'th v. Cleary*, 148 P. S.

26. See *Comm'th v. Keck*, 148 P. S. 639.

(c) **Dying declarations.**

263. In a bastardy case the attending physician was permitted to testify as to the mother's declarations of paternity made while in labor, though he was not certain she was *in extremis*, the jury being instructed not to regard them unless they were satisfied that she believed herself to be at the time in peril and not likely to survive. *Easley v. Comm'th*, 11 Atl. 220.

264. Upon an indictment for murder, the dying declarations of the deceased are properly received in evidence, although he was under the influence of drugs at the time they were made, but it appears that he understood everything that was said and that he made intelligent answers to all questions put to him. *Comm'th v. Straesser*, 153 P. S. 451.

265. Upon the trial of an indictment for murder the dying declarations of the deceased are admissible in evidence where the witness to whom they were made testifies that the deceased was in his right mind and conscious that his death was imminent at the time he made them. *Comm'th v. Silcox*, 161 P. S. 484.

266. The subject of dying declarations is considered in a note to *Railing v. Comm'th*, 1 Atl. 319.

(d) **Pedigree — legitimacy.**

267. If a child be shown to be the child of a decedent, she is presumed to be legitimate. *Simpson's Estate*, 4 Del. 129; s. c. 1 Lack. Jur. 193.

268. Early recollections of a child when between four and five years of age are but little value in establishing identity in a question of pedigree. Value of a birth-mark and resemblance. *Shehan's Estate*, 139 P. S. 168; s. c. 38 P. L. J. 215; affirming s. c. 37 P. L. J. 397.

269. A certified copy of a birth and baptism record, containing a statement of illegitimacy, together with evidence of general reputation, will justify a finding

of illegitimacy. *Goerman's Appeal*, 1 Cent. 228; s. c. 1 Atl. 447.

270. Illegitimacy cannot be established by the mere belief of members of the family; mere belief is not equivalent to general repute. *West v. Sherer*, 1 Lack. Jur. 117.

271. In an issue involving the legitimacy of offspring, admissions by one of the parties that a marriage had taken place, when in fact no marriage had been contracted, while greatly weakening the force of subsequent admissions, will not have the effect of excluding them altogether. *Drinkhouse's Estate*, 151 P. S. 294; affirming s. c. 11 C. C. 144.

272. Upon the question of pedigree, recitals in deeds, records and monumental inscriptions more than fifty years old are inadmissible when there is no other evidence than mere identity of name to show that the person mentioned in such recitals is the same whose pedigree is in question. *Gehr v. Fisher*, 143 P. S. 311.

273. When a declaration as to pedigree made by a deceased person is offered to show that A and B were related to each other by blood, it is sufficient to show that the declarant was connected with the family of A. It is not necessary to show that the declarant was also related to B. *Gehr v. Fisher*, 143 P. S. 311.

274. Common reputation in a family connection as to who are members of the family, is admissible in evidence when no superior evidence is attainable or in connection with superior evidence to prove pedigree, legitimacy and marriage. *Picken's Estate*, 163 P. S. 14.

275. Where an estate is claimed by first cousins of a decedent and also by persons claiming as children of his half brother, whose legitimacy is denied, there is a presumption of marriage and legitimacy, and this presumption is strengthened by lapse of time and cannot be overcome after ninety years except by strong, direct and satisfactory proof. *Picken's Estate*, 163 P. S. 14.

276. For an interesting note on the subject of illegitimacy and how estab-

lished, see *Goerman's Appeal*, 1 Atlan. 447.

See **BASTARDY**.

(e) **Boundary.**

277. Upon the location of an old and recognized division fence the evidence of the borough regulator who run the lines was held to be admissible to prove where the dividing line was actually located. *Haupt v. Haupt*, 15 Atlan. 700.

XXXI. Character.

278. In an action for personal injuries, where plaintiff's case depends almost entirely upon his own testimony and a large amount of evidence is offered tending to show his bad character for veracity, it is error for the court to omit in its charge all mention of such evidence. *Herstine v. Lehigh Valley R. R. Co.*, 151 P. S. 244.

279. Where the witness testified that the plaintiff did not have a good character for truth and veracity, and gave the names of eight persons who had made such a statement to him, and a verdict was rendered for the defendant, and subsequently six of the eight persons swore that they had never made such a statement; it was held, that a new trial should be granted. *O'Bryan v. Bowers*, 10 C. C. 254.

XXXII. Parol evidence to affect written instruments.

(a) **Sufficiency of the evidence.**

280. There being no ambiguity in a written instrument, evidence to explain it is inadmissible. *Kirk's Estate*, 5 Montg. 107.

281. The language of a stipulation in a bill of sale being unambiguous, parol evidence was held to be inadmissible to contradict it. *Coen v. Adamson*, 11 Atlan. 74.

282. Evidence to reform a written instrument on the ground of fraud, accident or mistake, must be clear, precise

and indubitable. *Kirk's Estate*, 5 Montg. 107.

283. To contradict a written instrument the evidence must be clear, precise, and indubitable, but not in the sense that there must be no opposing testimony. *Honesdale Glass Co. v. Storms*, 125 P. S. 268.

284. Equity will not reform a written instrument on the uncorroborated testimony of a single witness contradicting it, where the writing is supported by the plaintiff's testimony. *Gehres v. Crawford*, 9 Atlan. 508.

285. If the vendor of a right of way to a railroad company by deed, showing a consideration of one dollar, set up a contemporaneous parol agreement to pay independently of the deed, such agreement must be established by clear proof. *Loar v. Somerset & Cambria Railroad Co.*, 14 Atlan. 269; s. c. 13 Cent. 214.

286. It may be established by the testimony of one witness (the one who drew the contract), in the absence of evidence to the contrary, that, at the time the contract was executed, it was verbally agreed that either could terminate it at will. *Real Estate Title Ins. & Trust Co.'s Appeal*, 125 P. S. 549.

287. A printed provision on the back of a railroad ticket, not signed by the holder, is not such a written contract, as can only be altered by the evidence of two witnesses or their equivalent. *Camden & Atlantic Railroad Co. v. Bausch*, 7 Atlan. 731; affirming *Bausch v. Camden & Atlantic Railroad Co.*, 43 L. I. 250.

288. A bill of lading is a contract *inter partes*; it is not a mere memorandum, and oral testimony is not receivable to show the real contract. *Hostetter v. Baltimore & Ohio Railroad Co.*, 11 Atlan. 609.

289. If an instrument be obtained by fraud, or a fraudulent use thereof be attempted in violation of a parol agreement made at the time of its execution, the collateral agreement, though contradicting the terms of the original instrument, may be proved by parol. *Honesdale Glass Co. v. Storms*, 125 P. S. 268.

290. One who claims as heir of his father and puts in evidence a deed from his father to a third person, is not thereby estopped from attacking its validity on the ground that it had been obtained by fraud. *Parry v. Parry*, 130 P. S. 94.

291. In an action upon a fire policy, evidence is admissible to show that the company's agent wrote down other answers than those given by the insured, and that the latter signed the policy in ignorance of that fact. *Kister v. Lebanon Mutual Insurance Co.*, 128 P. S. 553.

292. In ejectment by a lessee against a lessor, a verdict for defendant was sustained on the evidence of the defendant of fraud in the insertion of a false clause in the lease by the plaintiff, the defendant being unable to read. *Christie v. Blackley*, 15 Atlan. 874.

293. In an action upon a written lease, an affidavit of defence that the original contract had been abrogated or modified must set forth a clear averment of a binding contract. *McBrier v. Marshall*, 126 P. S. 390; *Johnson v. Blair*, Ibid. 426.

294. Upon a *scire facias sur mortgage* to which there was a supplemental agreement which became part thereof, it was held there was not sufficient evidence to impeach the validity of the supplemental agreement, and a verdict was ordered for the plaintiff. *McHarney v. Paine*, 10 Atlan. 20.

295. A clause of forfeiture inconsistent with the terms of the instrument will not be inserted in an oil lease, upon the evidence of the lessor and his family (contradicted by the lessee) of an alleged contemporaneous agreement to that effect. *Thompson v. Christie*, 138 P. S. 230; s. c. 27 W. N. C. 87; 38 P. L. J. 136.

296. In order to open a judgment by confession upon the ground of fraud in procuring the instrument, where no testimony denying the fraud is presented it is not requisite that the charge of fraud be sustained by more than one witness. *Yost v. Mensch*, 141 P. S. 73.

297. Where the declarations of a decedent are offered to rebut a presumption of

payment arising from receipts, they may be proved by the testimony of any one who heard them. *Eshelman's Estate*, 143 P. S. 24.

298. Where a note was discounted by the plaintiff for the payee, and it was an accommodation note, and the defence was made by the maker that he was not to be held liable on the note, it being made for accommodation of the payee; it was held, that the instrument could not be reformed by the testimony of the defendant, denied by the plaintiff and unsupported by circumstances equivalent to another witness. *Mifflin County Bank v. Thompson*, 144 P. S. 393.

299. Where the plaintiff alleges that a contemporaneous parol agreement induced him to execute the written contract, his unsupported oath to that effect, contradicted by the defendant, is insufficient to entitle him to have the question submitted to the jury. *Halberstadt v. Bannan*, 149 P. S. 51.

300. The uncorroborated testimony of one witness is not sufficient to vary or contradict the terms of a written instrument. *Van Voorhis v. Rea*, 153 P. S. 19.

301. Where the plaintiff agreed to erect a church for the defendant and entered into a written agreement with the agent of the board of trustees that the church should be secured against any mechanics, liens; it was held, that parol evidence was inadmissible to contradict the written agreement except for fraud, accident or mistake, which must be established by such evidence as would induce a chancellor to reform or set it aside. *Dymond v. First Methodist Church*, 2 Lack. Jur. 132.

302. Parol evidence cannot be admitted to contradict the terms of a promissory note in the absence of fraud, accident or mistake. *Kanada v. Duckworth*, 8 Montg. 208; *Wood v. Williams*, 9 Montg. 9.

303. All conversations, all oral promises, all verbal agreements, become merged in and extinguished by a sealed instrument which is the final result of the bargaining, and unless fraud, accident or

mistake be averred, the terms of the sealed instrument can neither be added to or subtracted from, by parol evidence. *Wodcock v. Robinson*, 148 P. S. 503; affirming s. c. 9 C. C. 503.

304. A written contract is presumed to contain the whole contract between the parties, and the jury must so find unless they are satisfied by clear and convicting evidence that another part of the agreement was in fact made at the same time, but was omitted from the writing by fraud, mistake or accident. *Jessop v. Ivory*, 158 P. S. 71.

305. In an action by the superintendent of a corporation for a balance of salary, where he testified that the general manager agreed that his salary should be ten thousand dollars, but directed that his salary be credited on the books at seven thousand dollars and that the other three thousand dollars should be charged to the expense account kept at the general office; it was *held*, that the book entries and accounts kept under his own supervision were strong proof of a contract to serve at a salary of seven thousand dollars, but that they did not in any proper sense constitute a written contract which could not be varied or affected by parol evidence. *Chapin v. Cambria Iron Co.*, 145 P. S. 478.

306. Where a contract for advertising in railway cars was in writing and the plaintiffs claimed that the defendant had agreed by parol to permit them to substitute the advertisement of other parties, and this was testified to by one witness, and denied by the defendant, and under a similar contract for the previous year, it appeared that the plaintiffs, at their own request, were permitted to sub-let their space; it was *held*, that the evidence was not sufficient to sustain a finding that the written agreement had been changed or modified. *Wyckoff v. Ferree*, 168 P. S. 261.

307. Where the defendant by a written contract agreed to purchase oil from the plaintiff at a certain sum per barrel, and the plaintiff claimed that the written

agreement did not embody the actual terms of the contract, but that the defendant was to pay ten cents per barrel for packing the oil; it was *held*, that the plaintiff could not recover the ten cents where he was the only witness who testified in support of the claim. *Thayer v. Seep*, 168 P. S. 414.

308. As to the effect of parol testimony in contradiction of a lease as to its termination, see *Diehl v. Lee*, 9 Atlan. 865.

309. On the subject of the admissibility of parol evidence to vary a written contract, see note to *Cullman v. Lindsay*, 6 Atlan. 335.

(b) Previous agreements.

310. In ejectment by a vendor against a vendee after the execution and delivery of the deed, parol evidence that the original contract which led to a deed was a gaming contract of insurance, is inadmissible. *Smith v. Steffy*, 6. Lanc. 169.

311. The parties to a written contract may subsequently abandon, modify or change it, or substitute a new contract, and this may be shown by parol, and for this purpose evidence of the negotiations which led up to the written agreement is admissible to show the reason for it being made as it was, and to sustain the allegation of a change when the reason ceased to exist. *Holloway v. Frick*, 149 P. S. 178.

312. In an action to recover rental under an oil lease, where there was no allegation of fraud, accident or mistake, it was *held*, that an agent of the lessee would not be permitted to testify that before the lease was signed, he explained the legal construction of the forfeiture clause to the lessor, who assented to the explanation, where the clause was unambiguous and its construction was directly contrary to that stated by the witness. *Hall v. Phillips*, 164 P. S. 494.

(c) Contemporaneous agreements.

313. To modify the effect of a written instrument by parol proof of a contem-

poraneous agreement, there must be proof of its omission from the instrument by fraud, accident or mistake. *Baer's Appeal*, 127 P. S. 360.

314. The time for the performance of a written contract may be extended by parol. There was held to be sufficient evidence of such extension. *Locust Mountain Water Co. v. Yorgey*, 13 Atlan. 956.

315. A contemporaneous parol agreement to renew a promissory note, being the consideration of its execution, is admissible in evidence to vary its terms. *Pearce v. Snare*, 7 C. C. 537.

316. A married woman's judgment note for the purchase of land is valid; parol evidence is admissible to prove the consideration. *Hamilton v. Baum*, 4 Cent. 708.

317. In a suit on a renewal note, parol evidence is admissible to show the indorsement of the note given up in exchange for the note in suit. *Hipps v. Wardle*, 1 Atlan. 727.

318. Where no time of payment is mentioned in a note, the legal inference is, that it is payable on demand, but in an action between the parties to the note such inference may be rebutted by proof of a parol contemporaneous agreement fixing the time of payment. *Horner v. Horner*, 145 P. S. 258.

319. The payee of non-negotiable paper does not become an indorser by writing his name on the back of it, but if it appear that he agreed that he would be responsible for its payment, such agreement may be shown, and if made for a sufficient consideration, may be enforced. *Shaffstall v. McDaniel*, 152 P. S. 598.

320. In a suit on a premium note given to a mutual life insurance company, it may be shown that there was a parol agreement to allow a rebate of a certain proportion of the amount of the note at maturity; such parol agreement does not contradict the note itself. *Michigan Mutual Life Ins. Co. v. Williams*, 155 P. S. 405.

321. In the absence of fraud, accident or mistake, parol evidence is not admis-

sible to contradict a judgment note by proof that judgment was not to be entered upon it. *Lippincott v. Rittenhouse*, 9 Montg. 159; s. c. 5 Del. 343.

322. In an action on a promissory note, a parol agreement to renew and not to negotiate the same, is no defence. *Philler v. Esler*, 29 W. N. C. 258.

323. Upon the trial of an action on a promissory note, evidence is admissible for the defendant that the note was given on the strength of a contemporaneous parol agreement on the part of the payee not to negotiate it, but to hold it until the money was realized out of certain territory sold. *Hoke v. Martin*, 7 York 133.

324. Where the land conveyed was not bounded by a navigable river, but by a line drawn between certain points upon the bank of the river, which excluded the flats, parol evidence was admitted to show that the grantee had notice of the reservation of the flats, and that the conveyance was made subject to such reservation. *Palmer v. Farrell*, 129 P. S. 162.

325. An agent for the sale of property is not thereby authorized to vary the agreements contained in the deed as executed. Evidence of his parol agreement at the execution of the deed will not be admitted. *Rice v. Lewis*, 4 Atlan. 810.

326. A dower interest of the assignor was held not to pass by a general assignment, where it was shown that the assignor signed the deed upon the faith of a parol contemporaneous agreement that it was not to be included in the assignment. *Wanner v. Landis*, 137 P. S. 61; s. c. 26 W. N. C. 529; 7 Lanc. 385.

327. Upon an issue to test whether a judgment was confessed in fraud of the plaintiff in the issue, the plaintiff in the judgment may show the real consideration; and this, though it may tend to contradict the indorsement of the consideration on the bond. *Wolf v. Kohr*, 133 P. S. 13.

328. Where the plaintiff was operating a coal mine on the north side of a road, under a written lease from the defendant, and made a parol agreement with the

defendant that if he, the plaintiff, could find coal on the south side of the road, the defendant would lease to him eight or ten acres thereof for as long as it would last at a certain rental, and the plaintiff developed coal on the south side of the road and opened and prepared a pit, and the defendant then refused to execute the lease; it was *held*, that the parol contract was an independent agreement, upon the breach of which the plaintiff was entitled to recover damages to the value of his work done, and that the case was unaffected by the statute of frauds and no change of the written contract by parol was involved. *Heilman v. Weinman*, 139 P. S. 143.

329. An oral contract made at the same time as the written contract under seal, and purposely omitted therefrom, cannot be set up to contradict or destroy it. *Irvin v. Irvin*, 142 P. S. 272.

330. Where defendant by a contract under seal in consideration of certain things to be done by the plaintiff, a married woman, covenanted to pay her six thousand dollars, four thousand of which was to be secured by a note and delivered to her attorneys as custodians for the parties, and the plaintiff performed her covenants, but the note was never delivered to her; it was *held*, in an action for the amount where she called one of said attorneys to prove and identify the note, that it was error to permit the witness to testify on cross-examination that by her contemporaneous parol stipulation intentionally omitted from the written contract, the plaintiff agreed as part of the consideration that she would secure a divorce from her husband; such testimony, if admissible at all, was only by way of defence, and being denied by the plaintiff, it was error to direct a verdict for the defendant on the ground that the plaintiff's case exhibited a transaction tainted with illegality. *Irvin v. Irvin*, 142 P. S. 272.

331. The fact that the minutes of a school board authorized the board to execute a written contract for the purchase of school furniture, was *held* not

necessarily to exclude evidence of a distinctive parol contract made at the same time. *Sidney School Furniture Co. v. Warsaw Township School District*, 158 P. S. 35.

332. In an action against a surety in a lease, the defendant will not be permitted to testify to a statement made by her when the lease was signed, when the mere purpose of the offer is to introduce a statement made to one not the agent of the plaintiff and never communicated to the plaintiff. *Medray v. Cathers*, 161 P. S. 87; affirming s. c. 8 Montg. 123.

(d) Subsequent parol agreements.

333. Parol evidence is admissible to show that for a new consideration a prior contract under seal was so changed as to provide for doing something not embraced therein, or for an alteration in the manner of its performance. *McCauley v. Keller*, 130 P. S. 53.

334. As between partners themselves it may be shown by parol testimony that land conveyed to them as tenants in common was treated by them as partnership assets; such evidence is, however, inadmissible as against purchasers and lien creditors dealing with the owners on the faith of the recorded title. *Warri-mer v. Mitchell*, 128 P. S. 153.

335. In a suit on a bond for purchase money, the defendant may show that it was satisfied by a sheriff's sale to the plaintiff in pursuance of a verbal agreement to that effect. *McCauley v. Cremerieux*, 132 P. S. 22.

336. The transfer of a judgment to a wife at a time when the husband is out of debt, will not be affected by subsequent declarations and misrepresentations made by the husband in order to procure goods, if the wife has not been privy to them. *Reese v. Reese*, 157 P. S. 200.

(e) Inducement.

337. A written contract may be varied, reformed or set aside by a contemporaneous oral agreement as to a material subject matter, by which one of the parties

was induced to sign the writing. *Sidney School Furniture Co. v. Warsaw School District*, 130 P. S. 76.

338. If the execution of a written agreement has been induced upon the faith of an oral stipulation, made at the time and omitted from the instrument (though not by fraud, accident or mistake), parol evidence of the oral stipulation is admissible; but the same must be established by clear, precise and indubitable proof. *Ferguson v. Rafferty*, 128 P. S. 337.

339. A tenant cannot in replevin prove by parol a contemporaneous agreement, upon the faith of which the lease was signed, that the landlord would repair a leaky roof; such evidence not tending to establish fraud, mistake or a trust. *Eberle v. Girard Life Ins. A. & T. Co.*, 4 Atlan. 808.

340. If a written order for work contain a notice that it was subject to acceptance "on the face as written" and no one was authorized to verbally modify it, it cannot be modified by parol evidence which falls short of a parol agreement which induced the party to sign it; the mere declarations made by an agent when the order was signed are inadmissible. *Express Publishing Co. v. Aldine Press*, 126 P. S. 347.

341. Where the terms of a compromise of a suit are put in writing and entered of record, parol evidence is not admissible forty years afterwards, that the agreement was executed on the faith of a condition not contained in the writing and afterwards left unperformed. *Horn v. Miller*, 142 P. S. 557.

342. Where rent is reserved in money in a written lease, parol evidence is not admissible that immediately prior to its execution, the lessee was induced to sign the lease by a statement that part of the rent was to be taken out in boarding. *Stull v. Thompson*, 153 P. S. 43.

343. In an issue to determine the validity of a judgment note given for a bottling establishment, it may be shown by parol that the number of bottles in

the hands of customers was much less than the number represented by the plaintiff; and this, although the number of such bottles was not stated in the bill of sale. *Volkenand v. Drum*, 154 P. S. 616; affirming s. c. 6 Kulp 519.

344. In an action upon an instrument in writing, where the defendant alleges in his affidavit of defence the failure of the plaintiff to fulfil the condition on which the instrument was signed and on which it was to be effective, judgment will not be entered for want of a sufficient affidavit of defence. *Hardwick v. Pollock*, 15 C. C. 161.

345. A written agreement cannot be contradicted by parol proof in the absence of an allegation of fraud, accident or mistake, or that the party was induced to sign the instrument because of the verbal stipulation; this doctrine is rigidly enforced where it is sought to add parol warranties to contracts of sale. *Buchwalter Stove Co. v. Wood*, 9 Montg. 30.

346. A judgment entered on a judgment note will be opened upon evidence of an indebtedness by the plaintiff to defendant at the time of its execution and the testimony of a subscribing witness that the note was practically signed as a receipt. *Wilson v. Cox*, 37 W. N. C. 142; reversing s. c. 10 Montg. 43.

347. In a suit on a promissory note parol evidence is admissible of a verbal stipulation, upon the faith of which the instrument was executed; and this, though it contradict and vary the terms of the writing. *Shue v. Fuhrman*, 1 York 62.

(g) Intent.

348. In an issue to test the validity of an assignment, evidence is admissible of the knowledge and intent of the assignee, and of the insolvency and admissions of the assignor. *Kline v. First National Bank*, 15 Atlan. 433.

349. Parol evidence is not admissible to show what lands were intended to be embraced in the description in an oil lease, there being no fraud or mistake. *Duffield v. Hue*, 129 P. S. 94. See *Palmer v. Farrell*, Ibid. 162.

350. In the construction of a written contract, a usage of trade known to the parties, not unreasonable or in conflict with positive law, is admissible to explain the intention and give effect thereto. *First National Bank v. Fiske*, 133 P. S. 241; s. c. 25 W. N. C. 454.

351. Where a grantor actually owning 185 feet front sold 60 feet on one end and 60 feet on the other, and finally sold 60 feet in the middle to a third grantee, evidence was admitted tending to show whether or not he intended to sell to the last grantee all that was left in the block; the five feet in dispute being triangular in shape and running to a point in the rear. *Horn v. Hornbeck*, 2 Northam. 241.

352. In a suit on a note given in settlement of a partnership, where the defendant had brought a suit for its cancellation and discontinued the same, evidence is admissible that he had so discontinued by the advice of a third party that he might set up the same defence to the note. *Selzer v. Brundage*, 17 Atlan. 9.

353. In an action of ejectment, where the sole defence is that the prior conveyance from the common grantor to the plaintiff erroneously included the land in dispute by the mutual mistake of the parties to it, such mistake must be established by proofs which would justify a chancellor in reforming the deed; evidence is inadmissible of the undisclosed intentions and opinions of the parties to the plaintiff's deed. *Breneiser v. Davis*, 141 P. S. 85.

354. The legal effect of a forfeiture clause in a contract cannot be varied by an alleged oral understanding between the lessee and one only of the several lessors. *Springer v. Citizens Natural Gas Co.*, 145 P. S. 430.

355. Where a fire insurance company, under stress of suit, paid a fire loss which resulted from the alleged negligence of a natural gas company, by which an explosion occurred and set on fire the property of the assured, and the assured, for a consideration not named, released the gas company from all claims of every kind

arising out of the explosion, with the provision that the release would not affect claims for loss occasioned by fire, and which claim the assured should be entitled to receive in addition to the sum paid by the gas company; it was *held*, that such release was no bar to an action by the insurance company to recover the amount of the fire damages from the defendant, and parol evidence was inadmissible to show that the intention of the parties was to bar a recovery for damages by fire as well as by explosion; it was further *held*, that the insurance company could maintain a suit in the name of the assured without an assignment of the claim or formal order of subrogation. *Fidelity Title & Trust Co. v. People's Natural Gas Co.*, 150 P. S. 8.

356. Where no conversation took place at the signing of a telephone contract and it was not read, but a master found that certain parol negotiations as to future abatement of rates were omitted by mistake, the supreme court did not reverse, but intimated that signing upon mere suppositions, without knowledge or inquiry, came dangerously near negligence. *Martinsburg Bank v. Central Pennsylvania Telephone & Supply Co.*, 150 P. S. 36.

357. A deed made before the act 8 June, 1881 (Brightly's Purdon 651), though absolute in form, may be shown by parol evidence to be a mortgage, but such evidence must be clear, convincing and explicit. *Reeder v. Trullinger*, 151 P. S. 287.

358. Where a broker was employed to negotiate a loan on mortgage and he procured a party who would lend the money, and in the memorandum of agreement between the broker and the proposed lender was a provision that the borrower should pay the state tax, which was contrary to the borrower's instructions; it was *held*, in an action by the broker to recover his commissions, that he was entitled to show by the lender that such provision was a mistake through the use of an old printed form, and that it was no part of the actual contract. *Middleton v.*

Thompson, 163 P. S. 112. See *Vincent v. Woodland Oil Co.*, 165 P. S. 402.

359. Upon the trial of a sheriff's interpleader as to the ownership of growing crops and corn in crib, the claimant may show by parol that the lease which was signed by the defendant in his own name was really signed by him as the claimant's agent, and that the defendant had no interest in the property. *Galbraith v. Bridges*, 168 P. S. 325.

(h) Limitation of responsibility.

360. In a suit against an indorser of a note, he cannot reform it by testimony that the holder agreed not to look to him on his indorsement, where such testimony is contradicted by the holder. *Braithwait v. Renshaw*, 13 Atlan. 319; s. c. 12 Cent. 176.

361. A parol agreement by the vendor to refund the purchase money on failure of title, and to reimburse the vendee for his costs and expenses, is enforceable by action; its enforcement does not involve a proceeding to reform the deed, and such an agreement is not merged in a deed containing a covenant of special warranty but no covenant of title, afterwards accepted by the vendee. *Close v. Zell*, 141 P. S. 390.

362. The presumption of actual payment arising from a receipt of purchase money in a deed, may be rebutted by parol evidence. *Eshelman's Estate*, 143 P. S. 24.

363. A lease will not be reformed by proof of a parol agreement contemporaneous therewith, to the effect that the provision contained in the lease as to the abatement of rent applied to the second year of the term. *Rea v. Ganter*, 152 P. S. 512.

364. A lessee cannot, in the face of the terms of a written lease and an assignment thereof, relieve himself of personal liability by showing by parol evidence that he was acting as agent for a proposed corporation; at least without showing that the execution of the lease was induced by

fraud or misrepresentation. *Sanders v. Sharp*, 153 P. S. 555.

365. In an action for goods sold and delivered, it is a good defence that the goods were furnished the defendants, not as purchasers, but as managers of a business entered upon for the benefit of both parties, and as plaintiff's contribution to the stock, and that such stipulation had been omitted by mistake from the written agreement. *Lee v. Taylor*, 154 P. S. 95.

366. Where a person who had money in his hands derived from the estate of an intestate, executed a bond to the widow, conditioned to pay to her, her executors, administrators or assigns, the said sum with legal interest payable semiannually, and the principal of the fund belonged to the decedent's children; it was held, that after her death her administrator could bring suit on the bond, and evidence was inadmissible that the giving of the bond was in pursuance of an agreement with the children that the interest should be paid to the mother for life, and at her death, the principal to the children, and that some of the children had arranged with the defendant to settle severally concerning their respective shares. *Young v. Patterson*, 165 P. S. 423.

367. Where a municipal lien was filed for paving, and it appeared that the defendant had loaned money to the contractor to complete his contract, and that the agreement of loan provided for an allowance to the defendant of ten per cent upon all bills which he might have to pay by reason of his being the owner of real estate upon the line of the street, but there was no provision in the agreement as to how or when the loan should be repaid; it was held, that the lender could show by parol evidence that the agreement between him and the contractor was, that the amount borrowed should go as against the claim of the contractor for paving, and it was further held, that the deduction of ten per cent was not usurious. *Philadelphia v. Kelly*, 166 P. S. 207.

368. Where a son gave a judgment to

his father, it was *held*, upon an issue to test the validity of the judgment, that parol evidence was admissible to show that at the time the judgment was given it was verbally agreed that the judgment was merely to secure the father's support in case he met with reverses, and that no portion of it was ever to be collected unless he needed it for that purpose. *Davidson v. Young*, 167 P. S. 265.

(4) Explanations.

369. A written agreement for the sale to the defendant's grantor, which preceded the deed, was *held* to be competent evidence to aid in a correct understanding of the description in the deed. *Warfel v. Knott*, 128 P. S. 528.

370. Where one claim is assigned "in lieu of" another, there being doubt whether the assigned claim was in full satisfaction or on account, parol evidence is admissible to remove the doubt. *Selser's Estate*, 141 P. S. 529; affirming s. c. 7 C. C. 417; s. c. 46 L. I. 411.

371. A justice of the peace may testify that an unintelligible mark appearing on the face of an execution was meaningless and intended only to fill a blank space. *Tarr v. Eddy*, 142 P. S. 410.

372. Upon the sale of tobacco, where the words and figures of the inscription on the samples were themselves unintelligible without explanation, evidence was admissible that, in the general usage of the tobacco trade, the inscription was *held* to be a warranty on the part of the inspectors engaged in the business of inspecting tobacco for dealers, that the tobacco was sound, such warranty running in favor of future purchasers. *Conestoga Cigar Co. v. Finke*, 144 P. S. 159.

373. Where the defendants agreed to consign all lumber which they manufactured to the plaintiffs as their sole agents for sale thereof, the said agreement to continue so long as the defendants trading as the — Lumber Company or under any other name should make, work or manufacture lumber in the southern states, and in the first part of the agreement the

defendants were described as trading as the Tar River Lumber Company, whilst in other parts there was a blank before the words "Lumber Company"; it was *held*, in an action for the breach of contract, that parol evidence was admissible to prove that the defendants organized the Southern Lumber Company, and under its name manufactured lumber and shipped it to other parties from the south. *Hagy v. McGuire*, 147 P. S. 187.

374. Under a contract for driving a well and guarantying "to get the water from bed rock unless we should find good water acceptable to you at a less depth"; it was *held*, that where the contractors drove the well to the bed rock and got water, they were entitled to recover, although the water was salt and unfit for drinking purposes, and parol evidence was inadmissible to show that the water referred to in the contract was intended and meant to be good water to be used for drinking purposes. *Book v. Newcastle Wire Nail Co.*, 151 P. S. 499.

375. Where the words of a written contract are ordinary words used in their ordinary sense, and there is no latent ambiguity or uncertainty of subject matter, and no allegation of fraud, accident or mistake, parol evidence is not admissible to vary or control the meaning of the words, or to show the circumstances under which the contract was made, as explanatory of such meaning. *Book v. Newcastle Wire Nail Co.*, 151 P. S. 499.

376. The record and proceedings for specific performance, under and by virtue of which defendants acquired title, are admissible in evidence in ejectment, and parol evidence is not admissible to contradict the record in order to show that one of the plaintiffs had no guardian. *Cochrane v. Sanderson*, 151 P. S. 591.

377. Where a contract for the sale of bricks was not in writing, and the plaintiffs alleged that the bricks were to be counted in the wall, while the defendants alleged that they were to be measured in the wall; it was *held*, that the question was for the jury and it was competent to

show by the testimony of persons in the trade what was meant by the expression "measured in the wall," and how such measurement was made. *Welsh v. Huckestein*, 152 P. S. 27.

378. Entries in a firm's books showing credits of dividends after the date of the alleged withdrawal of a partner, may be explained by the testimony of book-keepers that they were made as a matter of book-keeping, so as to gradually cancel the indebtedness of the partner. *McConomy v. Reed*, 152 P. S. 42; affirming s. c. 9 Lanc. 65.

379. Where a deed conveyed a tract of land by metes and bounds, and called for "other land" of the grantor as an adjoiner on the east, "together with the right of mining and removing all the mineral that may be reached under said grantor's land from the land above described and hereby conveyed"; it was *held*, that the description was sufficiently certain to indicate the mineral in the grantor's land east of the tract conveyed, and that parol evidence was admissible to locate it. *Peart v. Brice*, 152 P. S. 277; reversing s. c. 11 C. C. 606.

380. In an action by a widow for a death benefit, the defence that the deceased member of the association was not in good standing may be sustained by parol testimony where the minutes show a motion to suspend, but do not show what action was taken on the motion; and in such a case members of the association are competent witnesses to show that the husband was not in good standing as a member at the time of his death. *Hamill v. Supreme Council of Royal Arcanum*, 152 P. S. 537.

381. In an action upon a building contract, where the defendants claimed liquidated damages for delay and the plaintiffs averred that the delay was caused by reason of the defendants having delayed putting in a railroad siding as they agreed to do; it was *held*, that the declarations of the defendant and their architect to third parties as to the terms of the contract, were admissible to cor-

roborate the testimony of the plaintiffs. *Huckestein v. Kelly*, 152 P. S. 629.

382. Parol evidence is admissible to give identity to the subject matter of a written contract. *Duquesne Nat. Bank v. Williams*, 155 P. S. 48.

383. Where a building contract in writing was so vague and indefinite that nearly all the details had to be supplied orally from time to time, it was not improper to instruct the jury that they might regard the written contract as altered or annulled by the conversations between the parties. *Green v. Paul*, 155 P. S. 126.

384. Where the owner of a tannery also owned a number of timber tracts adjoining the land upon which the tannery was situated, and he agreed to sell to the defendant the tannery and the tract of land upon which it was situated, and the agreement provided that "all bark is to be sold to the party of the second part at the cost price thereof"; it was *held*, in an action to recover the price of the bark, that the contract did not include any other bark than such as had already been peeled and was then on the premises sold, and that the terms of the written agreement could not be varied by proof that it was understood that all of the bark of the plaintiff was included in the agreement, no fraud, accident or mistake being alleged. *Baugh v. White*, 161 P. S. 632.

385. Where an oil lease provided that the work should be prosecuted with due diligence until completion or abandonment; it was *held*, that the question of what was due diligence, was one of fact, upon which the parties might agree apart from the writing, and that parol evidence was admissible of the understanding and agreement of the parties upon that subject. *Bartley v. Phillips*, 165 P. S. 325.

386. Where a contract for paving with vitrified brick required the contractor "to prepare all necessary beds of gravel, sand or other material"; it was *held*, that the contractor might show by parol that the words "beds of gravel, sand or other ma-

terial" had a definite and well-known meaning in the trade and related to the thin bed of light material placed at the top to receive the bricks and did not embrace the coarse material at the bottom. *McDonough v. Jolly*, 165 P. S. 542.

387. In an action on a constable's bond for his neglect to appraise or sell goods which he had levied upon; it was held, that parol evidence was admissible to explain the return of the constable, which was unintelligible without such proof. *Comm'th v. Rooney*, 167 P. S. 244.

388. In an action against a constable for levying on personal property which the plaintiff claims to have purchased at a previous sheriff's sale, neither the plaintiff nor the sheriff are competent witnesses to show by parol that the property was sold at sheriff's sale, where neither the levy nor the return of sale included the property in question. *Heinbaugh v. Powell*, 13 C. C. 360.

389. Either party to a written contract has a right to show that an agreement was had when the contract was entered into, that its words were to have a different meaning from their meaning in law, but the evidence to establish such an agreement or understanding must be clear, precise and indubitable. *Cochran v. She-nango Natural Gas Co.*, 40 P. L. J. 82.

(k) Practice.

390. In an action on a lease an affidavit of defence setting up a contemporaneous parol agreement should be clear and precise. *Sanders v. Sharp*, 153 P. S. 555.

391. An offer to prove that the controversy between the parties was settled by an agreement partly in writing and partly in parol, cannot be refused on the ground that verbal testimony is not admissible to alter a writing; the court cannot know in advance whether any part of the testimony is objectional to the rule. *Wolf v. Wolf*, 158 P. S. 621.

392. A parol alteration of a written contract draws to its nature the retained stipulations of the old contract, and reduces the whole to a parol contract, and

where a written contract has been so essentially changed by the parties as to become a parol contract, it is not necessary under the act 25 May 1887 (Brightly's Purdon 1728) for the plaintiff to file a copy of the written contract with his statement, and in such a case the written contract may be admitted in evidence, although no copy was filed. *Malone v. Philadelphia & Reading R. R. Co.*, 157 P. S. 430.

393. When matters of fact depending on oral testimony are necessary to a proper understanding of written evidence, such admixture draws the whole question to the jury. *Home B. & L. Ass'n v. Kilpatrick*, 140 P. S. 405.

XXXIII. Burden of proof.

394. Upon a rule to open a judgment, the burden of proof is on the defendant to establish a defence. *Roenigk's Appeal*, 2 Cent. 68; *Vogely's Appeal*, 15 Atlan. 878.

395. A note being given by a father to his son, who was also his trustee under an assignment for the benefit of creditors, discloses such a confidential relation as throws the burden of proving the consideration upon the son. *Huffman v. Iams*, 11 Atlan. 444.

396. A judgment confessed to an attorney by his client will stand as security only for what is actually due, and on an allegation of fraud will be opened. The burden is on the attorney to establish its fairness. *Acker v. Lambert*, 4 Montg. 189.

397. In trespass by a married woman against the sheriff for selling her goods under execution against her husband, the burden is upon the plaintiff to establish by clear and satisfactory evidence that the goods had been bought for her and paid for with money of her separate estate. *Diehl v. Peterson*, 127 P. S. 65.

398. If husband and wife are living together, the presumption is that the household property belongs to the husband; the burden is on the wife to show

that she owned it before marriage or acquired it subsequently, independent of her husband. *McDevitt v. Vial*, 11 Atlan. 645.

399. A wife who claims that she loaned money to her deceased husband has the burden upon her to establish the fact fully and clearly. *Brunner's Estate*, 6 Montg. 115.

400. If the husband at the time of a voluntary settlement on his wife be indebted in any amount, the burden is on those claiming under the settlement to show that it was not covinous. *Seiple v. Seiple*, 1 Northam. 365; reversed as to another point in 133 P. S. 460; s. c. 25 W. N. C. 488.

401. From the mere fact of a husband's reception of his wife's money, the law raises a presumption that he received it for her use, and the burden is on him or his heirs to prove a gift. Such a gift cannot be established by his declarations not made in the presence of his wife. *Wormley's Estate*, 137 P. S. 101; s. c. 27 W. N. C. 13.

402. Upon a bill to set aside and cancel a deed from the plaintiff to the defendant who was the niece of his deceased wife and his housekeeper, the burden is upon the plaintiff to establish by clear and precise evidence such matters of fact as are essential to the granting of the relief; there is no fiduciary relation between them. *Gardner v. McConlogue*, 8 C. C. 424; s. c. 2 Northam. 167.

403. In an action for negligence the plaintiff is bound to show by the weight of the evidence that the defendant has been guilty of negligence. *Schneider v. Pennsylvania R. R. Co.*, 2 Cent. 74.

404. In an action for negligence the burden is on the plaintiff to show a negligent act of the defendant which was the proximate cause of the injury. *Brownfield v. Hughes*, 128 P. S. 194.

405. If cattle be injured on a public bridge or highway, the burden is on the plaintiff to show that the bridge or highway was out of repair, and that the township was guilty of negligence. Whether

neglecting to spike down the floor of a bridge is negligence depends upon whether bridges so maintained are usually safe. *Zimmerman v. Conemaugh Township*, 2 Cent. 361.

406. In an action for loss of eggs under a contract for cold storage, the burden is on the plaintiff to show that the eggs were in a fit condition to be kept at the temperature of defendant's warehouse, and that they were injured by the defendant's act alone. *Boswell v. Collins*, 8 Atlan. 845.

407. If, in trover, the title be proved to have formerly been in the plaintiff, the burden is thrown on the defendant to show by preponderating evidence a change of title to himself. *Morningstar v. Jamieson*, 2 Cent. 574.

408. Where one claims as an heir of a decedent the burden is upon the claimant to show affirmatively that she is the decedent's child. *Shehan's Estate*, 139 P. S. 168; s. c. 38 P. L. J. 215; affirming s. c. 37 P. L. J. 397.

409. The signature of the maker of a promissory note being admitted, the burden of proof is thrown upon the defence. *Tassey's Appeal*, 3 Atlan. 101.

410. The onus is upon a joint debtor to show that a separate note was taken in satisfaction of the joint debt. *Kimberly's Appeal*, 7 Atlan. 75.

411. If a note "given for a patent right" does not contain those words in the margin, the burden is on the holder to show that he acquired the note before maturity and for value without notice. *Horstman v. Zimmerman*, 3 Cent. 249.

412. In a suit on a note under seal brought within twenty years the burden of proving payment is on the defendant, but payment may be presumed from the fact that during that time the holder was constantly pressed for money while the defendant was abundantly able to pay. *Morrison v. Collins*, 127 P. S. 28.

413. Where the narr. in a previous suit was sufficient to cover the claim in a second suit, the judgment was taken in the first suit by agreement, the party alleging

that the settlement did not include the claim in the second suit has the burden of proving that fact. *Moser v. Guarantee Trust & S. D. Co.*, 3 Atlan. 454.

414. In a suit by the administrator of the insured against the assignee of the life policy, who had received payment after the death, the burden is on the plaintiff to prove not only that the assignee was not a relative, but also, that he was not his creditor. *Lenig v. Eisenhart*, 127 P. S. 59.

415. In a suit on a bond conditioned to pay a certain sum in case the obligor should collect another certain sum from a third party, the burden is on the plaintiff to prove a neglect to make reasonable efforts to collect. *Depew v. Depew*, 2 Cent. 611.

416. Where a servant has been discharged before the expiration of his term, the burden of showing that by reasonable efforts he might have found employment elsewhere is upon the master. *Emery v. Steckel*, 126 P. S. 171.

417. A city may regulate the erection and maintenance of telegraph poles and wires and impose a reasonable license fee for the same. The reasonableness of the fee is a matter for the court, but the burden is on the defendant to show its unreasonableness. *Lancaster v. Edison Electric Illuminating Co.*, 8 C. C. 178.

418. In ejectment by a sheriff's vendee, if the plaintiff put in evidence a deed by the defendant in the execution to her daughter, executed and recorded two years before the judgment was entered, the burden is on him to show that the conveyance was made to hinder, delay or defraud the judgment creditor; otherwise, he was properly nonsuited. *Brown v. McCormick*, 135 P. S. 434.

419. In an action of ejectment, where it appeared that the deed under which defendant claimed was executed by the grantor to his step-son for a nominal consideration and was prepared by the latter's attorney and acknowledged in the presence of the grantee before a notary to whom the grantor was unknown; it

was held, that the burden was upon the defendant to establish that the grantor understood the nature of the act and executed the deed of his own free will. *Miller v. Rivers*, 138 P. S. 270.

420. Where a trustee seeks to show that the trust fund in his hands was converted into an ordinary debt, the burden of proof is upon him to establish the fact by clear and satisfactory evidence; it cannot be established by a release purporting to have been executed several years after the transaction, unattested, without consideration stated, and with interlineations, and produced without proof of execution and delivery save by opinions as to signatures. *Stewart's Estate*, 140 P. S. 124.

421. In an action against physicians for giving a false certificate for the commission of the plaintiff to an insane hospital, where the court below found that although the plaintiff was not insane, yet the defendants were not guilty of negligence; it was held that, the certificate averring that a proper examination had been made, the burden of proving negligence was upon the plaintiff, and that no presumption of negligence arose from the fact that the defendants were mistaken. *Williams v. LeBar*, 141 P. S. 149; s. c. 2 Northam. 274.

422. In an action by the beneficiary in a life certificate to recover from an assignee without an insurable interest the amount received on the policy by the latter, the burden is on the plaintiff to show the want of insurable interest; a *prima facie* case is made out, however, by proof that the assignment was executed in blank and afterwards filled in with the assignee's name, who did not at the time claim to be a relative or a creditor, and that the beneficiary never knew the assignee. *Vanormer v. Hornberger*, 142 P. S. 575.

423. In an action against several individuals as co-partners late doing business under the firm name of the Home Savings Bank for the amount of a deposit in a banking institution of that name; it

was *held*, that the burden was on the plaintiff to prove the alleged partnership, and until *prima facie* proof of such fact the defendants were not called on to enter upon a defence. *Hallstead v. Coleman*, 143 P. S. 352; reversing s. c. 10 C. C. 434.

424. Where the plaintiff in ejectment showed title to a tract that included the land in dispute, and the defendant put in evidence a deed to himself from plaintiff's ancestor, and the bearing of a certain line with a statement that it was at right angles with another line were inconsistent, and there were other circumstances showing that the bearing was a mistake; it was *held*, that the burden of proof was on the defendant to show that the disputed land was enclosed in the disputed line. *Henry v. Huff*, 143 P. S. 548.

425. The measure of a boy's responsibility for contributory negligence is his capacity to see and appreciate danger; in the absence of clear evidence or the lack of it, he will be held to such measure of discretion as is usual in boys of his age and experience; at the age of fourteen the presumption of capacity changes and the law puts upon the infant the burden of showing his personal want of the intelligence, prudence, forethought or strength usual to boys of that age. *Kehler v. Schwenk*, 144 P. S. 348; *Greenway v. Conroy*, 160 P. S. 185.

426. In an action for a loss by fire caused by a spark from a locomotive, the burden is on the plaintiff to prove that the fire was communicated by some engine of the defendant, and also to prove negligence in the construction or management in the engine; such facts may be established by circumstantial evidence, but where a fire is shown to have been caused by the sparks from a certain engine, the evidence should be confined to the condition, management and operation of that engine, and evidence is inadmissible tending to prove defects in other engines of the company. Where, however, the offending engine is not clearly identified, the plaintiff may prove that the defend-

ant's locomotives generally at or about the time of the occurrence threw sparks of unusual size, causing numerous fires on that part of the road. *Henderson v. Philadelphia & Reading R. R. Co.*, 144 P. S. 461; reversing s. c. 47 L. I. 58.

427. Upon the trial of an indictment, the defendant is presumed to be sane until such presumption is successfully rebutted by fairly preponderating evidence that he was insane at the time of committing the crime; evidence which creates only a mere doubt or a reasonable doubt of his sanity, is insufficient to justify an acquittal, but it is error, especially in a capital case, to instruct the jury that the fact of insanity must be clearly proved. *Comm'th v. Gerade*, 145 P. S. 289. See s. c. 40 P. L. J. 117.

428. In a bill for an account of a partnership, where it had been agreed between the parties that all items of property held by defendant should be considered as partnership property, and the fact of the holding of an item of property at the date of the agreement was established; it was *held*, that the burden of proof was on the defendant and that in thus assigning the burden of proof there was no violation of the equity rule that requires the evidence of two witnesses to overcome a responsive answer. *McCullough v. Barr*, 145 P. S. 459.

429. In an action on a bond given by the defendant to her father, since deceased, where it was alleged that in release of payment he had voluntarily destroyed the bonds in his lifetime, and a close confidential relation between them was not denied, and there was strong evidence of extreme weakness bodily and mentally; it was *held*, that the burden was on the defendant to show that the transaction was righteous and conscientious, and that the obligee had acted intelligently, deliberately and freely; and this, though the disorder was merely temporary and not operative at the particular time, and it was competent for the plaintiff's executors to prove declarations of the

obligee before his capacity was questioned to the effect that he had intended the bonds should be paid. *Smith v. Loafman*, 145 P. S. 628.

430. In an action on a promissory note against defendants who are not parties to the note, the burden is on the plaintiff to show affirmatively that the note was made by the authority of the defendants for a debt due by them. *Freeport Bank v. Egan*, 146 P. S. 106.

431. Money deposited in the name of a wife is, *prima facie*, her money, and when claimed by her husband on her decease, the burden is on him to prove that it was his property. *Qualter's Estate*, 147 P. S. 124.

432. In assumpsit for goods of the plaintiff unlawfully appropriated by the defendant, who had been in the habit of purchasing goods from the plaintiff; it was *held*, that the defendant by his wrong doing having prevented the plaintiff from accurately estimating the value of the goods taken, the highest value in kind might be charged against him, and the burden was upon him to show what it was that he actually took. *McCoun v. Quigley*, 147 P. S. 307.

433. In an action against a common carrier for loss of baggage, it is a complete defence that the baggage was destroyed by a flood of such unprecedented character as amounted to an act of God; the destruction of the day express on 31 May 1889 by the Johnstown flood was an act of God; in such a case there is no presumption of negligence which will shift the burden of proof upon the carrier to show that he was not negligent. *Long v. Pennsylvania R. R. Co.*, 147 P. S. 343.

434. The term "confidential relation" includes all persons who are associated by any relation of trust and confidence, and embraces partners and co-partners, principal and agent, master and servant, physician and patient, as well as trustees and *cestui que trusts*, guardian and ward, attorney and client, parent and child, and husband and wife. Where a man eighty-three years of age went to reside with his

nephew and gave him a letter of attorney authorizing him to manage his estate, which amounted to about nine thousand dollars, and subsequently the nephew presented to his uncle a note for seven thousand dollars, which the uncle signed, the nephew stating that it was given for past services and for care during the remainder of his life; it was *held*, that the note must be held void in the absence of affirmative proof that the maker was informed of the effect which would result from his signing the note, of the proportion of his estate which would be required to pay it and of the fact that if paid but little of his estate would remain for payment of legacies provided for in his will. *Darlington's Estate*, 147 P. S. 624. See *Crothers v. Crothers*, 149 P. S. 201.

435. The mere fact that a passenger on a railway car was injured, does not raise the presumption of negligence so as to shift the burden of proof, where the evidence clearly shows the cause of the accident. *Keller v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 149 P. S. 65; affirming s. c. 1 Dist. Rep. 197.

436. Where a son resides with his father at the time of the conveyance of real estate to him by his father, the presence of any fact or circumstance which casts the slightest suspicion upon the transaction will require the son to prove that there was no taint of fraud or undue influence in it; but the mere fact that the son held a general power of attorney, executed very shortly before the conveyance and especially authorizing a lease of the farm, is not of itself sufficient to put the burden upon the son showing the integrity of the transaction. *Crothers v. Crothers*, 149 P. S. 201.

437. Upon an issue to determine the domicile of a testator, where it appeared that testator's domicile of origin was West Chester, Pennsylvania, that his domicile of choice was Brooklyn, New York, and that having purchased a farm near West Chester, he returned from Brooklyn to West Chester, where he died; it was *held*, that the burden of proof was upon the

plaintiff to establish that the testator was a resident of Pennsylvania, and it was not error to charge that if the jury concluded that the testator abandoned his residence in Brooklyn with the intention of residing on his farm or in Philadelphia, but died before consummating that intention, Brooklyn continued to be his legal place of residence. *Price v. Price*, 156 P. S. 617.

438. Where a plaintiff in an action for negligence makes out a *prima facie* case without disclosing contributory negligence, the burden is thrown upon the defendant of establishing contributory negligence. *Baker v. Westmoreland & Cambria Natural Gas Co.*, 157 P. S. 593.

439. The assent to a gift by the donee will be presumed and the title will vest *eo instanti* the gift is made; and this, though he be ignorant of the transaction. The title will continue in the donee until he rejects it, and the burden of proof is on those who allege his refusal to accept. *Tarr v. Robinson*, 158 P. S. 60.

440. In an action on a warehouse receipt to recover damages for the non-delivery of the goods stored, the burden is on the defendant to show that the goods were delivered to somebody by the plaintiff's authority or that they disappeared with the knowledge or consent, or with the concurrence of the plaintiffs. *Hoeveller v. Myers*, 158 P. S. 461.

441. Where a bill of sale is taken by a creditor in satisfaction of an antecedent debt, he is entitled to hold the goods as against the equities of an original vendor who claims that the goods were obtained from him by fraud; but in such a case the burden of proof is on the creditor to show that he took the goods in payment of a debt. *Bughman v. Central Bank*, 159 P. S. 94.

442. In an action for malicious prosecution, the burden is on the plaintiff to show malice and want of probable cause, but the jury may infer the former from the latter. A discharge by the examining magistrate casts the burden of establishing probable cause upon the

defendant unless it appears in plaintiff's testimony; if probable cause be shown, it matters not whether the motive of the prosecution was praiseworthy or malicious. *Beihof v. Loeffert*, 159 P. S. 374; *Beihof v. Loeffert*, 159 P. S. 365.

443. Upon a bill to restrain a borough from undertaking the erection of an electrical plant on the ground that the borough indebtedness would be increased beyond the constitutional limit, the burden is on the plaintiff to prove that the indebtedness would be necessarily increased to an amount exceeding the legal limit. *Linn v. Chambersburg Borough*, 160 P. S. 511.

444. Where, under a coal lease, the lessee was to mine at least three thousand tons of coal annually, or to pay for that quantity whether mined or not, and it was further provided that, should the seam of coal prove faulty in the strata or unmerchantable in the quality, the lessee should have the right to abandon the same; it was held, in an action for the rent, that the burden of proof was on the lessee to show that the coal was unmerchantable. *Wilson v. Beech Creek Cannel Coal Co.*, 161 P. S. 499.

445. An illegal consideration, or the failure of a lawful consideration, constitutes a good defence to a mortgage, but the burden is on the mortgagor to establish such defence by competent evidence. *Saalfeld v. Manrow*, 165 P. S. 114.

446. Where the maker of a promissory note under seal has notice that the payee has assigned the note, he cannot purchase a note of the payee to be used as a set-off; but in an action by the assignee, the burden is on him to show that the defendant had notice of the assignment before he purchased the payee's note. *Burford v. Fergus*, 165 P. S. 310.

447. Upon an appeal from the register, the burden of proof is upon the proponent to prove the execution of the paper probated. *Simcox's Estate*, 11 C. C. 545.

448. The owner of a steer is not liable for injuries inflicted upon a person in the absence of evidence that the animal had

a vicious character and that the defendant had previous knowledge thereof; the burden is upon the plaintiff to show negligence on the part of the owner even when the animals belong to a class of known dangerous propensities. *Curtis v. Schlosser*, 14 C. C. 600.

449. Upon an application to open a judgment, where the plaintiff makes a full and responsive answer under oath, denying the defendant's allegations, the burden of proof is thrown upon the defendant. *Markle v. Fichter*, 7 Kulp 549.

450. Where a fiduciary relation is established between the maker and payee of a note and an advantage is obtained at the expense of the maker, the law presumes that the benefit was the fruit of the continuing confidence; upon an allegation of actual undue influence the burden of proof rests upon him who would avoid the instrument, but where a confidential relation exists, the burden shifts upon him who would retain the benefit. *Browning v. Patterson*, 11 Montg. 78. See *Clark v. Clark*, 42 P. L. J. 384.

451. In a contest between the plaintiff and a defendant in a judgment as to whether certain payments were made on it, the burden of proof is upon the party attempting to show such payments, and where the only evidence is that of the parties to the judgment, who contradict each other, the credits cannot be allowed. *Fuhrman v. Fuhrman*, 2 York 169.

452. Where a certificate of life insurance provided that the company at the expiration of sixty days after proof of death would pay to the widow of the insured three dollars for every one thousand dollars maximum sum of benefit actually in force upon such decease, and upon which the assessments were paid, provided that the amount should not exceed the maximum sum of three thousand dollars; it was held, that the burden of proof was upon the company to show that there were not one thousand dollars maximum sums of benefits actually in force in the company upon the decease of the insured and upon which mortuary assess-

ments had been paid. *Leidig v. New Era Life Ass'n*, 4 York 135.

453. In an action for injuries to livestock during transportation, the burden of proof as to any limitation of liability is upon the defendant; unless such limitation is admitted or clearly established by proof, the question is for the jury. *Schaeffer v. Philadelphia & Reading R. R. Co.*, 168 P. S. 209.

XXXIV. Circumstantial evidence.

454. Murder may be established by circumstantial evidence where all the proven circumstances are irreconcilable with any other theory than that of deliberate murder, and are also irreconcilable with any reasonable theory consistent with defendant's innocence. *Comm'th v. Johnson*, 162 P. S. 63.

455. Where the evidence tended to show that the prisoner lived with the deceased who was not his wife, that he had made frequent threats to kill her, that he had previously struck and beaten her, that on the evening of the killing he had bought and given her liquor, but later in the evening he left his house and went into another state, where he remained until he was arrested, and there were plainly visible thumb and finger marks on the neck of the deceased, which warranted experts in expressing an opinion that her death was due to strangulation; it was held, that the evidence was sufficient to sustain a verdict of murder in the first degree. *Comm'th v. Bell*, 164 P. S. 517.

456. Upon the trial of an indictment, the flight of the defendant immediately after the commission of the offence is a circumstance which may always be submitted for the consideration of the jury. *Comm'th v. McMahon*, 145 P. S. 413.

457. Upon the trial of an indictment where the commonwealth proved that the person who committed the offence wore a false beard, evidence was held to be admissible to prove the purchase of such a beard by the person at whose house

the defendant resided and this, although there was a discrepancy in the testimony as to the day of purchasing the beard and the bringing of it to the house, and there was no evidence of its delivery to the defendant. *Comm'th v. Painton*, 5 York 140.

458. That a fire was caused by sparks from a locomotive may be shown by circumstantial evidence; the habitual use of insufficient spark arresters may be shown. *Gowen v. Glaser*, 3 Cent. 109. See *Glaser v. Lewis*, 14 W. N. C. 228.

459. In an action for a loss by fire caused by a spark from a locomotive, the burden is on the plaintiff to prove that the fire was communicated by some engine of the defendant, and also to prove negligence in the construction or management of the engine; such facts may be established by circumstantial evidence, but where the fire is shown to have been caused by the sparks from a certain engine, the evidence should be confined to the condition, management, and operation of that engine and evidence is inadmissible, tending to prove defects in other engines of the company. Where, however, the offending engine is not clearly identified, the plaintiff may prove that the defendant's locomotives generally at or about the time of the occurrence threw sparks of unusual size, causing numerous fires on that part of the road. *Henderson v. Philadelphia & Reading R. R. Co.*, 144 P. S. 461; reversing s. c. 47 L. I. 58.

460. Where the issue is one of forgery in an issue to determine the genuineness of a judgment note, it is competent for the defendant to show that the plaintiff had in her possession, a few days before the entry of judgment, other notes bearing the signature of the same maker but in blank as to dates and amount; and where the plaintiff testified that the note was signed on a Thursday and that she knew it was a Thursday because she had looked at the almanac, it was proper to ask her on cross-examination why she looked at the almanac. *Thomas v. Miller*, 151 P. S. 482; s. c. 165 P. S. 216.

461. Where the issue is whether certain papers are forged or not, evidence is admissible of the forging of other papers of the same kind in order to demonstrate the means and the individual by which the forgery was effected; evidence is admissible to show that the desk of the alleged forger contained a genuine signature of the alleged maker torn from his ledger, and that in the same desk were other completed and partly completed signatures imitating the genuine signature, and such signatures are admissible. *Pennsylvania Company for Insurance on Lives & Granting Annuities v. Philadelphia, Germantown & Norristown R. R. Co.*, 153 P. S. 160; affirming s. c. 11 C. C. 482.

462. The ownership of a roll of money found concealed on the premises after the death of plaintiff's decedent was permitted to be proved by circumstantial evidence. *Warren v. Ulrich*, 130 P. S. 413.

XXXV. *Res gestæ*.

463. Declarations which are made under such circumstances as raise the reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and which are made so soon thereafter as to exclude the presumption that they are the result of premeditation and design, are admissible as part of the *res gestæ*. *Comm'th v. Wertz*, 161 P. S. 591.

464. The declarations of a passenger, hurt while alighting from a railroad train, and made immediately after the train had passed, and while he lay upon the platform where he fell, are admissible as part of the *res gestæ*. *Pennsylvania Railroad Co. v. Lyons*, 129 P. S. 113.

465. Upon the question of reasonable cause for a desertion, the declarations of the wife and her manifestations of sorrow at the time are admissible as part of the *res gestæ*, but not so of her subsequent manifestations. *Hahn v. Bealor*, 132 P. S. 242; s. c. 25 W. N. C. 361.

466. In an action against a corporation

for salary, a letter written by the general manager to another officer of the company more than two months after the contract of employment, was *held* to be inadmissible, being no part of the *res gestæ*. *Chapin v. Cambria Iron Co.*, 145 P. S. 478.

467. In an action for overflowing plaintiff's land by the surface water from a city street, the declarations of a street commissioner while doing such work are evidence as part of the *res gestæ*. *Weir v. Plymouth Borough*, 148 P. S. 566.

468. Upon a trial for murder, it is error to refuse to charge that if the jury believe the testimony of certain witnesses "that the deceased made declarations at the time of the shooting and subsequently thereto, that the shooting was accidental and contradictory of his dying declarations," such declarations are to be taken into consideration of the jury and, if true, there should be an acquittal. *Comm'th v. Silcox*, 161 P. S. 484.

469. Where a claimant against a decedent's estate was the father-in-law of the decedent, and it appeared that the decedent had purchased a house and the claimant took the cash part of the purchase money to the company employed to examine the title and asserted to the officers that he was advancing it by way of loan; it was *held*, that such an assertion on his part was not admissible in evidence as part of the *res gestæ* for the purpose of establishing the loan. *Muller's Estate*, 13 C. C. 183.

470. Upon the question of domicile, the casual character of a person's residence may be shown by his declarations, where the latter are untainted with any motive of self-interest; such declarations are part of the *res gestæ*. *Mintzer's Estate*, 13 C. C. 465; s. c. 2 Dist. Rep. 584.

471. Where the defendant and his workmen were repairing the plaintiff's roof, and the plaintiff's house was set on fire from the sparks of their fire-pot; it was *held*, that there was a fair presumption that the fire was caused by the negligence of the workmen and that the defendant

was not relieved from liability because he furnished proper appliances and competent workmen; and it was further *held*, that the declarations of the defendant's workmen, made while the fire was in progress, as to the cause of the fire were admissible in evidence to charge the defendant with liability. *Shafer v. Lacock*, 168 P. S. 497; s. c. 42 P. L. J. 430.

See EVIDENCE, XXIX.

XXXVI. Practice.

(a) Duty to produce the best evidence.

472. The rule requiring the production of the best evidence excludes only that evidence which itself indicates the existence of more original sources of information. *Western Union Telegraph Co. v. Stevenson*, 128 P. S. 442.

473. The rule which requires that the best evidence shall be produced means merely the best evidence within the reach of the party; that more conclusive evidence might possibly be obtained does not preclude a party from offering such evidence as is available. *Crozer v. New Chester Water Co.*, 148 P. S. 130.

474. Where an architect sued for work in preparing the plans and drawings for a building and defendant sought to charge the plaintiff, with loss occasioned by the heating plant being unsatisfactory, and it appeared that after the heating works were put in, the plaintiff gave to the plumber a certificate to show that the work was finished in accordance with the plans; it was *held*, that the mere fact of giving the certificate was not sufficient to charge the plaintiff with liability, but that the certificate itself must be produced in evidence or accounted for. *Brown v. Burr*, 160 P. S. 458.

475. Where it was desired to show a change of proprietorship of a hotel by the fact that the new proprietor used a new register; it was *held*, that the register itself should be produced in evidence and that parol evidence of the change of register was competent. *Grauley v. Jermyn*, 163 P. S. 501.

(b) Admission of secondary evidence.

476. Secondary evidence of the contents of a release of a mineral right alleged to have been executed some forty years before, and lost or destroyed, was refused. *Phoenix Iron Co. v. Lewis*, 7 Cent. 515.

477. In an action upon a promissory note against the maker, where the plaintiff bank proved that it discounted the note for the payee, and had returned the same to him on maturity on the receipt of a new note which was a forgery and that the forger had fled the country; it was held, that sufficient ground had been laid to excuse the non-production of the note and secondary evidence was admissible of its contents. *West Philadelphia Nat. Bank v. Field*, 143 P. S. 473.

478. A party may prove that he is the owner of personal property without producing the written evidence of his ownership. *Gallagher v. London Assurance Corporation*, 149 P. S. 25; reversing s. c. 5 Kulp 467.

(c) Offer and order of evidence.

479. How formally and in what detail the purpose for which a paper is offered in evidence must be stated, is within the discretion of the trial judge. *Myers v. Kingston Coal Co.*, 126 P. S. 582.

480. The form in which evidence is given being adopted upon the suggestion of opposing counsel, the latter's client is estopped from complaining of it. *Rees v. Schuylkill River E. S. Railroad Co.*, 135 P. S. 629; s. c. 26 W. N. C. 500.

481. Where defendant agreed to pay a maximum price for coal lands unless after a thorough examination he found that a certain supposed vein of coal did not exist; it was held, in an action for the price, that the plaintiff was not bound to show in the first instance the manner of the examination or its insufficiency, but having shown the manner of performance by the defendant as part of his case in chief, it was not error to allow him to give evidence tending to show its insufficiency. *Wells v. Leek*, 151 P. S. 431.

482. The order of admission of testimony is largely within the discretion of the trial judge; a judgment will not be reversed because of the admission in rebuttal of evidence which should have been offered in chief. *Amrhein v. Clausen*, 155 P. S. 93.

(d) Objections to evidence.

483. Where an objection is made to an offer of evidence and the offer is refused, but the witness subsequently testifies, without limitation, to everything relating to the subject, the refusal of the offer works no harm and an assignment thereto is without merit. *Collins v. Houston*, 138 P. S. 481.

484. If an offer of evidence be objectionable in part, it is not error to reject it as a whole. *Evans v. Evans*, 155 P. S. 572.

485. Where portions of a deposition are competent, the admission of the whole deposition over a general objection is not error. *Martin v. Kline*, 157 P. S. 473.

486. Where an objection to the receipt of certain testimony as to damages was very general, and at the suggestion of the judge the witness was cross-examined as to her means of knowledge, and there was no motion afterwards made to strike out her testimony; it was held, that the judgment would not be reversed in a case where the verdict showed that the jury was not governed by the testimony. *Huling v. Henderson*, 161 P. S. 553.

487. Where a witness offered was only competent under the exception contained in the act 11 June 1891 (Brightly's Purdon 819) and the offer did not set forth sufficient to enable the court to determine whether or not the witness was within the exception; it was held, that the supreme court would not consider an assignment of error to the rejection of the offer. *Krumrine v. Grenoble*, 165 P. S. 98.

488. After all the plaintiff's evidence has been put in without objection and the plaintiff's case is closed, it is too late for the defendant to object on the ground of a material variance between the bill of

particulars and the evidence; the defendant might move at that time to strike out the testimony that is not applicable to the bill of particulars, but he cannot claim a nonsuit. *Dee v. Sharon Hill Academy*, 5 Del. 72.

489. The evidence of an incompetent witness being received without objection, a subsequent objection is too late. *Gerker's Estate*, 8 C. C. 583; s. c. 26 W. N. C. 344.

490. Where a party objects to evidence, he will be held to the ground upon which he based his objection; whatever was not denied or made special ground of objection will be held to have been conceded. *Brandt v. Spahr*, 3 York 163.

See APPEAL AND ERROR.

(e) Withdrawal of evidence.

491. The offer of evidence which the evidence fails to sustain, and its subsequent withdrawal, are matters of discretion, the exercise of which will not be reviewed except in case of abuse. *Comm'th v. Crossmyer*, 156 P. S. 304.

492. A judgment will not be reversed for the admission of incompetent evidence which was withdrawn before argument. *Sidney School Furniture Co. v. Warsaw Township School District*, 158 P. S. 35.

(g) Striking out evidence.

493. Improper evidence being admitted without exception, a motion to strike out should be disregarded. *Dallmeyer v. Dallmeyer*, 16 Atlan. 72.

494. If an appeal be tried on its merits, without regard to the amount of the plaintiff's claim or the defendant's set-off, it is too late, after the testimony is all in, to ask to have the evidence of defendant's set-off withdrawn from the jury, because it exceeds the jurisdiction of the justice. *O'Farrall v. Moore*, 127 P. S. 234.

495. Where a portion only of a witness's testimony is objectionable, a motion to strike out without specifying the objectionable portion should be rejected.

Miller v. Windsor Water Co., 148 P. S. 429.

496. Where proof of an assignment for creditors in a foreign state consisted of a certified copy of the act and warrant of confirmation of the trustee of the sequestered estate, showing that the trustee had power to recover the effects of the estate, and the certificate of the consul that the act and warrant was evidence of title of the trustee to the property wherever situate, and such proof was admitted by agreement of counsel, it was not error to refuse to strike it out. *Long v. Girdwood*, 150 P. S. 413; affirming s. c. 28 W. N. C. 299.

497. Where only a part of the testimony of certain witnesses was objected to, the trial judge is justified in refusing a motion to strike out all of their testimony. *Wilson v. Equitable Gas Co.*, 152 P. S. 566.

498. Where an answer is not responsive to a question, and no exception is taken to the answer, and the court is not requested to strike it off, it cannot be objected to on appeal. *Broadnax v. Cheraw & Salisbury R. R. Co.*, 157 P. S. 140; affirming s. c. 1 Dist. Rep. 251.

499. Upon the trial of an indictment for incestuous fornication, where the prosecutrix was asked under objection if she had told her brothers and sisters of the offence about the time of its occurrence, and answered that she did not then, but did about four or six weeks afterwards, and being about to tell what she said, the court instructed her not to state it; it was held, that as no motion was made by the prisoner's counsel to strike out her answer or so much thereof as was not responsive to the question, the prisoner was not prejudiced, and judgment on a verdict of guilty would not be reversed. *Comm'th v. Bell*, 166 P. S. 405.

500. The misconduct of a witness in volunteering evidence that had been declared inadmissible, and which was immediately struck out, is no ground for a new trial. *Ruddy v. Ruddy*, 6 Kulp 297.

XXXVII. Competency of witnesses.

501. Where, upon a claim against a decedent's estate, a witness was competent at the time his testimony was taken on behalf of the claimant, but shortly afterwards through the death of the claimant he became interested and disqualified as an heir of the claimant; it was *held*, that the testimony could nevertheless be considered. *Hege's Estate*, 12 Lanc. 105.

XXXVIII. What interest disqualifies a witness.

502. A witness, otherwise competent, is not disqualified by a mere interest in the question being tried. *Broomall v. McCallion*, 8 Atlan. 413.

XL. Agents.

503. Upon an investigation by a committee of councils in Philadelphia, where the shares of stock of a telephone company had been used to secure the passage of a certain ordinance; it was *held*, that a witness who had purchased from a deceased councilman's estate six shares of the said stock could not be compelled to disclose for whom he bought the stock; an agent cannot be compelled to disclose the principal except for the protection of some individual right or to establish the guilt or innocence of a defendant in a criminal trial. Query as to the constitutionality of the act 1 June 1885. *Simon's Case*, 4 Dist. Rep. 189.

See AGENCY.

XLI. Legatees and heirs.

504. A legatee may testify against a claim for services against the estate where the latter is sufficient to pay his legacy, whether the claim be allowed or not. *Sayer's Estate*, 8 C. C. 32.

505. In a proceeding by a claimant against a decedent's estate, a legatee or heir, under the act of 23 May 1887

(Brightly's Purdon 817), may testify in behalf of the estate, whether such testimony relates to occurrences before or after the decedent's death. *Third National Bank v. Hunsicker*, 8 C. C. 635; s. c. 6 Montg. 73.

506. In an action upon a bond of a testator where the testator's signature to the bond is denied, the heirs and legatees of the testator are competent witnesses to testify concerning the genuineness of his signature; they may testify to a present opinion based on a test paper and compared with a mental exemplar formed from previous opportunities of observation, such evidence not being in the nature of matters occurring in the lifetime of the testator, but of a fact existing after his death. *York Trust, Real Estate & Deposit Co. v. Kindig*, 7 York 149.

507. In a proceeding to charge the estate of a deceased administrator, neither a surviving administrator nor an heir, or the latter's husband, are competent to testify to any matter occurring in the lifetime of the deceased administrator. *Finley's Estate*, 7 York 201.

508. Where it is sought to charge a legatee with money of the decedent in her hands, and the only evidence to support the claim is a declaration of the legatee herself, that she had received the money from the decedent before his death as a gift, the whole of the declaration must be taken as true in the absence of evidence to the contrary. *Miller's Estate*, 151 P. S. 525.

See EVIDENCE, XLV.

XLII. Husband and wife.

509. If there is no service or appearance the libellant is not a competent witness in divorce, except to prove the fact of marriage. *Shipman v. Shipman*, 5 Kulp 370.

510. In an action for criminal conversation, the husband is not a competent witness as to the wife's adultery. *Cornelius v. Hambay*, 150 P. S. 359.

511. Upon the trial of an indictment

for murder where it appears that the prisoner's wife was present at the killing, it is not improper for the district attorney to comment upon the fact that the prisoner failed to call his wife as a witness for the defence. *Comm'th v. Weber*, 167 P. S. 153.

512. Where either a husband or a wife is incompetent to testify as a witness, the other also is incompetent. *Bitner v. Boone*, 128 P. S. 567; *Daisz's Appeal*, *Ibid.* 572.

513. Where either a husband or a wife is incompetent as a witness, the other is also incompetent; the husband is not made competent, however, by reason of the wife's having been called by way of cross-examination. *Root's Estate*, 11 *Lanc.* 225.

514. Where a wife is excluded from testifying on the ground of interest, her husband is also excluded by reason of identity of interest growing out of the closeness of the personal relation. *Quickel v. Finley*, 7 *York* 169.

515. Upon a bill to set aside a voluntary settlement in trust for the plaintiff's wife, the plaintiff is competent to prove a fraudulent combination between his brothers and the trustee, the wife not being a party to the deed nor a purchaser under it. *Merriman v. Munson*, 134 P. S. 114.

516. Under the act of 23 May 1887 (*Brightly's Purdon* 817), a married woman is competent to testify on the trial of an indictment against her husband and another for conspiracy to put her in an insane asylum. *Comm'th v. Spink*, 137 P. S. 255; s. c. 27 *W. N. C.* 37.

517. The testimony of a wife is admissible to corroborate that of her husband to the effect that a judgment in ejectment was confessed by him because his creditors were crowding him, such evidence being offered to show the husband's turpitude. *Bell v. Throop*, 140 P. S. 641.

518. Though a husband and wife are alike incompetent witnesses, a mother is competent to prove on the question of her son's legitimacy that he was born eleven

or twelve years before her marriage and that his father's name was Docherty and not the man she subsequently married. *Janes's Estate*, 147 P. S. 527.

519. A wife is a competent witness to prove the marriage with her deceased husband. *Drinkhouse's Estate*, 151 P. S. 294; affirming s. c. 11 *C. C.* 144.

520. Where property is sold at sheriff's sale as the property of a husband and ejectment is brought against the husband and wife by the sheriff's vendee, the wife is a competent witness to establish her title to the property; in such a case she is not called to testify against her husband or against his title. *Young v. Scaft*, 153 P. S. 352.

521. On an issue to determine the ownership of personal property claimed by a married woman, both the husband and wife are competent to testify in support of the wife's title. *Evans v. Evans*, 155 P. S. 572.

522. In interpleader proceedings where the goods are claimed by the defendant's wife, she is a competent witness to support her title where the husband disclaims ownership; it is otherwise, however, where the husband claims the property and is on the side of the execution creditor. *Norbeck v. Davis*, 157 P. S. 399.

523. Where the husband is the plaintiff in replevin, and the defendant pleads property in the plaintiff's wife, the plaintiff is not a competent witness to prove his title. *Johnson v. Watson*, 157 P. S. 454; affirming s. c. 10 *Lanc.* 11.

524. A woman who is also her husband's administrator is incompetent to testify that during her husband's lifetime she procured two horses under a contract with him, and that prior to her husband's death she gave the horses to her sons, who claimed them from the estate. *Irwin's Estate*, 160 P. S. 82; affirming s. c. 1 *Dist. Rep.* 265.

525. Where purchasers at a sheriff's sale under a judgment against a husband bring ejectment, and the husband is the defendant and claims possession under a title which he alleges to be that of his

wife, evidence is admissible of acts and declarations of the husband against interest, although not made in the presence of his wife; and in such a case the plaintiff may also show that the property was assessed in the name of the husband. *Müller v. Baker*, 160 P. S. 172.

526. The declarations of a husband made in the absence of his wife are not admissible against the wife. *Leedom v. Leedom*, 160 P. S. 273.

527. In an action of ejectment against a husband, it seems that the wife cannot be called as on cross-examination on the allegation that she was the real plaintiff. *Wells v. Bunnell*, 160 P. S. 460.

528. In a suit against a firm, one of the members of which was a married woman, who had allowed judgment to be entered against her by default; it was held, that her husband was a competent witness to establish the claim against the co-partner. *Frack v. Gerber*, 167 P. S. 316; s. c. 36 W. N. C. 230.

529. In actions against executors, the claimant not being a competent witness against the estate, her husband thereby becomes likewise incompetent. *Smith's Estate*, 8 C. C. 29.

530. A husband cannot be a witness for the commonwealth upon the trial of a charge against a third person for fornication with his wife, but he may be informant and prosecutor. *Comm'th v. Geary*, 9 C. C. 60.

531. The policy of the law which forbids a wife to testify against her husband does not extend to the case of a widow testifying against her husband's estate upon knowledge not derived from confidential communications. *Tucker's Estate*, 9 C. C. 345; s. c. 48 L. I. 4.

532. In an action by a married woman against her husband's administrator to recover a portion of her separate estate, where a witness for the defendant testified to declarations made by the plaintiff in the decedent's lifetime, but not in his presence; it was held, that it was competent for the plaintiff, in rebuttal under the act 11 June 1891 (Brightly's Purdon

819), to deny or explain such declarations. *Karch v. Karch*, 10 C. C. 669.

533. In an action of ejectment against husband and wife brought by a stranger, the declarations of either of the defendants are evidence as against the interests of both; query, whether the wife is a competent witness in such a case to rebut the presumption of law, that the land belongs to her husband. *Phillips v. Hanby*, 5 Del. 102.

534. Where a husband, party in interest against a decedent's estate, is called by way of cross-examination by the adverse party, his wife is thereby made a competent witness in his behalf. *White's Estate*, 2 Dist. Rep. 808.

535. The widow of a decedent is a competent witness to prove her marriage in a matter in which she is interested. *Odenwall's Estate*, 1 York 189.

536. A divorced husband is a competent witness to testify against his wife's interests where the facts testified to were not derived from confidential communications with her nor came to his knowledge by virtue of the marital relation. *Brandt v. Spahr*, 3 York 163.

537. A widow is not a competent witness in support of a claim by her against her husband's estate for payment of maintenance due to her under a decree of court in desertion proceedings. *Quickel's Estate*, 5 York 71.

See EVIDENCE, XXIX., XXXV.

XLIII. Drawers and indorsors.

538. Where a testator in his lifetime had procured one of his debtors to make notes under seal in favor of his, the decedent's wife, and such notes were found among his papers after his death; it was held, that the gift to the wife was perfected, and it was further held, that the maker of the notes having no interest in the question whether the notes were the property of the decedent or his wife, was a competent witness. *Emig's Estate*, 3 York 111.

XLIV. Lunacy of party.

539. In an action brought by the committee of a lunatic, the defendant cannot testify in his own behalf as to matters occurring before the appointment of the committee. *Kauffman v. Kauffman*, 1 York 194.

XLV. Death of party.

(a) When death disqualifies.

540. In a suit on a mortgage, the defendant having died since the institution of the suit, the plaintiff is incompetent to testify against the executor. *Ballentine v. Ballentine*, 15 Atlan. 859.

541. The lessor in an oil lease being dead, his rights having passed to the defendant in an ejectment, neither the surviving party to the lease nor the plaintiff is a competent witness. *Duffield v. Hue*, 129 P. S. 94. See *Palmer v. Farrell*, Ibid. 162; *Bell v. Farmers' Deposit Nat. Bank*, 131 Ibid. 318.

542. The thing in controversy being the validity of a deed from the plaintiff's father to his wife, the defendant's deviser, both the grantor and grantee being dead, the plaintiff claiming under one and the defendant under the other, neither was a competent witness. *Parry v. Parry*, 130 P. S. 94.

543. In a feigned issue between a widow and the assignee of her assignee as collateral, to test the ownership of life insurance money, the widow's assignee being dead, she is not competent to prove any matter occurring before his death. *De Coursey v. Johnston*, 134 P. S. 328; s. c. 26 W. N. C. 88.

544. If one of two lessors be dead, the lessee and his assignee are incompetent to testify to matters occurring in the lifetime of the deceased, where such assignee is plaintiff, and the successors in title of the lessors, defendants. *Duffield v. Hue*, 136 P. S. 602; s. c. 26 W. N. C. 387.

545. If the defendant claims title under the grantee in a deed, who is deceased, the grantor is incompetent to prove facts occurring in the lifetime of

the grantee which tend to prove a forgery. *Sutherland v. Ross*, 140 P. S. 379; affirming s. c. 6 Montg. 203. See s. c. 160 P. S. 29.

546. Neither the daughters of a decedent nor their husbands are competent to establish the decedent's ownership of lands against adverse claimants, the result of which is to surcharge administrators of a solvent estate; neither can heirs establish their own claim against an estate, nor can they volunteer as witnesses to defend an action against the estate. *Lazarus's Estate*, 6 Kulp 53; affirmed in 142 P. S. 104; and reversed in 145 P. S. 1.

547. Where the plaintiff in ejectment claimed by descent from his deceased father, and the defendant claimed under a deed from the father, the plaintiff was held to be incompetent, under the act 23 May 1887 (Brightly's Purdon 817), to testify to matters occurring prior to the death of his father. *King v. Humphreys*, 138 P. S. 310; *Crothers v. Crothers*, 149 P. S. 201. See *Brose's Estate*, 155 P. S. 619; *Serfass v. Serfass*, 14 C. C. 97.

548. In assumpsit for rent where the lessor was dead, it was held, that one of the lessees who made the contract of letting was incompetent, under the act 23 May 1887 (Brightly's Purdon 817), to testify to the terms of the contract. See act 11 June 1891 (Brightly's Purdon 819). *Arrott Steam Power Mills Co. v. Way Mfg. Co.*, 143 P. S. 435.

549. Where real estate standing in the name of the husband has been sold at sheriff's sale as his property, and in ejectment against him, he sets up a resulting trust in favor of the wife, who died intestate before the sheriff's sale, he cannot testify as to what his wife said about the ownership of the land while he was in possession of it with her, nor is evidence admissible of her declarations to a third person. *Lawrence v. Keener*, 149 P. S. 402.

550. Upon a *scire facias sur* mortgage, where the mortgagor is dead, the terre tenant is not a competent witness to prove

that the mortgagor had sold the property to him prior to the execution of the mortgage. *Griggs v. Vermilya*, 151 P. S. 429.

551. In an action by a mother against the estate of her daughter to rescind a gift, the plaintiff is not a competent witness. *Yeakel v. McAtee*, 156 P. S. 600.

552. In an action of ejectment, where the land in controversy was a family graveyard, it was held, that one of the trustees, who was a member of the family and who claimed an interest, personal to himself, as one of the class for whose benefit the trust was created, could not, after the death of the grantor, testify against the interest of the plaintiffs who claimed the land as grantees of the decedent. *Brothers v. Mitchell*, 157 P. S. 484.

553. In an action of trespass *quare clausum fregit*, where the defendants claim that their father was a tenant in common with the plaintiff, and that a parol partition was made between them, the plaintiff is not a competent witness to testify to the manner of the original acquisition of the title, which took place prior to the death of the defendant's father. *Wolf v. Wolf*, 158 P. S. 621.

554. Where the date of the acknowledgment of a deed is within the lifetime of the grantee, the grantor and his wife are not competent witnesses after the death of the grantee to testify that the deed was a forgery, and that on the day of the alleged acknowledgment they were not in the county specified. *Sutherland v. Ross*, 160 P. S. 29. See s. c. 140 P. S. 379.

555. Where a plaintiff in a judgment is dead, and her title has passed to her husband, the defendant, in a proceeding to open a judgment, is incompetent to testify as to matters occurring during the lifetime of the plaintiff. *Cake v. Cake*, 162 P. S. 584.

556. The rule that where one party is dead, the other party cannot testify, applies to actions of tort; in trespass *quare clausum fregit*, where the defendant was a *de facto* trustee who had forcibly taken possession of a part of a farm

owned by his church, and which had been leased to plaintiff by other persons claiming to be trustees, and the defendant died while the suit was pending; it was held, that the plaintiff was a surviving party interested adversely to the deceased and was incompetent to testify. *Irwin v. Nolde*, 164 P. S. 205.

557. Upon the trial of a sheriff's interpleader, where the goods were found in the possession of a decedent at the time of his death; it was held, that the claimant was not a competent witness to prove title thereto in himself. *Hause v. Sloyer*, 3 Dist. Rep. 320.

558. Upon the trial of a *scire facias sur mechanic's lien*, the contractor being dead, the owner is not a competent witness against the administrator. *Hill v. Solden*, 5 Kulp 464.

559. The widow and son of a decedent are not competent before an auditor to attack a judgment given by the decedent before his death. *Lefever's Estate*, 7 Lanc. 131.

560. In a proceeding on a judgment bond, where the plaintiff is dead, the defendants are incompetent to testify; and this, although the entire transaction was conducted not by the plaintiff herself, but by her agent, a third party still living. *Swade v. Garman*, 12 Lanc. 193.

561. In an action by indorsee against maker, the payee and indorser being dead, the defendant is not a competent witness to prove a failure of consideration and notice thereof to the plaintiff before he took the note. *Rau v. Weidner*, 2 Northam. 289.

562. An executor dying before an audit of his account, the husband of a legatee is not a competent witness to sustain exceptions to the executor's commissions. *Smith's Estate*, 37 P. L. J. 33.

563. Where an executor charges himself with money received as an attorney for the testator before the latter's death, he is incompetent to prove payments in reduction of the amount made prior to the death. *Dewalt's Estate*, 33 P. L. J. 275.

564. In an action against a sheriff's

estate for trespass in his lifetime in selling the plaintiff's property as that of her husband, it was *held*, that neither the plaintiff nor her husband was competent to testify to any fact occurring in the lifetime of the sheriff; and this, though the deceased sheriff had been indemnified by the execution creditor. *Quickel v. Finley*, 7 York 169.

565. In ejectment by executors, where the land in question had been devised to testator's son upon his paying to the estate a certain amount per acre, and there was evidence that the son refused to accept, and the land was sold under a judgment against the son; it was *held*, that it was the duty of the purchaser to have made inquiry as to the condition of the title, and if such inquiry would have led to knowledge of the refusal to accept, he was concluded. It was further *held*, that the son was a competent witness to prove that he had never accepted the devise; that the rights of the plaintiffs should not be prejudiced by the declarations of the son, made in the absence of the parties interested; and that one of the defendants called to testify to the declarations of the devisee, was rendered incompetent by the fact that certain residuary devisees of the testator were dead at the time of the trial. *Tarr v. Robinson*, 158 P. S. 60.

566. Where a testator recited that he was indebted to his sisters in a certain sum, which he directed his executor to pay, and the widow objected to the allowance, averring that they were not *bona fide* debts; query, whether the sisters were competent to testify that the indebtedness was *bona fide*. *Eshelman's Estate*, 143 P. S. 24.

567. Whether the heirs and distributees of an estate are competent to testify that a paper alleged to be signed by decedent, and offered to establish a claim against the estate, is a forgery, was not decided. *Toomey's Estate*, 150 P. S. 535.

568. Where judgment was entered on a judgment note executed in the name of two persons, it is doubtful, where one defendant is dead, whether the other de-

fendant, upon a rule to open the judgment, is competent to testify that he did not sign the note and that it is a forgery. *Peters v. McDonald*, 7 Kulp 308.

569. To remove the incompetency of a surviving party, it must be shown, not only that on a former trial the witness was called by the opposite party and examined, but also that the questions and answers related to matters occurring in the lifetime of the deceased party. *Bair v. Frischkorn*, 151 P. S. 466.

570. As to the admissibility of testimony concerning transactions with deceased persons, see brief of authorities in notes to *Kisterbock v. Lanning*, 7 Atlan. 597, and *Welch v. Adams*, 1 Ibid. 7.

(b) When it does not disqualify.

571. Where the plaintiff in ejectment was the purchaser at sheriff's sale under a judgment against defendant's father, and the defendant claimed under a deed from her father made prior to the entry of the judgment, the defendant was competent to show, notwithstanding her father's death, that the real consideration of the deed (expressed therein as nominal) was her personal services rendered under an express contract. *Van Horne v. Clark*, 126 P. S. 411.

572. If the "subject in controversy" be the force and effect of a deed, one of the grantors is a competent witness in ejectment against defendants claiming under a living grantee, though the other grantors in the deed are dead. *Palmer v. Farrell*, 129 P. S. 162.

573. In ejectment by a brother claiming by descent from his deceased father against his sister, claiming under a deed from the father, evidence is admissible on the part of the plaintiff to show that when the deed was made the grantor was mentally incapacitated therefor. *King v. Humphreys*, 138 P. S. 310.

574. Where, in ejectment against a husband by one claiming title under a sheriff's deed on an execution against the husband, the defence is based on the title of the wife, and the vendor of the

wife is dead, both husband and wife are competent to show that the purchase was made by the wife and that the deed made some years after the purchase and not recorded at the time of the sheriff's sale had been made to the husband by mistake. They are not within sec. 5, clause (e), of the act 23 May 1887 (Brightly's Purdon 817). *Brown v. Carey*, 149 P. S. 134.

575. Where a plaintiff in ejectment claims, as heir, real estate conveyed by his father to the plaintiff's brother, on the ground that the father had not sufficient mental capacity to make a deed, a sister of the plaintiff and defendant is a competent witness for the defendant; and this, though, at the time of the conveyance, it was agreed that part of the purchase money should be paid to her and the same was secured by a judgment note of defendant, which was not fully paid at the time of trial. *Crothers v. Crothers*, 149 P. S. 201.

576. To exclude a witness on the ground of interest, it is necessary that he should have a vested interest not in the question, but in the event of the suit. The act 23 May 1887 (Brightly's Purdon 817) relates solely to the competency of interested parties; in an action of ejectment, witnesses called to prove fraud in a sheriff's sale, upon which defendant's title rested, are not incompetent because they are the remaining parties to the fraud, the other party being dead, where they have no interest in the event of the suit. *Dixon v. McGraw*, 151 P. S. 98.

577. In a feigned issue to determine whether an executor is indebted to the estate, legatees under the will are competent to testify to matters occurring in the lifetime of the testator, but the executor is not competent. *Smith v. Hay*, 152 P. S. 377.

578. In an action by a widow for a death benefit, the defence, that the deceased member of the association was not in good standing, may be sustained by parol testimony, where the minutes show a motion to suspend, but do not show what action was taken on the motion;

and in such a case members of the association are competent witnesses to show that the husband was not in good standing as a member at the time of his death. *Hamill v. Supreme Council of Royal Arcanum*, 152 P. S. 537.

579. In an action by an executor, a brother of the defendant, who is not a party to the suit and has no adverse interest to plaintiff's testator, is a competent witness. *Fowler v. Smith*, 153 P. S. 639.

580. The payee of a check is a competent witness to prove that the check was drawn in the maker's lifetime in order to enable the payee to collect the money and pay it to a third person, to whom the maker intended to present it as a gift. *Taylor's Estate*, 154 P. S. 183.

581. Persons interested in the estate of a decedent are competent to testify as to the declarations made by the claimant, as against a claim for services rendered. *Brose's Estate*, 155 P. S. 619; affirming s. c. 6 York 6. See *King v. Humphreys* 138 P. S. 310; *Serfass v. Serfass*, 14 C. C. 97.

582. Where a husband has borrowed money on a bond with a surety, and has loaned the money thus borrowed to his wife, the surety is a competent witness against the wife's estate after her death, to establish the husband's right to the fund. *Spotts's Estate*, 156 P. S. 281.

583. Where a policy of life insurance was transferred to the beneficiary and the question was whether the latter had an insurable interest; it was held, that she was not incompetent, in a suit against the insurance company, to testify to facts showing the relations between herself and the assured in the latter's lifetime. *Carpenter v. United States Life Ins. Co.*, 161 P. S. 9.

584. Where the thing in controversy is a transaction between the parties and both are living, both parties are competent witnesses. *Davis v. Hawkins*, 163 P. S. 228.

585. Where a son has assigned his expectancy in the estate of his living par-

ent, and after the death of the parent the interest has been attached by a creditor who afterwards dies, both the assignor and the assignee are competent witnesses to show that the assignment was made in good faith, and for an adequate consideration. *Khun's Estate*, 163 P. S. 438.

586. Where a suit has been brought against a decedent in his lifetime, notes of the testimony of an interested witness then duly taken, may be given in evidence in support of a claim against the decedent's estate. *Dunlevy's Estate*, 10 C. C. 454.

587. In a controversy over the title of real estate, where brothers are plaintiffs and claim by descent from a deceased father, and their sister is defendant and claims under a deed from the father, the brothers are competent witnesses in their own behalf. *Serfass v. Serfass*, 14 C. C. 97.

588. Where one party to a thing or contract in action is dead and his interest has passed to a party on the record, those witnesses only are incompetent who are either of the other party to such thing or contract, or have an interest adverse to the interest of the decedent; the widow, an heir and an executor are competent when called in support of the interest of the decedent. *Miller v. Miller*, 1 Dist. Rep. 95.

589. Where the original trustee dies and other trustees are substituted, the *cestui que trust* is a competent witness upon a bill filed by her against the substituted trustees for a revocation of the trust. *Jackson v. Pennsylvania Co. for Ins. on Lives & Granting Annuities*, 2 Dist. Rep. 225.

590. Where an accountant, in good faith, paid a claim by a widow against her husband's estate in the lifetime of a witness who could have proved the claim; it was held, that the widow was a competent witness to prove her claim; she was not liable over for said voluntary payment and was therefore disinterested. *Fulmer's Estate*, 3 Dist. Rep. 457.

591. All parties claiming by devolution

on the death of an owner, are competent witnesses before an auditor to distribute. *Simpson's Estate*, 4 Del. 129; s. c. 1 Lack. Jur. 193.

592. A witness was held to be not incompetent to testify to the admissions made by a decedent, merely because of a contingent interest dependent on the possible death intestate in his own lifetime of one or both of his children. *Shaeffer v. Geary*, 3 Lack. Jur. 360.

593. Where the share of a son was claimed by attaching creditors, it was held, that another son was competent to testify as to declarations made to him by his father to establish advancements made to his brother. *Wiest's Estate*, 12 Lanc. 41.

594. Where A made a verbal lease of his farm to B, under which B claimed one-half the winter grain and the right to harvest the whole, and C succeeded B as tenant and claimed that under his lease he was entitled to harvest the grain and that B was entitled to but one-fourth, and it was conceded that A was entitled to one-half of the grain and no more; it was held, in an action by B against C for trespass in harvesting the grain, A being dead, that B was a competent witness to prove the terms of his lease. *Silfies v. Laubach*, 4 Northam. 196; s. c. 5 Del. 477.

595. In a contest between a widow and children as to the widow's right to the exemption, both parties are competent to testify to facts occurring in the lifetime of the decedent. *Venus's Estate*, 2 York 193.

596. Where the note sued on plainly showed an alteration, and the note was signed by two makers; it was held to be competent upon a claim against the estate of one of the makers for the claimant to call the other maker to testify when and by whom the alteration was made; and this, although his testimony showed that he was the principal of the note and the decedent was the surety. *Weiser's Estate*, 5 York 5.

597. Children of deceased children of a decedent are competent to testify in

their own interest as to the decedent's ownership of certain property not accounted for by the administratrix. *Steward's Estate*, 5 York 9.

(c) Suits by and against executors and administrators.

598. If an administrator of a plaintiff in ejectment proceeds for mesne profits after the plaintiff's death, the testimony of the defendant is inadmissible. *Hart v. McGrew*, 11 Atlan. 617.

599. In an action by an executor, a legatee or distributee, who has released her interest, is a competent witness for the plaintiff, unless there be some other ground of exclusion. *Hest v. Ogle*, 127 P. S. 244.

600. In an action by the defendant in a judgment against the payee's administrator, for damages for issuing execution after notice of payment, the plaintiff is not competent to prove payment to the deceased payee in the latter's lifetime. *Mell v. Barner*, 135 P. S. 151.

601. In a suit by an administrator for the amount of a policy of insurance paid to defendant, the defence being that the policy was held as collateral for a firm debt, the defendant's partner is a competent witness on his behalf, if it be proved that the debt was assumed by the defendant and charged to him on the books. *Shaak v. Meilly*, 136 P. S. 161; s. c. 47 L. I. 454.

602. The executor of a deceased party defendant, who has been substituted in the suit, cannot be examined as to matters occurring before the death of his decedent; and this, though the plaintiff had been examined and testified at length before the death. *Crawford v. Shriver*, 139 P. S. 239.

603. In an action by an administrator where, while the debt existed, the defendant's intestate conveyed a farm to one of his sons without valuable consideration; it was held, that he was incompetent as a witness for defendant under clause (e) of sec. 5 of the act 23 May 1887 (Brightly's *Pardon* 817); and this, though he executed

an assignment of all his interest in his father's estate, real, personal and mixed, but still owned the farm so conveyed. *Keener v. Zartman*, 144 P. S. 179.

604. In a suit against executors a pecuniary interest in the estate will not exclude the testimony of witnesses called to disprove a claim against the estate, their interest not being adverse to the right of the decedent. *Gerz v. Weber*, 151 P. S. 396.

605. Where the plaintiff in an execution dies after a levy is made, and his administrator is substituted on the record as defendant in an interpleader, the plaintiff in the interpleader claiming title, by purchase, from the defendant in the execution, is an incompetent witness, but the defendant in the execution is a competent witness to the sale, as he is not a person whose interest is adverse to the right of the deceased. *Smith v. Rishel*, 154 P. S. 181.

606. Where an administrator brought an action against a sheriff for the wrongful sale of decedent's goods, it was held, that a person who signed the bond to indemnify the sheriff had an interest adverse to the decedent, and was incompetent to testify as to matters occurring prior to the death. *Kyte v. Foran*, 167 P. S. 252..

607. Upon an issue between an administrator of the assignee of a legacy and an attaching creditor of the legatee, the latter is ineligible to prove that the assignment was as collateral for a debt, and that he paid the debt to a former administrator of the assignee, who is deceased. *Fisher's Estate*, 7 C. C. 14; s. c. 46 L. I. 230.

608. Where executors made certain payments for repairs, it was held, that the contractors with whom the testator was alleged to have contracted for the repairs were not competent witnesses to prove that the testator entered into the contract, and the executors were not allowed credits for such payments against the objections of the parties interested. *Burton's Estate*, 15 C. C. 367.

609. In a proceeding to charge the estate of a deceased administrator, neither a surviving administrator nor an heir of the latter's husband are competent to testify to any matter occurring in the lifetime of the deceased administrator. *Finley's Estate*, 7 York 201.

(d) Matters between surviving party and living third party.

610. Under the act 11 June 1891 (Brightly's Purdon 819) a surviving party cannot be called, unless the living witness to the transaction between himself and the deceased has already testified; he is not rendered competent by the fact that the other side subsequently calls the living witness. *Roth's Estate*, 150 P. S. 261; reversing s. c. 5 York 99, 197.

611. Under the act 11 June 1891 (Brightly's Purdon 819) the living witness, whose testimony is to make competent the surviving or remaining party to the record, must be called in the interest of and by the party representing the right of the deceased; the calling of such a witness by the adversary was not in the contemplation of that act. *Cake v. Cake*, 162 P. S. 584.

612. Under the act 11 June 1891 (Brightly's Purdon 819) one of the parties is competent to testify to facts transpiring before the death of the deceased party, if the relevant matter occurred between the witness and some other living and competent person. *Irwin v. Patchen*, 164 P. S. 51.

613. Where a witness offered was only competent under the exception contained in the act 11 June 1891 (Brightly's Purdon 819), and the offer did not set forth sufficient to enable the court to determine whether or not the witness was within the exception; it was *held*, that the supreme court would not consider an assignment of error to the rejection of the offer. *Krumrine v. Grenoble*, 165 P. S. 98.

614. In an action by a niece against her uncle's estate to recover under a contract alleged to have been made with her uncle, declarations of the plaintiff

made prior to the death of her uncle as to the existence of the contract, are not admissible under the act 11 June 1891 (Brightly's Purdon 819). *Thomas v. Miller*, 165 P. S. 216.

615. In an action by a married woman against her husband's administrator to recover a portion of her separate estate, where a witness for the defendant testified to declarations made by the plaintiff in the decedent's lifetime but not in his presence it was *held*, that it was competent for the plaintiff, in rebuttal under the act 11 June 1891 (Brightly's Purdon 819), to deny or explain such declarations. *Karch v. Karch*, 10 C. C. 669.

616. Where a witness testifies to the declarations of a surviving party to a suit, the latter, under the act 11 June 1891 (Brightly's Purdon 819), is competent to testify in rebuttal; and this, although the effect is to allow said party to be examined upon a matter which occurred in the lifetime of the other party, who is now dead. *Steele v. Nichols*, 3 Dist. Rep. 517.

617. In an action by a surviving partner where the plaintiff was called and sworn as a witness for the defendant; it was *held*, that under the act 11 June 1891 (Brightly's Purdon 819) the defendant was a competent witness to matters occurring between him and the living partner. *Gathercole v. Wolf*, 7 Kulp 305.

618. Under the act 11 June 1891 (Brightly's Purdon 819) a surviving party cannot be rendered competent to testify in his own behalf by his offer to call a third person to corroborate him. *Bowers v. Overfield*, 3 Northam. 81.

(e) Facts subsequent to death.

619. An interested witness may prove facts existing after the death, and this, though they inferentially tend to prove that the same facts existed prior to the death. *Patterson v. Dushane*, 137 P. S. 23; s. c. 27 W. N. C. 41.

620. Where a husband is a claimant against the estate of a decedent, his wife may testify to a fact existing or an act

occurring after the decedent's death; and this, although such evidence may, in its effect, tend to prove that the same facts existed prior to decedent's death. *Hoffer's Estate*, 156 P. S. 473.

621. In an action of ejectment, where the location of the end of an ancient bridge was in dispute; it was *held*, that the defendant was competent to testify that, since the death of one of the plaintiffs, an old abutment of the bridge had been uncovered by a flood; and this, though it tended to prove a fact in the lifetime of the deceased. *Krepps v. Carlisle*, 157 P. S. 358.

622. In ejectment by executors where the land in question had been devised to testator's son upon his paying to the estate a certain amount per acre, and there was evidence that the son refused to accept, and the land was sold under a judgment against the son; it was *held*, that it was the duty of the purchasers to have made inquiry as to the condition of the title, and if such inquiry would have led to the knowledge of the refusal to accept, they were concluded. It was further *held*, that the son was a competent witness to prove that he had never accepted the devise; that the rights of the plaintiffs should not be prejudiced by the declarations of the son, made in the absence of the parties interested; and that one of the defendants called to testify to the declarations of the devisee, was rendered incompetent by the fact that certain residuary devisees of the testator were dead at the time of the trial. *Tarr v. Robinson*, 158 P. S. 60.

623. In an action upon a bond of a testator, where the testator's signature to the bond is denied, the heirs and legatees of the testator are competent witnesses to testify concerning the genuineness of his signature; they may testify to a present opinion based on a test paper and compared with a mental exemplar formed from previous opportunities of observation, such evidence not being in the nature of matters occurring in the lifetime of the testator, but of a fact existing after his

death. *York Trust, Real Estate & Deposit Co. v. Kindig*, 7 York 149.

(g) Partnership suits.

624. Where a judgment against partners by default is opened as to one, and the plaintiff then dies and his administrator substituted, the partner not defending is incompetent to testify that he put the firm name on the note, and that the same was for his own individual debt. *Dick v. Williams*, 130 P. S. 41.

625. In an action by a surviving partner, the son of a deceased partner may testify to occurrences in the lifetime of his father other than conversations and transactions between the deceased personally and the defendant. *Graff v. Callahan*, 158 P. S. 380.

626. Where the recorded title to real estate is in tenants in common who are also partners, and no purchaser or lien creditor appears, and there is no contract expressly made upon the faith of such title, it may be shown by parol that the property was bought with partnership money, and that it was the intention of the partners to hold it as partnership property; and this may be shown by the testimony of the surviving partner, where such testimony neither helps to establish a liability in his own favor nor to shift upon the deceased partner a burden which the estate was not already carrying, but simply aids in deciding to which of two conceded creditors a fund ought to go. *Miller's Estate*, 14 C. C. 147.

XLVI. Calling opposite party.

627. A witness, incompetent on the ground of interest, who is called for cross-examination, is made competent to testify on his own behalf as to all relevant matters. *Corson's Estate*, 137 P. S. 160; s. c. 27 W. N. C. 84. See *Houser v. Griesing*, 7 Lanc. 23; *Eichhorn's Estate*, 7 C. C. 433; s. c. 24 W. N. C. 364.

628. Where an interested party is called as a witness by way of cross-examination, he is thereby made a competent witness

for the other party as to all relevant matter; and this, whether or not touched upon on the cross-examination. *Root's Estate*, 11 Lanc. 225.

629. In an action of ejectment against a husband, it seems that the wife cannot be called as on cross-examination on the allegation that she was the real plaintiff. *Wells v. Bunnell*, 160 P. S. 460.

630. Where either a husband or a wife is incompetent as a witness, the other is also incompetent; the husband is not made competent, however, by reason of the wife's having been called by way of cross-examination. *Root's Estate*, 11 Lanc. 225.

631. Upon distribution of the proceeds of sheriff's sale a party plaintiff to any judgment may be called as for cross-examination by any other person interested in the distribution. *Harris v. Berry*, 7 C. C. 239.

632. An officer of a defendant bank may be compelled to testify on behalf of the plaintiff, whether there are any records in the bank's books by which they can identify notes deposited with them for collection or discount and the parties to those notes. *McManus v. Freeman*, 2 Dist. Rep. 144.

633. Upon the trial of an interpleader, where it was alleged that the defendant in the execution transferred the property to the claimant in fraud of his other creditors; it was *held*, that the defendant could not be called by the plaintiff in the execution for cross-examination as a person whose interest was adverse to the party calling him, his interest being in equi-pose. *Krall v. Doutrick*, 3 Dist. Rep. 12.

634. Upon a motion to dissolve an attachment where the confession of an alleged fraudulent judgment by the defendant is one of the acts complained of, the plaintiff has a right to call for examination the defendant and the person in whose favor the alleged fraudulent judgment was confessed. *Sullivan v. Wallace*, 32 W. N. C. 440.

635. Where the note sued on plainly showed an alteration, and the note was signed by two makers; it was *held* to be

competent upon a claim against the estate of one of the makers for the claimant to call the other maker to testify when and by whom the alteration was made; and this, although his testimony showed that he was the principal of the note, and the decedent was the surety. *Weiser's Estate*, 5 York 5.

XLVII. When a witness is excused from testifying.

636. Communications made to a law student employed to prosecute a criminal proceeding before a justice are not privileged. *Schubkagel v. Dierstein*, 131 P. S. 46.

637. An attorney being called to testify to confidential communications between himself and his client, a third party has no right to object; the right to object is that of the client only. *Dowie's Estate*, 135 P. S. 210.

638. Where a husband engages an attorney to do some conveyancing for his wife, what he says to the attorney is not a privileged communication. *Lazarus's Estate*, 6 Kulp 53; affirmed in 142 P. S. 104; and reversed in 145 P. S. 1.

639. Where a man conveyed land to his intended wife by executing a deed, and after his death the deed was placed in the hands of his counsel; it was *held*, that there was no violation of professional confidence for the latter to testify to the delivery of the papers and the condition in which they were found after the death. *Turner v. Warren*, 160 P. S. 336; affirming s. c. 5 Del. 249, 297.

640. Where several persons employ the same attorney in the same business, communications made to or by him in relation to such business, while privileged to their common adversary, are not privileged *inter esse*. *Seip's Estate*, 163 P. S. 423.

641. Where the witness was an attorney for the testator and had also been counsel for the legatee in small matters; it was *held*, that he was competent to testify that when he went to the testator's house upon business, he met the legatee, who requested him to use his influence with

the testator to assist her in getting her legacy during the testator's lifetime, and that he had declined to do so. *Turner's Estate*, 167 P. S. 609.

642. An attorney-at-law is competent to testify as to circumstances and conversations occurring in his office between two persons, both of whom were his clients. *Weaver's Estate*, 9 C. C. 516; s. c. 28 W. N. C. 95.

643. An attorney who acted for both the defendant and the representative of the plaintiff was *held* to be a competent witness as to matters communicated to him by the parties that were not, in their nature, private or the subject of any confidential disclosure. *Leas's Estate*, 6 York 74.

644. Upon a bill of discovery in aid of an action at law brought by a shipper against a railroad company to recover damages for loss of goods, the defendant will not be required to produce for the plaintiff's benefit a report made by the local freight agent of the company to the general freight agent relating to the goods in controversy and intended to be sent by the general agent to counsel for use on the trial of the case. *Davenport v. Pennsylvania R. R. Co.*, 2 Dist. Rep. 784.

645. In a proceeding in the orphans' court, a witness will not be compelled to answer questions or to produce books and papers which are not material to the proceedings pending, but a collateral matter, as to which the court has no jurisdiction. *Lafferty's Estate*, 4 Dist. Rep. 90.

646. Upon an investigation by a committee of councils in Philadelphia, where the shares of stock of a telephone company had been used to secure the passage of a certain ordinance; it was *held*, that a witness who had purchased from a deceased councilman's estate six shares of the said stock could not be compelled to disclose for whom he bought the stock; an agent cannot be compelled to disclose the principal except for the protection of some individual right or to establish the guilt or innocence of a defendant in a criminal

trial. Query, as to the constitutionality of the act 1 June 1885 (Brightly's Purdon 2106). *Simon's Case*, 4 Dist. Rep. 189.

647. Under the act 1 June 1885, art. XV., sec. 1 (Brightly's Purdon 2106), each branch of councils in Philadelphia has the right to compel the attendance of witnesses, and when a witness is summoned he cannot refuse to appear and be sworn on the ground that he is already under indictment for alleged criminal connection with the matters proposed to be investigated and that the answers to questions might tend to prejudice him in the criminal proceeding then pending; his proper course is to appear and wait until the question is propounded which tends to criminate him, which question he can then decline to answer. *Eckstine's Petition*, 148 P. S. 509; affirming s. c. 10 C. C. 41.

XLVIII. How a witness may be rendered competent.

648. Under the act 23 May 1887 (Brightly's Purdon 818) any person who is incompetent under clause (e) may make himself competent by assignment of his interest, where such assignment is in good faith; and it is the duty of the trial judge to decide the question of good faith as a preliminary question. *Turner v. Warren*, 160 P. S. 336; affirming s. c. 5 Del. 249, 297.

649. Where the incompetency of a witness arises simply from interest in the result, he may be made competent by the execution of a release or assignment; and this, though the same be executed for the sole purpose of rendering the witness competent; the consideration imported by attaching a seal to such an instrument is sufficient. *Steward's Estate*, 15 C. C. 380.

650. Calling the plaintiff as on cross-examination makes him a fully competent witness for all purposes. *Houser v. Griesing*, 7 Lanc. 23.

651. Where an interested party is called as a witness by way of cross-ex-

amination, he is thereby made a competent witness for the other party as to all relevant matter; and this, whether or not touched upon on the cross-examination. *Root's Estate*, 11 Lanc. 225.

652. If upon the audit of a wife's estate, the husband is called and interrogated as to matters occurring in her lifetime, he becomes a competent witness generally. *Eichhorn's Estate*, 7 C. C. 433; s. c. 24 W. N. C. 364. See *Corson's Estate*, 137 P. S. 160; s. c. 27 Ibid. 84; *Boyd v. Conshohocken Worsted Mills*, 149 P. S. 363.

653. To remove the incompetency of a surviving party, it must be shown, not only that on a former trial the witness was called by the opposite party and examined, but also that the questions and answers related to matters occurring in the lifetime of the deceased party. *Bair v. Frischkorn*, 151 P. S. 466.

654. Upon a claim against a decedent's estate where a distributee is called to testify to facts occurring after the death of the decedent and is cross-examined by the other side as to matters occurring prior to the death, he thereby becomes a competent witness for all purposes. *Hambleton's Estate*, 166 P. S. 500.

655. Where a husband, party in interest against a decedent's estate, is called by way of cross-examination by the adverse party, his wife is thereby made a competent witness in his behalf. *White's Estate*, 2 Dist. Rep. 808.

656. Where a claimant against a decedent's estate was called as under cross-examination after the passage of the act 23 May 1887, but before it went into operation; it was *held*, that he was improperly so called and was not thereby rendered competent to testify in his own behalf, as would undoubtedly have been the case under the act of 1887, had he been so called after that act became operative. *Neely's Estate*, 5 York 199.

657. A pardon does away with the future consequences of the criminal act as completely as if it had never been committed; where a witness has been

convicted and sentenced for perjury, a pardon restores his competency. *Diehl v. Rodgers*, 169 P. S. 316; s. c. 36 W. N. C. 447.

XLIX. Testimony of experts.

658. An expert may express an opinion based on the testimony of another expert; and this, without reading the cross-examination. *Good v. Good*, 1 Mona. 718.

659. An expert who neither knows nor can know more about the subject matter than the jury, is not competent to testify to his opinion. *Lineoski v. Susquehanna Coal Co.*, 157 P. S. 153.

660. An engineer and surveyor with thirty years' experience, and called upon frequently to measure brickwork, may testify to his knowledge of a certain alleged "constructive measurement." *Ambler v. Phillips*, 132 P. S. 167.

661. Where a contract for the sale of bricks was not in writing, and the plaintiffs alleged that the bricks were to be counted in the wall, while the defendants alleged that they were to be measured in the wall; it was *held*, that the question was for the jury, and it was competent to show by the testimony of persons in the trade what was meant by the expression "measured in the wall" and how such measurement was made. *Welsh v. Huckestein*, 152 P. S. 27.

662. In an action for a share of profits upon the erection of a monument, the testimony of the persons who made the monument and shipped it, the opinions of expert witnesses and the original freight bills were competent evidence as to the cost to defendants of the making, shipping and setting. *Cansfield v. Johnson*, 144 P. S. 61.

663. In an action for purchase money, where the vendee has covenanted to thoroughly examine the land in search of coal in order to settle the price of the land, he may select his own mode of examination, and having proved that the examination showed no trace of coal, he may corroborate that fact by expert wit-

nesses, who may testify that they have examined the tract and that the vendee has reached a correct conclusion. *Wells v. Leek*, 151 P. S. 431.

664. A witness who testified that he bought the beer cooler in question, and at another time had bought a smaller one, was held competent to testify to its value. *Betz v. Hummel*, 13 Atlan. 938.

665. A witness with no personal knowledge of the fact will not be permitted to testify as to the depth to which an oil well was dug. *Holmes v. Charters Oil Co.*, 138 P. S. 546; s. c. 27 W. N. C. 156.

666. Evidence that a machine was defective can only be received from an expert. *Hawthorne v. Pennsylvania Salt Co.*, 10 C. C. 77; s. c. 48 L. I. 76.

667. A fireman on a locomotive is not competent, as an expert, to testify as to the necessity of a safety switch at the place of injury. *Ballard v. New York L. E. & W. Railroad Co.*, 126 P. S. 141.

668. An elevator builder was permitted to testify that an elevator running with a five-eighths rope, and used to transport iron weighing a ton and passengers also, he would regard as unsafe. *Bier v. Standard Manufacturing Co.*, 130 P. S. 446.

669. Expert evidence is not admissible as to the dangerous condition of a station platform nine inches high and four feet wide from which a passenger fell in alighting from a train. The general subject of the admissibility of expert testimony considered. *Graham v. Pennsylvania R. R. Co.*, 139 P. S. 149; s. c. 27 W. N. C. 297; s. c. 38 P. L. J. 249.

670. Upon the question of the plaintiff's efficiency and his method of distributing samples; it was held, that the opinions of witnesses having experience in introducing articles to the public by the distribution of samples, was admissible in evidence. *Perry v. Jensen*, 142 P. S. 125.

671. An expert witness was permitted to testify, that in his opinion it was absolutely necessary for the plaintiff, who was suing for personal injuries, to get in

between the rails in order to unhitch the chain of the dump-car, and that the plaintiff had neither size nor strength to unhook the mule while outside the rails. *Kehler v. Schwenk*, 151 P. S. 505.

672. An expert witness cannot be asked to state his experience with relation to motion given to cars when starting as affecting the passengers either seated or standing. *Holmes v. Allegheny Traction Co.*, 153 P. S. 152.

673. A witness who is qualified to express an opinion, may testify whether a given act was performed in a prudent and proper manner in his opinion, but whether the management of a culm pile was negligent or careful, was held to be a question for the jury upon all the facts before them. Where the injury to plaintiffs was done by the defendant throwing culm into a stream, it was held, that the evidence of an engineer, that certain retaining walls were built in a proper manner, was irrelevant. *Elder v. Lykens Valley Coal Co.*, 157 P. S. 490.

674. Evidence as to the genuineness of a paper may be corroborated by a comparison to be made by a jury or auditor between it and other well-authenticated writings of the party; but mere experts will not be permitted to make the comparison, and then to testify to their conclusions from it. *Rockey's Estate*, 155 P. S. 453.

675. A sewing machine agent not residing in the vicinity and who had simply made efforts to sell an adjoining property, is not competent to express an opinion as to the value of land. *Schuylkill River E. S. Railroad Co. v. Stocker*, 128 P. S. 233.

676. Qualifications of experts in regard to the value of land being taken for railroad purposes. *Rees v. Schuylkill River E. S. Railroad Co.*, 135 P. S. 629; s. c. 26 W. N. C. 500.

677. In proceedings against a railroad company to recover damages for the taking of a leasehold estate, limited in use for lodge rooms; it was held, that witnesses who testified that they had been

connected for several years with the business of renting out lodge rooms and knew what localities were most desirable in which to establish halls to rent to lodges, were competent to testify as to the value of the leasehold. *Boteler v. Philadelphia & Reading Terminal R. R. Co.*, 164 P. S. 397.

678. In condemnation proceedings, a witness who has known the property for ten or fifteen years, and knows of sales of like property in the neighborhood, is competent to testify to the market value of the property condemned. *McElheny v. McKeesport & Duquesne Bridge Co.*, 153 P. S. 108.

679. Expert witnesses called in condemnation proceedings, in respect to the market value of the land, should have a sufficient knowledge of such market value estimated upon a fair consideration of the land, the extent and condition of its improvement, its quantity and productive quality, and the uses to which it may reasonably be applied, taken with the general selling price of land in the neighborhood at the time. *Michael v. Crescent Pipe Line Co.*, 159 P. S. 99.

680. In a proceeding to assess damages caused by a change of grade, an expert may be called to testify that the new grade left plaintiff's house in a depression, that one of the ways in which this disadvantage could be remedied would be by raising the house and filling in the ground and that that process would not only be expensive but would also entail the loss of valuable trees and shrubbery. *Dawson v. Pittsburgh*, 159 P. S. 317.

681. Upon the trial of an appeal from the assessment of damages for land taken by a railroad company, the knowledge of a witness fixed in his mind by facts with which he is familiar — as to the price at which land is held, the price it sometimes sells at, the uses to which it is applicable and the selling price of similar land — is what is necessary to make him an expert. *Struthers v. Philadelphia & Delaware County R. R. Co.*, 6 Del. 190.

682. A witness who had seen premises

but once and then only as a traveller along the highway, was held not to be competent to speak of the effect of the smoke and dust from certain coke ovens upon the inmates of the house or of the extent to which the house was made untenable thereby. *Herbert v. Rainey*, 162 P. S. 525.

683. An attorney-at-law who had never been a practising chemist was held to be incompetent as an expert as to the chemical purity of whiskey. *Sed quere? Hass v. Marshall*, 14 Atlan. 421; s. c. 13 Cent. 99.

684. A physician may express an opinion upon the mental capacity of the prisoner from observations made while the prisoner is testifying in his own behalf on the witness stand. *Comm'th v. Buccieri*, 153 P. S. 535.

685. Where insanity caused by an epileptic fit was alleged as a defence, it is competent for a physician who examined the prisoner an hour after the commission of the crime, to express an opinion as to his mental soundness; and this, although the examination was not for the purpose of ascertaining whether there had been a recent epileptic convulsion. *Comm'th v. Buccieri*, 153 P. S. 535.

686. Upon a trial for murder, after a physician has testified as to the injuries found on the body, he is competent to state his opinion as to what caused the death and how the injuries were inflicted. *Comm'th v. Crossmyer*, 156 P. S. 304.

687. In a suit against a boom company, the evidence of a non-expert witness as to the cause of an ice-jam is inadmissible, though he lived by the side of the boom for years and knew the condition of the river before the boom was built. *Shaw v. Susquehanna Boom Co.*, 125 P. S. 324.

688. Whether a hypothetical question to an expert should be excluded on a hearing in the orphans' court, which contains only a partial statement of the material facts embraced in the testimony. *McCullough's Estate*, 2 Mona. 4. See *Hoffman v. Matthes*, Ibid. 1.

689. It is not error to leave to the jury the weight of expert testimony, but

they should be instructed that its value depends largely on the extent of the experience or study of the witness. *Wells v. Leek*, 151 P. S. 431.

690. Where the trial judge, after hearing the evidence as to the qualifications of a witness as an expert and after permitting him to testify as an expert, subsequently left it to the jury to say whether or not the witness had such experience as would make him an expert, the supreme court refused to reverse the judgment. *Whitmire v. Montgomery*, 165 P. S. 253.

L. Examination of witnesses.

(a) Leading questions.

691. Where a witness is examined as to a conversation between the plaintiff and defendant, he should be asked what occurred in the conversation, and it is not proper to direct his attention specifically to any particular matter. *Neely v. Bair*, 157 P. S. 417; affirming s. c. 5 York 179.

(b) Matters of opinion.

692. That non-expert witnesses may give their opinion after giving the facts upon which that opinion is based, see note to *Burnham v. Sherwood*, 14 Atlan. 715.

693. Upon the trial of an issue *deviseavit vel non*, a witness having testified to the altered manner of the deceased, his changed conduct to his family, his loss of memory, his inability to read or write or to converse coherently, may be permitted to express his opinion as to his testamentary capacity. *Good v. Good*, 1 Mona. 718.

694. A prothonotary having stated that he had no recollection of certain papers being taken out of his office except from a receipt, he could not testify as to his belief as to what had become of them. *Schrader v. Schrader*, 14 Atlan. 434; s. c. 13 Cent. 226.

695. In a proceeding to set aside a deed on the ground of lunacy of the grantor, the opinion of witnesses who are not experts is not evidence unless

they first testify to specific facts showing mental unsoundness. Mere difficulty of speech following an attack of paralysis is no evidence of mental condition. *Doran v. McConlogue*, 150 P. S. 98.

696. In an action against a city for injuries sustained by falling into an unguarded areaway, it is competent for a witness who is familiar with the place where the accident occurred, to express the opinion that it was a dangerous place. *McNerny v. Reading*, 150 P. S. 611.

697. Upon the question whether the debtor acknowledged the debt so as to toll the statute of limitations, the opinion of a witness is not sufficient unless the words on which the opinion is based are given, so that the court and jury may determine whether the opinion is well founded. *Hartranft's Estate*, 153 P. S. 530; affirming s. c. 8 Montg. 81.

698. A witness, it seems, may testify to his opinion as to the dangerous character of a street crossing. *Kraut v. Frankford & Southwark Philadelphia City Pass. Ry. Co.*, 160 P. S. 327.

699. In an action of trespass, where the defence was that the suit had been settled, it was held to be improper to ask a witness, who was present at the settlement, whether it was not the understanding of all the parties that all matters in dispute were settled; a witness cannot testify to the understanding of other parties. *Irwin v. Nolde*, 164 P. S. 205.

(c) Refreshing the memory of a witness.

700. The memory of a witness may be refreshed from a book account, copied from memorandum in a scratcher, made after the sale and containing lumping charges. *Wagonseller v. Brown*, 7 C. C. 663.

701. If a witness testifies that an entry of a list of items in a book was correct when he made it, he may use it to refresh his memory. *Mead v. White*, 8 Atlan. 913.

702. It is not competent on cross-examination to present a letter with which the witness is in no way connected, for

the purpose of refreshing his recollection as to matters about which he has testified in chief. *Steele v. Wisner*, 141 P. S. 63.

703. Where the admission of a memorandum book to refresh the memory of a witness could have done no harm, it is not sufficient ground for reversal. *Vulcanite Paving Co. v. Ruch*, 147 P. S. 251.

(d) Contradicting a witness.

704. If upon the trial of a sheriff's interpleader, the plaintiff in the execution calls the execution debtor as a witness to prove collusion and the latter denies it, he cannot contradict him. *Unangst v. Goodyear*, 141 P. S. 127; affirming s. c. 2 Northam. 90. See *Tisch v. Utz*, 142 P. S. 186.

705. A party cannot ordinarily be bound by the unlooked-for statements of a witness who shows himself to be hostile to the party calling him. *Lewis v. Baker*, 162 P. S. 510.

706. A party cannot impeach the credibility of his own witness, but he may prove the facts to be otherwise than as stated by the witness. *Eastern Lumber Co. v. Gill*, 9 C. C. 630.

707. A party is not bound to accept all that his own witness says; he may show by other witnesses what the facts really were. *Munley v. Scranton*, 1 Lack L. N. 21.

(e) Cross-examination.

708. Where witnesses testified to the circumstances of a railroad accident at a crossing, it was proper cross-examination as to the presence and gestures of the track foreman immediately preceding the accident. *McNeal v. Pittsburgh & Western Railway Co.*, 131 P. S. 184.

709. A case having been reversed because a witness included in his calculation of damages an improper element, and he subsequently testifying to the same amount, it is competent to ask him on cross-examination whether he had not made a new arrangement of the elements of damage so as to arrive at the same

result. *Reading & Pottsville Railroad Co. v. Balthaser*, 126 P. S. 1.

710. A witness having testified that a pocket-book was given her by a certain person at a certain time, and that the same pocket-book had been handed to the officers in her presence, it was not error to refuse to permit the defendant producing a pocket-book on cross-examination, to interrogate as to its identity with the pocket-book handed the officers. *Comm'th v. Nicely*, 130 P. S. 261.

711. As to the examination and cross-examination of witnesses on the question of adverse possession, see *Moyer v. Rick*, 2 Mona. 256.

712. Where an insurance agent has denied that the plaintiff accepted an insurance policy under an agreement that he should have time to pay the premium, and it is admitted that he received from the plaintiff after the fire a check for the premium and held it for two weeks, such agent may be asked on cross-examination whether he would not have insisted on the payment of the check if no fire had occurred. *Long v. North British & Mercantile Insurance Co.*, 137 P. S. 335.

713. The rule that cross-examination must be confined to the matter of the examination in chief, applies where a party to the suit is a witness. *Boyd v. Conshohocken Worsted Mills*, 149 P. S. 363; affirming s. c. 7 Montg. 209.

714. A witness who has put a value upon a farm may be asked upon cross-examination whether he does not know of particular sales of other farms in the neighborhood at certain prices below that fixed by him in his estimate. *Lentz v. Carnegie*, 145 P. S. 612.

715. Where the issue is one of forgery in an issue to determine the genuineness of a judgment note, it is competent for the defendant to show that the plaintiff had in her possession, a few days before the entry of the judgment, other notes bearing the signature of the same maker, but in blank as to the date and amount; and where the plaintiff testified that the note was signed on a Thursday, and that

she knew it was a Thursday because she had looked at the almanac, it was proper to ask her on cross-examination why she looked at the almanac. *Thomas v. Miller*, 151 P. S. 482; s. c. 165 P. S. 216.

716. Where a witness has testified in chief that he would not believe another under oath, and bases his testimony upon the latter's general reputation for veracity, the witness may be cross-examined as to his business and social relations with the person whose veracity is impeached, in order to show bias. *Hepworth v. Henshall*, 153 P. S. 592.

717. The range of cross-examination must be left to the sound discretion of the trial judge, and the judgment will not be reversed unless such discretion has been plainly abused. *Bohan v. Avoca Borough*, 154 P. S. 404.

718. Collateral matters tending to prejudice the other parties in the minds of the jury should not be brought out on cross-examination, merely for the purpose of laying ground for a subsequent contradiction to affect the credibility of a witness, but the supreme court will not reverse unless convinced of clear error by the trial court in the exercise of its discretion. *Jessop v. Ivory*, 158 P. S. 71.

719. Where a surveyor in his examination in chief, testifies that he had made a draft of land described in a deed, but he is not asked to state whether the land in controversy is any part of the land described in the draft, he cannot be asked on cross-examination whether such is the case. *Wolf v. Wolf*, 158 P. S. 621.

720. In an action of assumpsit, the plaintiff may show by the cross-examination of the defendant, that he, the defendant, did not himself employ counsel to defend the case. *Leedom v. Leedom*, 160 P. S. 273.

721. The contradiction of the plaintiff's testimony is a matter of defence; it cannot be introduced upon the cross-examination of one of the plaintiff's witnesses. *Leedom v. Leedom*, 160 P. S. 273.

722. Matters of defence cannot be introduced on the cross-examination of

the plaintiff's witnesses. *Denniston v. Philadelphia Company*, 161 P. S. 41.

723. Where a civil engineer who has made a map for the plaintiff, which is offered in evidence, testified in chief to its correctness and to the location of certain objects marked upon it, he may be cross-examined as to other points and distances of the locality upon the same map. *Derk v. Northern Central Ry. Co.*, 164 P. S. 243.

724. Where an unwilling witness gives evidence which is a surprise to the party calling him, it is in the sound discretion of the court to permit him to be cross-examined by the party calling him, in order to show that his previous statements and conduct were at variance with his testimony. *McNerny v. Reading*, 150 P. S. 611.

725. Where a witness, called by the plaintiff, in reply to a question, says "I don't remember," and makes the same reply to the question "Did you not tell me so yesterday?" this does not establish him as a hostile witness so as to entitle the plaintiff to cross-examine him as such. *Fisher v. Hart*, 149 P. S. 232.

(g) Re-examination.

726. Upon an issue for injuries by the construction of a railroad, a witness for plaintiff testifying on cross-examination that a portion of the land was under lease, the plaintiff may explain in chief that the land leased was not touched by the railroad. *Reading & Pottsville Railroad Co. v. Balthaser*, 126 P. S. 1. See s. c. 119 P. S. 472.

727. Where the plaintiff has rested and his witness is recalled by the defendant before his cross-examination, it is not error to permit the plaintiff to re-examine him as if called as the defendant's witness. *Steele v. Wisner*, 141 P. S. 63.

728. Where, upon cross-examination, the opposite party has elicited facts upon a subject germane to the issue, the party calling the witness may, upon redirect examination, inquire for further facts explanatory of those elicited; and this,

though he might not have been competent to prove them upon the examination in chief. *McElheny v. Pittsburgh, V. & C. R. R. Co.*, 147 P. S. 1.

729. That a witness was permitted in rebuttal to repeat a portion of the testimony which he had already given in chief, is no ground for reversal. *Holthouse v. Rynd*, 155 P. S. 43.

LI. Credibility of witnesses.

(a) General principles.

730. The jury must pass upon the credibility of witnesses, and the supreme court will not reverse, though they think the weight of the evidence to be with the plaintiff in error. *Waters v. Burgess*, 14 Atlan. 398; s. c. 13 Cent. 217.

731. The testimony of a witness should not be broken down unless the jury are convinced that his reputation is so bad that they could not safely rest their verdict upon his testimony. *Oberholtzer v. Heist*, 16 Atlan. 804.

732. Though a party is not absolutely concluded by his own testimony as to a fact, yet the same is not to be entirely disregarded upon the mere assumption that he may have been mistaken. *Sanford v. Hestonville, Mantua & Fairmount Railroad Co.*, 136 P. S. 84; s. c. 26 W. N. C. 401.

733. Where a mortgage has been assigned by the two owners thereof (one of whom was the defendant in the attachment execution) to the garnishee, and one of the two assignors (the defendant) testifies that the assignment was made in fraud of creditors, which was contradicted by the other assignor and the garnishees, who both testified to a full consideration for the assignment; it was held, that the court properly instructed the jury to find for the garnishees. *Skiles v. Dickson*, 147 P. S. 117.

734. Upon a rule to open judgment, where the defendant swears that he did not know that the note was a judgment note, but his testimony is discredited by

the denial of the plaintiff and by three other witnesses, the court will be justified not only in disbelieving him upon that matter, but also in refusing to believe him as to other defences. *Fisher v. King*, 153 P. S. 3. See *Ives v. Snyder*, 7 Kulp 393.

735. Upon a trial for murder, it is entirely proper to call the jury's attention to the prisoner's interest as affecting his credibility, but a charge is improper, the general effect of which is to discredit the prisoner as a witness, and to lead the jury to throw out his testimony except where it was corroborated. *Comm'th v. Pipes*, 158 P. S. 25.

736. It is the province of the jury to reconcile, if possible, apparent contradictions and inconsistencies in the testimony of witnesses, and where there are such contradictions and inconsistencies, it is improper for the court to suggest that the case turns solely on the veracity of a particular witness. *Fullam v. Rose*, 160 P. S. 47.

737. Upon a trial for murder, in determining the credit to which the defendant's testimony is entitled, the jury may consider the extent to which he was contradicted, the character of his testimony and its reasonableness and its consistency with the established facts of the case. *Comm'th v. Breyessee*, 160 P. S. 451.

738. Where the witness testified that the plaintiff did not have a good character for truth and veracity, and gave the names of eight persons who had made such a statement to him and a verdict was rendered for the defendant, and subsequently six of the eight persons swore that they had never made such a statement; it was held, that a new trial should be granted. *O'Bryan v. Bowers*, 10 C. C. 254.

739. Where a person is put upon the stand as a witness, the party calling him cannot ask credit for him in one part of his testimony and deny credit to him in another. *Guinney v. Hand*, 2 Lack. Jur. 358. See s. c. 153 P. S. 404.

(b) How a witness may be discredited.

740. The court may properly direct the attention of the jury to the fact that witnesses are admitted thieves, as affecting their credibility. *Rohm v. Borland*, 7 Atlan. 171.

741. Upon the wilful misrepresentation by the plaintiff in any material particular, it throws a suspicion on his whole case, and it is not error to charge that the jury may disregard his evidence. *Sharp v. Erie*, 4 Atlan. 161.

742. Upon a rule to set aside a sheriff's sale for inadequacy of price, the defendant's testimony as to value of adjoining property may be rebutted by testimony of what the surrounding property had brought at sheriff's sale. *Bartolet v. Saylor*, 12 Atlan. 854; s. c. 11 Cent. 787.

743. A defendant having denied adultery with the woman mentioned in the indictment, may, for the purpose of discrediting him, be asked on cross-examination why he pleaded guilty to an indictment for adultery with the same woman in another state. *Comm'th v. Mosier*, 135 P. S. 221; s. c. 26 W. N. C. 182.

744. It is competent to show the declarations of a deceased witness tending to impair the effect of his previous deposition. *Patterson v. Dushane*, 137 P. S. 23; s. c. 27 W. N. C. 41.

745. A defendant in a criminal proceeding who becomes a witness may be discredited by showing his conviction and sentence in another state for a felony or any species of the *crima falsi*. The record of such conviction is admissible, though it affect injuriously his case in other respects. *Comm'th v. Barry*, 8 C. C. 216.

746. Where a defendant contends that his interest in a partnership is greater than the plaintiff's interest, but has testified that his interest and that of a third member were equal, evidence is admissible that the interest of the third member was one-third, in support of plaintiff's contention that the three were equal partners. *Holloway v. Frick*, 149 P. S. 178.

747. Evidence is not admissible of threats against the plaintiff's witness by a person who was not connected with the defendant in any way. *Thomas v. Miller*, 151 P. S. 482.

748. Where a witness has testified in chief that he would not believe another under oath, and bases his testimony upon the latter's general reputation for veracity, the witness may be cross-examined as to his business and social relations with the person whose veracity is impeached, in order to show bias. *Hepworth v. Henshall*, 153 P. S. 592.

749. Upon the trial of an appeal from an assessment of damages and benefits, the report of the viewers is admissible in evidence to show that one of the viewers called as a witness, had signed the report making an entirely different estimate of the effect of the improvement on plaintiff's land from that to which he testified at the trial. *Dawson v. Pittsburgh*, 159 P. S. 317.

750. In an action of assumpsit the plaintiff may show by the cross-examination of the defendant that he, the defendant, did not himself employ counsel to defend the case. *Leedom v. Leedom*, 160 P. S. 273.

751. Where a witness for the commonwealth testified that he saw the prisoner stab the deceased, it was held to be error to exclude an offer to show that immediately after the occurrence and before the witness had time for premeditation or design, he had made statements entirely inconsistent with the testimony at the trial. *Comm'th v. Werntz*, 161 P. S. 591.

752. In an action of trespass, a witness for the defendant may be asked whether he did not give money to a witness for the plaintiff, in consideration of the latter's promise to go away and not testify. *Fitzpatrick v. Riley*, 163 P. S. 65.

753. In an action against a railroad company for injuries from a defective rail, where the track foreman testified that the track was in good condition and

denied on cross-examination that he had stated to certain persons on the day of the accident that the track was in bad condition; it was *held*, that evidence was admissible in rebuttal of the track foreman's declarations for the purpose of enabling the jury to judge of his credibility as a witness. *Dampman v. Pennsylvania R. R. Co.*, 166 P. S. 520.

754. Upon the trial of an indictment for murder, where the prisoner on the stand denied that he had made threats against the deceased; it was *held*, that the person in whose presence the alleged threats had been made could be called in rebuttal to contradict the prisoner. *Comm'th v. Weber*, 167 P. S. 153.

755. In an action against a firm for the price of goods alleged to have been sold the firm, where judgment was entered by default against one partner and the other partner defended on the ground that the goods were not purchased by the firm, but by his co-partner, and contributed by the latter to the firm, and the manager of the firm's business testified that the goods had been purchased by the firm; it was *held*, that a statement of the business prepared at the time of dissolution, in which the price of goods claimed was charged to capital stock, was admissible in evidence as affecting the credibility of such manager. *Frack v. Gerber*, 167 P. S. 316; s. c. 36 W. N. C. 230.

756. After a defendant in a criminal case has testified in his own behalf, he may be cross-examined upon all questions affecting his interest and credibility; having answered that he believed in a God who would punish him for false swearing, he may be asked if he has not made inconsistent statements to other persons, and such persons may be called to establish the fact that he has made such statements. *Comm'th v. Wright*, 7 York 62.

757. As to the impeachment of a witness by proof of his previous contradictory statements, see notes to *Zebbley v. Storey*, 12 Atlan. 572, and *Milford v. Veazie*, 14 Ibid. 730.

(c) How a witness may be sustained.

758. If in a bastardy case it be attempted by the defence to show that the prosecutrix gave false testimony that she was not married, she may show in rebuttal that she was married in Ohio while under age, and that such marriage was invalid. *Easley v. Comm'th*, 11 Atlan. 221.

759. A witness may be corroborated by evidence not relating to the particular thing in action. *Scott v. Hart*, 4 Atlan. 206.

LII. Sufficiency of evidence.

760. A mere scintilla of evidence does not justify a judge in leaving a question of negligence to the jury. *Reinhart v. South Easton*, 4 Atlan. 532; affirming s. c. 1 Northam. 226. See *South Easton v. Reinhart*, 13 W. N. C. 389.

761. If there be more than a scintilla of evidence upon a question of fact, it should be submitted to the jury; the only remedy for a verdict against the weight of the evidence is by a motion for a new trial. *Gates v. Watt*, 127 P. S. 20.

762. If the evidence to support the plaintiff's claim be more than a mere scintilla, it must be submitted to the jury; a motion for a nonsuit admits every fact which might have been fairly found from the evidence. *Hineman v. Matthews*, 138 P. S. 204; s. c. 27 W. N. C. 49; 38 P. L. J. 145.

763. If the evidence fails to establish the facts alleged by the plaintiff, the court should direct the jury to find for the defendant. *Jackson v. Ferris*, 8 Atlan. 435.

764. If the plaintiff's testimony make out a case of negligence, though uncorroborated, it must be submitted to the jury. *Philadelphia, W. & B. Railroad Co. v. Alvord*, 128 P. S. 42.

765. Sufficiency of the evidence that the defendant railroad company, in an action of negligence, was operating the road upon which the accident happened. *Pennsylvania Railroad Co. v. Sellers*, 127 P. S. 406.

766. Notwithstanding the jury find that the testimony of one of the witnesses for the plaintiff be untrue, still they may find negligence upon other sufficient evidence thereof. *Citizens Railway Co. v. Costigan*, 7 Atl. 91.

767. Upon an issue whether a particular train was run at a negligent rate of speed, evidence is not admissible as to the usual rate trains were run over the same crossing. *Aiken v. Pennsylvania Railroad Co.*, 130 P. S. 380.

768. In considering the weight of testimony of a casual conversation twenty-seven years ago, the jury should consider the length of time that has elapsed. *Wanger v. Hipple*, 13 Atl. 81.

769. The plaintiff in rebuttal having shown that the defendant's loss of business was due to his habits of intoxication, the latter cannot show that before he purchased the place from the plaintiffs, one of them was intemperate, and yet they did a good business. *Shirley v. Keagy*, 126 P. S. 282.

770. The fact that a purchaser at sheriff's sale gave his own mortgage for a subsisting mortgage, which was then satisfied, is confirmatory of other evidence that he bought subject to the original mortgage. *Hohman's Appeal*, 127 P. S. 209.

771. In an action against the proprietor of a storage warehouse for alleged damage to goods by water, the defendant may show that the building was impervious to rain, as establishing the fact that the goods were damaged before he received them. *Doyle v. Mays*, 7 Atl. 747.

772. In covenant for purchase money, when the vendor has agreed to give a good title, the plaintiff must show a good title; if the defendant shows a doubtful title in plaintiff, by reason of an outstanding trust, the plaintiff cannot recover. *Elliott v. Tyler*, 5 Cent. 543.

773. Upon an agreement to sell real estate, an alleged verbal contract that the vendor was to have a right of way, was held not sustained by evidence of subsequent conversations proving an under-

standing that he should have some license or permissive right across the land. *Walton's Appeal*, 9 Atl. 922.

774. In a suit for breach of a parol contract to buy real estate, it is error to charge that the contract must be established by clear, positive and satisfactory proof, both of the contract and terms of payment. *Martin v. Frank*, 26 W. N. C. 361.

775. Sufficiency of the evidence of adverse possession by the plaintiff in ejectment for twenty-one years to entitle the case to go to the jury, though the defendant's paper title be the better. *Thompson v. Philadelphia & Reading Coal and Iron Co.*, 133 P. S. 46.

776. In a suit for the contract price for digging an oil well, evidence as to the average cost of digging oil wells is irrelevant. *Holmes v. Chartiers Oil Co.*, 138 P. S. 546; s. c. 27 W. N. C. 156.

777. It is not error to reject irrelevant testimony. *Adams v. Hiner*, 140 P. S. 166.

778. Where there is other evidence tending to establish the main question, it is not error to admit an offer to prove a fact which has some bearing upon the question, though if standing alone it would have little force. *Wray v. Spence*, 145 P. S. 399.

779. A party may prove that he is the owner of personal property without producing the written evidence of his ownership. *Gallagher v. London Assurance Corporation*, 149 P. S. 25; reversing s. c. 5 Kulp 467.

780. In an action for injuries in a mine alleged to have been caused by the incompetency of the mining boss, it was held, that the evidence of such incompetency was insufficient to submit to the jury. *Massey v. Snowden*, 149 P. S. 410.

781. Upon a *scire facias* to revive a judgment, where the defence is that the defendant's mother paid to the plaintiff a sum of money, which, though smaller than the judgment, was in full satisfaction, evidence of the existence of a mortgage

prior to the judgment is immaterial. *Fowler v. Smith*, 153 P. S. 639.

782. Where the evidence on one side is overwhelming and the evidence on the other side amounts to but a scintilla, the case may be withdrawn from the jury and a verdict directed. *Holland v. Kindregan*, 155 P. S. 156; affirming s. c. 8 Montg. 118.

783. Though the evidence tending to sustain the plaintiff's claim be very slight, yet if it amounts to more than a scintilla, a nonsuit should not be ordered; if there be any evidence which alone would justify an inference of the disputed fact on which the plaintiff's right to recover depends, the case must be submitted to the jury. *Bucklin v. Davidson*, 155 P. S. 362.

784. In an action by a creditor against his debtor and another person to whom the debtor has confessed judgment, to recover damages for the loss of the debt caused by an alleged conspiracy between the defendants, the case will be withdrawn from the jury unless the evidence of collusion does more than merely raise a suspicion. *Merchants & Manufacturers Nat. Bank of Pittsburgh v. Tinker*, 158 P. S. 17.

785. Upon a claim upon a promissory note against a decedent's estate, where the signature of the decedent was proven by a witness who saw him sign it, and its genuineness was testified to by a daughter of the decedent and her husband, and the only testimony to the contrary was that of expert witnesses; it was held, that the evidence was sufficient to warrant a finding that the notes were genuine. *Patterson's Estate*, 166 P. S. 119.

786. The written agreement of the parties cannot be overthrown by the testimony of a single witness. *Walt v. Kulp*, 9 Montg. 45.

787. In an action at law in the nature of a bill in equity to restrain the interference with a license, the equitable rule as to evidence must prevail; where the plaintiff's testimony is denied and is not supported by a second witness or by cor-

roborative circumstances, it is insufficient to submit to a jury. *Baldwin v. Taylor*, 166 P. S. 507.

788. The uncorroborated testimony of one witness is not sufficient to vary or contradict the terms of a written instrument. *Van Voorhis v. Rea*, 153 P. S. 19.

789. The evidence to reform a bill of sale by striking certain words out of the same, was held to be insufficient to submit to the jury. *McClain v. Smith*, 158 P. S. 49.

See EQUITY, XII.

EVIDENCE, XXXII.

EXAMINERS.

See EQUITY, XXXV., XLV.

EXCEPTIONS.

See APPEAL AND ERROR: EQUITY, XXXIX.

EXCHANGES.

1. Under the by-laws of the Commercial Exchange of Philadelphia, a member of the exchange who fails to meet his contracts may be debarred from all the privileges of membership until satisfactory settlements are made with members of the exchange; and this, although he notifies the president immediately upon his failure. *Sexton v. Commercial Exchange*, 10 C. C. 607; s. c. 29 W. N. C. 259.

2. The court refused to restrain by injunction the members of the builders' exchange at the suit of certain building contractors and journeymen bricklayers and apprentices alleging a confederation and combination between the defendants to prevent the complainants from carrying on their trade and business by refusing to sell and by persuading others not to sell to the plaintiffs. *Sweeney v. Torrence*, 11 C. C. 497.

EXCISE.

- I. License laws.
- II. Retail licenses.
 - (a) Of the application.
 - (b) Hearing and decree.
 - (c) Of the court's discretion
 - (d) Remonstrances.
 - (e) Necessity of a public house.
 - (g) When a license will be refused.
 - (h) When a license will not be refused.
- III. Wholesale licenses.
- IV. Druggists.
- V. Transfer of licenses.
- VI. Revocation of licenses.
- VII. License bonds.
- VIII. Duties and liabilities of licensees.
- IX. Fees.
- X. Jurisdiction of the supreme court.
- XI. Penal offences.
 - (a) Selling without a license.
 - (b) Selling on Sunday.
 - (c) Selling to minors and intemperate persons.

I. License laws.

1. The high license act of 13 May 1887 (Brightly's Purdon 1225) is not violative either of section 3 or section 7 of article III. of the constitution. *Comm'th v. Sellers*, 130 P. S. 32.

2. Sec. 8 of the high license act 13 May 1887 (since amended by act 9 June 1891, Brightly's Purdon 1227) is not unconstitutional; it does not deny the equal protection of the laws, nor grant to individuals a special privilege, neither does it impose a taxation which is not uniform. *Hoffman v. Bowman*, 1 Dist. Rep. 562.

3. The act 9 June 1891 (Brightly's Purdon 1235), regulating the licensing of wholesale liquor dealers, is constitutional; the title sufficiently expresses the subject of the act. *Comm'th v. Watson*, 5 Del. 201.

4. In the construction of an act of assembly, the courts may correct a clerical error where it involves a manifest absurdity and it is plain and obvious;

the act 10 June 1891, which recited itself to be an amendment of the wholesale license act of 24 May 1887, was construed as an amendment of the retail act of 13 May 1887, such being its evident intention. See act 4 May 1893 (Brightly's Purdon 1226). *Clearfield County License Bonds*, 10 C. C. 593; *Delaware County License Bonds*, 10 C. C. 594.

5. As to the sufficiency of the title of acts regulating the liquor traffic, see note to *New Jersey v. Circuit Court*, 15 Atlan. 297.

II. Retail Licenses.**(a) Of the application.**

6. Upon an application for license, it is valid to write the signatures of the indorsers in lead pencil. *Schoner's License*, 8 C. C. 453; s. c. 4 Del. 256.

7. An application for a retail liquor license which omits to name the owner of the premises must be refused. The court will not permit an amendment or a new petition. *Donnoyer's License*, 9 C. C. 303.

8. If one of the sureties named in the petition does not own the amount of property required, the petition is void, and the court will not permit additional sureties to be given. *Luff's Petition*, 4 Del. 258.

9. A petition for a retail license cannot be amended as to any material matter after the date fixed for filing; the date of the petitioner's birth is a material matter, especially if it affects his naturalization. *Sherry's License*, 12 C. C. 129.

10. Where an applicant for a retail liquor license dies pending the proceedings for the granting of the same, the license may be issued to the successor of, or to a substitute for, the original applicant. *McOmber's License*, 3 Dist. Rep. 431.

11. The quarter sessions of Luzerne county has power to make a rule requiring the lists of applicants for liquor licenses to be published in the Luzerne Legal Register in addition to the two newspapers especially designated; the

act 12 February 1863, P. L. 28, relating to the publication in Luzerne county, is not repealed by the act 13 May 1887, sec. 4 (Brightly's Purdon 1226). *Kulp v. Luzerne County*, 7 Kulp 312.

(b) **Hearing and decree.**

12. The court may open an order refusing a license and grant the same, though a full term has expired since the hearing. *Hamilton's Application*, 7 C. C. 113; s. c. 24 W. N. C. 303.

13. Although the act 9 June 1891 (Brightly's Purdon 1235) provides that the court shall fix by rule a time at which applications for wholesale licenses shall be heard, the hearing may be adjourned to a subsequent day to suit the convenience of the court or of the applicants or remonstrants. *Bowman's License*, 167 P. S. 644.

14. The rules adopted by the quarter sessions in pursuance of the act 13 May 1887, sec. 3, are as binding upon the court as the provisions of the act itself. *Kahrer's License*, 12 C. C. 12.

15. Associate judges unlearned in the law, may grant a liquor license notwithstanding the dissent of the president judge. *Branch's License*, 164 P. S. 427.

16. The associate judges have no power to strike off a judgment refusing a liquor license and to enter a different judgment without notice to the parties. *Kahrer's License*, 12 C. C. 12.

17. If a judgment has been entered refusing a license, the court cannot, of its own motion and without notice, strike off the judgment and grant the license. *Kahrer's License*, 12 C. C. 12.

18. Where a judge has endorsed his refusal of a liquor license on the application and handed it down, he may at any time during the same session of the court place on file his reasons for so doing. *Mead's License*, 161 P. S. 375.

(c) **Of the court's discretion.**

19. The court may use its discretion in the granting and refusing of wholesale liquor licenses. *Wolf's Petition*, 138 P. S.

316; *Kock's Petition*, Ibid. 318; *McCaffrey's Petition*, Ibid. 319; *Goldman's Petition*, Ibid. 321.

20. A judge has lawfully exercised his discretion in refusing a wholesale liquor license where he gives as his reason that there was no necessity for more than two wholesale licenses in the town, that the applicants were not fit persons to whom such licenses should be granted and that the interests of the community and the county at large require such refusal. *Mead's License*, 161 P. S. 375. See *American Brewing Co.'s License*, 161 P. S. 378.

21. There is no distinction between the discretion of the court in granting a wholesale license and its discretion in granting a retail license. *Kelminski's License*, 164 P. S. 231.

22. In deciding whether a liquor license is necessary, the judges must rely on their knowledge of the customs and habits of their respective communities, their observation and experience as to results in former years and on the unsatisfactory evidence of *ex parte* witnesses. *Erie Licenses*, 4 Dist. Rep. 167; *Philadelphia Licenses*, 4 Dist. Rep. 201.

(d) **Remonstrances.**

23. If a licensed hotel be remonstrated against on the ground of necessity, the court will be governed by the facts; and this, though the previous license is *prima facie* evidence of the necessity. *Lawler's License*, 5 Montg. 135.

24. The court should not refuse a license because it believes that no license should be granted, but it may base its refusal on the ground that there is a decided preponderance against granting the license in favor of the remonstrances. *Sparrow's Petition*, 138 P. S. 116; s. c. 38 P. L. J. 123. See s. c. 27 W. N. C. 74.

25. A remonstrance is a privileged communication and an action for libel will not lie upon it except upon proof of express malice; proof of falsity alone is not sufficient. *Metzler v. Romaine*, 9 C. C. 171; s. c. 47 L. I. 484.

26. In Montgomery county where a

remonstrance is filed against the renewal of a license, the practice is to grant the license and at the same time to grant a rule to show cause why the same should not be revoked. *Tierney's License*, 11 C. C. 406.

(e) **Necessity of a public house.**

27. Not only the hotel but the license to sell liquor must be shown to be necessary for the accommodation of the public. The necessity of the license to sell will be determined by the number and character of the petitioners for and against. *Washington County Licenses*, 8 C. C. 169.

28. Upon the question of necessity the court will consider not only the number and character of the petitioners, but also the general circumstances of each case, the wants of the community and the effects on business interests and society in general. *Montgomery Co. Licenses*, 4 Montg. 77.

29. The license of a house which has been licensed to sell liquors should not be lightly disturbed; such licenses should be considered necessary. *Arnold's Application*, 1 Northam. 93.

30. If the court be judicially convinced of the necessity for a license, it will be granted, though the signatures to the remonstrance far exceed in number those to the petition. *Winter's Application*, 26 W. N. C. 74.

31. The existence of a mere drinking place for the employees of a large manufacturing establishment in the vicinity does not show a necessity for a hotel. *Monaghan's License*, 6 Montg. 84.

32. Upon an application for a retail license, where the application was in due form, and was supported by the petition of eighty-five representative citizens certifying to the necessity of the house and the fitness of the applicant, and there was no opposition to the granting of the license and the proofs were all in favor of it, and the court was without knowledge or the means of knowledge other than that afforded by the petitions filed; it was held, that the license should have

been granted. *Kelminski's License*, 164 P. S. 231.

33. Upon an application for a retail license, the word "necessary" in the act does not mean indispensable or even necessary to the best interests of the public; but the necessity to sell liquor must be made to appear distinct from the necessity for a hotel. *Brownell's License*, 11 C. C. 404.

34. In considering the question of the necessity for a license, where the preponderance of the testimony in favor of the application is so great as to control the judgment of the court, the license will be reluctantly granted in deference to the wish of the community. *Brendlinger's License*, 11 Montg. 93.

35. The quarter sessions of Centre county refused all saloon licenses in 1891 because, in the judgment of the court, there was no public necessity for them and on account of the evils to the young flowing from them. *Centre County Licenses*, 9 C. C. 376.

(g) **When a license will be refused.**

36. The furnishing of free lunches by a liquor dealer will be considered a sufficient reason for refusing a license. *Erie Licenses*, 4 Dist. Rep. 167.

37. The court will refuse a license to a building erected on land where there is a covenant in the line of the title that the grantee will not sell liquors on the premises; such a covenant is one which runs with the title. *Snyder's License*, 2 Dist. Rep. 785.

(h) **When a license will not be refused.**

38. Under the act 13 May 1887, sec. 5, clause 7 (Brightly's Purdon 1226), a license will not be refused to a place because the owner of the property is a member of a firm of liquor dealers and the owner of a brewery. *Leahy's License*, 14 C. C. 430.

III. Wholesale licenses.

39. Outside of the counties of Philadelphia and Allegheny, the court of quarter

sessions under the general act of 22 March 1867 had the same discretion in granting or refusing a wholesale license as in the case of a retail license. The cases of *Pollard's Petition*, 127 P. S. 507, and *Prospect Brewing Co.'s Petition*, *Ibid.* 523, were decided upon the local laws in force in Philadelphia and Allegheny counties. *Nordstrom's Petition*, 127 P. S. 542. See *McBride's Application*, 7 C. C. 77; *Gordon's Application*, *Ibid.* 130; *Knarr's Petition*, 127 P. S. 554.

40. Under the act of 20 April 1858 a license to sell in any quantity less than a gallon could not be granted to a distiller. *Vandegrift's Application*, 3 Atlan. 103; s. c. 1 Cent. 626.

41. A distiller under his license from the county treasurer may manufacture and sell whiskey in original packages, but cannot sell by the gallon without a license from the quarter sessions under the act of 24 May 1887. *Comm'th v. Sweitzer*, 129 P. S. 644.

42. Brewers have a right to bottle and sell in quantities not less than one dozen bottles, under their brewer's license; they are not required to take out a bottler's license. *Comm'th v. Seitz*, 1 Northam. 100.

43. A petition for a bottler's license should aver that the petitioner is a man of good moral character and temperate habits. *Wheelin's Case*, 26 W. N. C. 72.

44. A remonstrance being filed against a bottler alleging him to be a man not of good moral character, the court may require his personal appearance and examine him as to the issue. If he refuse to appear, the court may deny the application on that ground. *Ibid.*

45. Where the bottlers already licensed only bottled beer of their own make, a license was granted, there being shown to be a demand for beer made elsewhere. *Kite's Petition*, 6 Montg. 81.

46. Upon a petition for a distiller's license under the act 9 June 1891 (Brightly's Purdon 1235), where the petition, bond and other papers are in accordance with requirements of the act

and no remonstrance is filed, the court has power to consider the questions of the necessity of the license and the fitness of the applicant, but it cannot act arbitrarily and refuse a license without any expression of opinion. *Johnson's License*, 156 P. S. 322. See act 20 June 1893 (Brightly's Purdon 1237).

47. Under the act 9 June 1891 (Brightly's Purdon 1235), it was held, that the court had no right to inquire into the necessity of a brewer's or a distiller's license, but only upon an application for a wholesale license. *Reigner's License*, 11 C. C. 401.

48. Under the act 9 June 1891 a wholesale liquor license may be granted to a corporation, and it is not necessary that the charter be recorded before filing the petition, if it is so recorded when the license is granted. *Gulf Brewing Co.'s License*, 11 C. C. 346.

49. Under the act 9 June 1891 (Brightly's Purdon 1236) it is not a valid reason for refusing a distiller's license, that it was unnecessary for the accommodation of the public; the fifth requirement as set out in sec. 4 of that act does not apply to distillers. *Gemas's License*, 169 P. S. 43; s. c. 36 W. N. C. 367.

50. Under the act 20 June 1893 (Brightly's Purdon 1237) distillers, upon payment of the annual sum into the state treasury, are entitled to a receipt from the county treasurer for a distiller's license tax for one year; distillers are no longer required to apply to the court for a license. *Distillers' License Tax*, 14 C. C. 599.

51. Under the act 9 June 1891 (Brightly's Purdon 1235) no wholesale dealer, rectifier or compounder can obtain more than one license to sell liquor at any place than that designated as a distillery or brewery; the only exception being that those engaged in the distilling or brewing business may obtain, besides their license as distiller or brewer, one as a wholesale dealer also. *Lutz's Application*, 9 Lanc. 198.

52. A combination among brewers to

prevent competition among themselves is an illegal combination in restraint of trade and equity will not, upon a bill for an account, enforce the claim of one member of such an illegal combination against the other members, where his cause of action is based upon the illegal agreement. *Nester v. Continental Brewing Co.*, 161 P. S. 473; affirming s. c. 12 C. C. 417.

53. Under the retail license act 13 May 1887 (Brightly's Purdon 1226), a contract between a brewer and an applicant for a retail license, by which the brewer furnishes the capital and is to be repaid by instalments, is not invalid, and a judgment confessed for the capital so furnished will not be opened. *German-town Brewing Co. v. Booth*, 162 P. S. 100; reversing s. c. 14 C. C. 189.

54. The act 9 June 1891 (Brightly's Purdon 1235), prohibiting wholesale dealers from selling brewed or malt liquors in less quantities than twelve pint bottles and from permitting liquor to be drunk on the premises, was held to apply to licenses which were granted before the passage of the act. *Comm'th v. Donahue*, 149 P. S. 104; affirming s. c. 29 W. N. C. 254.

55. The provisions of the act 9 June 1891 (Brightly's Purdon 1235), relating to wholesale licenses, were held to apply to licensees under the previous act of 24 May 1887. *Comm'th v. Jones*, 10 C. C. 611; s. c. 29 W. N. C. 253.

56. An indictment lies under the act 9 June 1891, sec. 2 (Brightly's Purdon 1235), for selling liquors in quantities prohibited by that section; the offence is a misdemeanor at common law and is punishable by fine and revocation of the license. Such an indictment will lie whether the liquor was sold in bulk or in bottles. *Comm'th v. Watson*, 5 Del. 201.

57. The act 9 June 1891 (Brightly's Purdon 1235), creates no new class of dealers, nor does it increase or diminish the rights of licensees except that under the act it is not lawful for any wholesale dealer or store-keeper to sell any brewed or malt liquors in less quantities than

twelve pint bottles and no liquor can be sold by them to be drunk on the premises nor any place provided for that purpose, and under that act all licenses are required to be numbered and delivery wagons marked. Wholesale dealers, brewers, distillers, rectifiers and compounders or manufacturers defined. *In re Wholesale Liquor Licenses*, 8 Lanc. 265.

58. Bottlers who held a state license to bottle and sold beer in the county could not be convicted of a violation of a borough ordinance imposing a fine for peddling liquors without a license, where it appeared that the beer was delivered by them to citizens residing in the borough on orders sent them by a party soliciting the same; such bottlers were not pedlars within the meaning of the ordinance. *Du Boistown v. Rochester Brewing Co.*, 9 C. C. 442.

IV. Druggists.

59. A druggist charged with selling liquor without a license may defend by showing that the sale was made on a physician's certificate. *Comm'th v. Prickett*, 132 P. S. 371; s. c. 25 W. N. C. 422.

60. If one of the counts upon which a druggist is convicted, charge him generally with selling liquor without a license, he may be sentenced under section 15 of the act of 13 May 1887 (Brightly's Purdon 1229). *Ibid.*

V. Transfer of licenses.

61. The quarter sessions has no jurisdiction to authorize the transfer of a liquor license from one place to another under the act 20 April 1858 (Brightly's Purdon 1229). *Laib v. Hare*, 163 P. S. 481.

62. Where a license has been granted to two partners, it may, upon the dissolution of the partnership, be transferred to the partner continuing the business. *Korman's License*, 13 C. C. 147.

63. The court has no power to transfer a retail liquor license from one building to another during the year for which the

license was granted. *Burns's License*, 14 C. C. 174.

64. The courts have no power to authorize a transfer of a wholesale or retail liquor license to another house; the act 20 April 1858, sec. 7 (Brightly's Purdon 1229), has not been repealed. *Rohm's License*, 14 C. C. 202.

65. Where the holder of a license becomes insolvent and removes from the licensed premises, his license may be transferred to another without his consent, on the application of the owner of the premises, if compensation be made to the original licensee for so much of the cost of the license as has not been used by him. *Leibeknecht's License*, 14 C. C. 571.

66. Where a house has been duly licensed for one year, and the licensee moves away, the court will, upon proper proof, transfer the license to a new party, but in such case the share of the licensee for the unexpired term should be refunded to the original party. *Doyle's License*, 6 Kulp 356.

67. In Luzerne county under the original rule of court an application for a transfer of liquor license had to be accompanied by the affidavit of the applicant for transfer setting forth the reasons for such transfer; such affidavit was to be made by the person to whom the license is to be transferred, and the original licensee had no standing to make such application. Such rule, however, has been amended by requiring the application now to be made by both parties. *In re Liquor Licenses*, 6 Kulp 471.

68. Where a license was granted to a foreign brewing company to sell as brewers, and designated the place for the store-room and named the agent to conduct the business; it was *held* to be a license as a brewer and not as a wholesale dealer generally, and that the court had jurisdiction to allow the company to change its place of business. *Gerke Brewing Company's Petition*, 40 P. L. J. 420.

69. Where two persons made application for a license for the same house and one application was granted and the

other continued, and the former subsequently failed to lift his license; it was *held*, that a license might be granted to the other for the unexpired portion of the year on the payment of a proportionate sum. *Russell's License*, 11 C. C. 505.

70. Where a house is necessary for the accommodation of the public, the applicant will not be permitted to withdraw his petition on the day of the hearing, after the constable has reported that he is an unfit person to be intrusted with a license, and thus prevent the granting of a license if a proper person make application for any portion of the license year. *Heilig's License*, 12 C. C. 538.

71. Where a licensee leaves the licensed property, the court may direct the transfer of the license to a fit and proper person without the consent of the licensee. *Summa's License*, 12 C. C. 667. See *Breen's License*, 13 C. C. 141; *Leahy's License*, 14 C. C. 430.

72. Where the quarter sessions directs the transfer of a retail liquor license, a *certiorari* to the judgment is not a *supersedeas*; such an action of the court cannot be questioned by a creditor of the original licensee. *Breen's License*, 13 C. C. 141.

73. The right to transfer a license is not general and can only be granted when the party licensed has died or removed or has ceased to keep the licensed house; where a license is refused because the applicant has violated the law, a license will not be granted to him upon condition that it be transferred. *Forest House License*, 5 Northam. 17.

74. All transfers of liquor licenses must be allowed under the act 20 April 1858 (Brightly's Purdon 1229); under that act a person who voluntarily sells out has no right to ask for a transfer nor has a person who is sold out at sheriff's sale, unless it is a *bona fide* sale for debts arising since the granting of the license. *Keating's Application*, 42 P. L. J. 454.

VI. Revocation of licenses.

75. Where a retail liquor license was paid for by a check and the bank failed the next day before presentation, it was *held*, to be no payment, and the court would revoke the license on failure of the licensee to take up the check. *Comm'th v. Shoenheiter*, Public Ledger, 22 Nov. 1890.

76. Upon a rule to revoke a retail license, the fact of music in the bar-room as an attraction to draw customers will be considered; the license will be revoked if beer be allowed to be carried from the saloon in excess of the limit allowed by law; so, it will be revoked where liquor is sold to a minor, and it appears that the proprietor did not exercise such supervision as would have prevented such a sale. *Tierney's License*, 11 C. C. 406.

77. A liquor license will be revoked where it is established that liquor was sold to a person of known intemperate habits; and this, although such habits were not known to the licensee. *Garey's License*, 11 C. C. 468.

78. Where it appeared that a theatre or place of amusement in the nature thereof, was maintained on the licensed premises, that minors were furnished with intoxicating liquors, that persons visibly under the influence of liquor were furnished with liquors and that the place was a disorderly house, the license of the respondent was revoked. *Gartenstein's License*, 15 C. C. 612.

79. Where a licensee permitted the customary visitation of disreputable persons and kept a disorderly house, the court revoked his license on account of the disorderly character of the restaurant in the second story, which was supplied with liquor from the bar-room. *Simmons's License*, 15 C. C. 618.

80. A retail liquor license was revoked where it appeared that the licensee had volunteered performances of songs and dancing, and had music upon a harp, piano and violin, and there was evidence that occasionally minors and intoxicated persons were supplied with liq-

uor, and that a disorderly crowd filled the place and blocked the sidewalk. *Comm'th v. Elliott*, 16 C. C. 122; s. c. 4 Dist. Rep. 89.

81. A license will be revoked where it appears that the tavern is obnoxious as a school of profligacy and intemperance, or a haunt of the vicious and depraved; and this, although there be no more specific charge. *Comm'th v. McCandless*, 3 Dist. Rep. 30.

82. A license will be revoked where it is clearly proven that the licensee sold liquor to an intoxicated man, but where the general management of a place affords no ground of complaint, the license will not be revoked unless it appear that the selling was wilful and the sale is proved beyond a doubt. *Comm'th v. McCandless*, 3 Dist. Rep. 30.

83. A retail liquor license must be revoked where the uncontradicted evidence shows the sale of liquor to minors; and this, though the minors appeared to be and represented themselves to be of age, and it appeared that the prosecutor was actuated by improper motives and that the hotel was a necessity and conducted in a very orderly manner. *Gillespie's License*, 3 Dist. Rep. 461.

84. Where proof is made that a licensee has violated any of the laws relating to the sale of liquors, the license must be revoked; the act is mandatory, and takes from the judge all discretion as to the revocation. *Genova's License*, 3 Dist. Rep. 722; *Forest House License*, 5 Northam. 17.

85. A license will be revoked upon satisfactory proof that the holder has permitted a customary visitation of disreputable persons. *Comm'th v. Simmons*, 4 Dist. Rep. 35.

86. A sale of liquor by a steward of a club is unlawful, and a wholesale dealer who sells to such a person thereby endangers his license. *Erie Licenses*, 4 Dist. Rep. 167.

VII. License bonds.

87. The court is not bound to accept a license bond with a material altera-

tion therein which is unexplained. *Nordstrom's Petition*, 127 P. S. 542.

88. Upon the conviction of a licensee of a violation of the liquor laws, the district attorney should enter up judgment, by virtue of the warrant attached to the bond, against him and his sureties for the amount of the fine and costs imposed only; if judgment be entered for the full penal sum, the court will strike it off for the excess, but the bond will stand for the use of all persons interested therein. *Comm'th v. Johnson*, 8 C. C. 378.

89. Under the act 24 May 1887 (P. L. 194) it was *held*, that the bond of a bottler should be given in two thousand dollars as provided by the act 12 April 1875, sec. 10, P. L. 40, and that such bond was not vitiated by the addition of a warrant to confess judgment. See act 9 June 1891, sec. 8 (Brightly's Purdon 1236). *Comm'th v. Deibert*, 2 Dist. Rep. 53; s. c. 12 C. C. 504.

90. In a suit in a bottler's bond judgment should be entered for the penalty, no execution to issue until after a *scire facias* to ascertain the actual amount due. *Comm'th v. Deibert*, 2 Dist. Rep. 53; s. c. 12 C. C. 504.

91. A penalty imposed upon a wholesaler is collectible upon his bond on his conviction of selling in a county in which he is not licensed and in which his bond is not filed; it seems, however, that this rule does not apply to a retailer. *Comm'th v. Deibert*, 2 Dist. Rep. 53; s. c. 12 C. C. 504.

92. A contract by a third party to pay a surety on a liquor license bond of an applicant for so becoming such surety, the money to be paid back if the application is refused, is not unenforceable as contrary to public policy; and this, though the contract is made to enable the applicant to answer negatively an interrogatory as to whether he has paid money to obtain sureties upon his bond. *Bing v. Willey*, 146 P. S. 381.

93. Upon an application for license, exceptions to the sufficiency of bail may be taken both before and after the bond

has been filed, and the question of sufficiency may be heard upon testimony and, if adjudged adversely, bail may be perfected by a new bond. *Branch's License*, 164 P. S. 427.

94. An order granting a liquor license will not be reversed because the record shows that the bond originally filed was not accepted, but that another bond, filed on the day that the license was granted, was accepted. *Branch's License*, 164 P. S. 427.

VIII. Duties and liabilities of licensees.

95. It is unlawful to sell liquor to persons of intemperate habits even when sober; a licensed dealer should make inquiry as to the character of his regular customers. *Lawler's License*, 5 Montg. 135.

96. The sale of liquor to be used on Sunday and at other times along the river banks or other public places was condemned. *Kite's Petition*, 6 Montg. 81.

97. The sale of malt liquor in kettles was condemned, and it was further decided that playing cards, quoits and other games of chance for drinks is gambling. *Montgomery County Licenses*, 4 Montg. 77.

98. A judgment confessed for the purchase money of liquors will not be opened although it appears that the sale was in violation of the act 8 May 1853, sec. 4 (see act 13 May 1887, sec. 14, Brightly's Purdon 1228), forbidding the sale of liquors on credit. *Shumaker v. Reed*, 13 C. C. 547.

99. The act of 12 April 1875, sec. 7 (Brightly's Purdon 1232), allowing a husband, wife, etc., of a person habituated to intoxicating liquors to recover damages for their sale, is a general restraint on the sale of liquors regardless of license or manner of licensing. The court should assess the damages. The act applies to Allegheny county. *Mardorf v. Hemp*, 5 Cent. 720.

100. Under the act 8 May 1854 (Brightly's Purdon 1231) if the jury find that

the defendant furnished the plaintiff's deceased husband with liquors while intoxicated, with knowledge that he was a man of intemperate habits, he is responsible for the resulting injury; and this, though others furnished him liquors on the same occasion. *Taylor v. Wright*, 126 P. S. 617.

101. A father cannot recover from an innkeeper money expended by him for medical attendance to his adult son, injured in consequence of a sale of intoxicating liquors to the son when drunk. *Veon v. Creaton*, 138 P. S. 48; s. c. 27 W. N. C. 57; 38 P. L. J. 154.

102. A widow may maintain an action for the death of her husband against one who caused it by furnishing him liquor, he being of known intemperate habits or being at the time visibly intoxicated; the husband's voluntary taking of the liquor is not such contributory negligence as will prevent her recovery. *Davies v. McKnight*, 146 P. S. 610.

103. In an action for causing the death of a person by unlawfully furnishing liquor to him, where the testimony showed that the deceased, in consequence of intoxication so caused, fell into a gutter of water and became thoroughly chilled, and that he at once became sick and exhibited symptoms of bronchitis and two or three days afterwards symptoms of pneumonia which was the immediate cause of his death; it was *held*, that there being medical testimony tending to show that the exposure would be likely to cause pneumonia, the question of proximate cause was for the jury. *Davies v. McKnight*, 146 P. S. 610.

104. The earning capacity of a husband is not the property of the wife, and she cannot maintain during his life an action for its impairment by the deed or neglect of another; where a man of known habits of intemperance has been furnished with liquor, and while under the influence thereof committed a crime for which he was sentenced to prison; it was *held*, in an action under the act 8 May 1854, sec. 3 (Brightly's Purdon 1232), that the wife

could not recover from the liquor seller damages based on the loss to her through her husband's inability to work for his family during his imprisonment. *Bradford v. Boley*, 167 P. S. 506; s. c. 36 W. N. C. 238.

IX. Fees.

105. A city of less than 10,000 inhabitants becoming a city of the third class, under the 57th section of the act of 23 May 1874, the retail license fee therein is five hundred dollars. *Comm'th v. Miller*, 126 P. S. 157; affirming s. c. 6 C. C. 482.

106. A city of the third class, having accepted the provisions of the act of 23 May 1874, may impose a license tax upon dealers in wines and liquors graduated by the estimated amount of their gross annual sales. *Allentown v. Gross*, 132 P. S. 319.

107. A case stated to determine the amount of liquor license fees to be paid should set forth that the money has been paid into court; otherwise, a writ of error to a judgment thereon will be quashed. *Hoffman v. Matthes*, 2 Mona. 1; s. c. 6 C. C. 487.

108. Only mercantile appraisers in cities of the first class are entitled to the \$2.50 fee provided by the second proviso of the fourth section of the act of 13 May 1887 (Brightly's Purdon 1228). *Gable v. Gutelius*, 6 C. C. 587; *Verzi v. Dolan*, Ibid. 588.

109. The money of a township received from liquor licenses must be applied to keeping the roads in good repair. It is not subject to mandamus execution upon a judgment for damages. *Dailey v. Wilkes-Barre*, 6 Kulp 43.

110. The city of Franklin, incorporated under the special act of 4 April 1868, is not a city of the third class, not having accepted the provisions of the act of 23 May 1874 as required by the act of 23 May 1889. The liquor license fee in Franklin is three hundred dollars. *Comm'th v. Shoup*, 9 C. C. 289; s. c. 8 Lanc. 105.

111. The act 23 May 1889, sec. 3 (Brightly's Purdon 1542), having declared that a borough charter shall remain in full force and operation until the first Monday of April following the election upon its change into a city, a license granted for the sale of liquor for one year from the first day of April in a borough, the city charter of which would go into effect on the 8th April, is chargeable with the fee to be paid in a borough and not with the cost of a city license. *Comm'th v. McGroarty*, 148 P. S. 606. See *Doolittle v. Luzerne Co.*, 6 Kulp 495.

112. The city of Wilkes-Barre being a city of the third class, persons licensed to sell liquors at retail in said city must pay the license fee fixed for cities. *Comm'th v. McGroarty*, 6 Kulp 195.

113. Where a city charter goes into effect on the same day that a liquor license will go into effect, the fee to be paid is such as is prescribed for cities. *Pittston Licenses*, 7 Kulp 527.

114. Under the act 9 June 1891 (Brightly's Purdon 1227), providing for the payment to cities, boroughs and townships of proportionate parts of all license fees, the whole amount of such fees must first be paid to the county treasurer and by him disbursed to all who are to share in the division, and for receiving and paying out these moneys he is entitled to compensation. No particular rate of compensation seems to be fixed for the payment of the sums due to the proper municipalities, but upon the proportion retained for the use of the county, the county treasurer is authorized to receive the same rate per cent as upon moneys collected and returned to the state. *South Bethlehem v. Heminway*, 16 C. C. 103; s. c. 4 Northam. 365.

115. A borough ordinance which provided that all persons selling liquors within the borough should, in addition to other licenses, pay the treasurer, for a saloon, twenty-five dollars, and for peddling with a wagon, fifty dollars annually, and that any person selling liquor within the borough without paying said

tax should be fined fifty dollars for each offence, was held to be invalid as imposing a tax for revenue. *Du Boistown v. Rochester Brewing Co.*, 9 C. C. 442.

116. Brewers, distillers, bottlers and wholesale and retail dealers in liquors are not assessable as vendors of merchandise; the old system of mercantile assessments as to all such persons has been superseded by the high license law. *Comm'th v. Iron City Brewing Co.*, 146 P. S. 642; s. c. 8 Lanc. 274.

X. Jurisdiction of the supreme court.

117. Upon an application for a whole-sale license and a remonstrance on the ground that the petitioner was not a person of good moral character, a hearing upon the issue and a refusal of the license; the supreme court will not review the case upon its merits. *Collarn's Case*, 134 P. S. 551; s. c. 26 W. N. C. 73.

118. The supreme court will not interfere with the refusal to grant a whole-sale liquor license, where nothing is shown to prove that the discretion of the court below was not reasonably and properly exercised. *Conway's Petition*, 1 Atlan. 727.

119. The return of the court below to a mandamus issued to them by the supreme court should show a graceful submission to the authority of the latter court and have no trace of insubordination or an assumption of superior wisdom. *Nordstrom's Petition*, 127 P. S. 542. See *In re Licenses*, 24 W. N. C. 198.

120. If the judge refuse or neglect to hear a petition for a license, the supreme court will enjoin upon him the performance of that duty. If, however, he has heard and determined, the exercise of his discretion will not be revised except in extreme cases. *Knarr's Petition*, 127 P. S. 554.

121. An appeal from an order refusing a petition for a license to sell liquors at retail, is but a substitute for a common

law *certiorari*; it brings up nothing but the record, of which, the reasons given for the refusal, form no part. *Berg's Petition*, 139 P. S. 354.

122. Where it appears that the court of quarter sessions has heard the petitioner's application for a distiller's license and upon due consideration denied it, the supreme court will refuse a writ of alternative mandamus; and this, though no objection was made or remonstrance filed. But see the act 20 June 1893 (Brightly's Purdon 1237). *McNulty's Petition*, 142 P. S. 475; *Fitzpatrick's Petition*, 143 P. S. 53.

123. The court refused an alternative mandamus upon the petition of parties that they had presented their applications for license to sell liquors at wholesale and for bottler's license, that they were duly qualified applicants and no remonstrances were filed averring the contrary, and that after hearing their application, it was refused without reason given. *Ostertag's Petition*, 144 P. S. 426.

124. Where a distiller's license was refused on the ground, that the distillery was not located in a city or town but in a township, that its former occupants had repeatedly violated the liquor laws, and that, in the judgment of the court, it was not necessary, did not do a legitimate business, and had not been properly conducted, the supreme court refused to compel the judge of the quarter sessions to grant a license. *Johnson's License*, 165 P. S. 315; affirming s. c. 13 C. C. 584.

125. Where the record shows that a wholesale liquor license was refused after a hearing, the supreme court will presume that the judge performed his duty according to law; the judge is not bound to set out legal reasons for his actions, he is only bound to have them. *Gross's License*, 161 P. S. 344. See *Quinton's License*, 169 P. S. 115.

126. Upon an appeal from an order granting a liquor license, the supreme court cannot consider the merits, but can only determine whether the license court has proceeded according to law. *Branch's Estate*, 164 P. S. 427.

127. Upon an application for a retail liquor license where the record shows that the case was heard, considered and refused because there was no necessity for the house to be licensed, the supreme court will not assume that the court acted arbitrarily or that the reason assigned has no existence in fact. *Sandcroft's License*, 168 P. S. 45.

XI. Penal offences.

(a) Selling without a license.

128. A wholesale licensee may sell in quantities not less than one gallon, and is not guilty of selling liquor without a license because the liquor was drunk on the premises. *Comm'th v. Brock*, 1 Lack. Jur. 415.

129. A wholesaler who attempts to evade the retail law by selling beer in quart mugs to be drunk on the premises without an intention in good faith that the whole shall be carried away, is guilty of selling liquor at retail without a license. *Comm'th v. Howard*, Philadelphia Times, 30 December 1890.

130. That the legality of sale is to be determined by its legality where the sale is consummated by delivery, see note to *Connecticut v. Ascher*, 7 Atlan. 826.

131. A liquor dealer in one county who receives an order for liquor to be delivered in another county C. O. D. cannot be convicted of selling liquor without license in the latter county. *Comm'th v. Fleming*, 130 P. S. 138.

132. A driver who takes and fills orders for beer in one county, for his employer, who has a bottler's license in another county, is guilty under the act of 13 May 1887 of selling without a license. *Comm'th v. Holstine*, 132 P. S. 357; s. c. 25 W. N. C. 423.

133. It is indictable under the act of 13 May 1887 to sell "Essence of Life," or any beverage which contains any proportion of alcohol, no matter how small. *Comm'th v. Gillett*, 6 Lanc. 156; s. c. 1 Wilcox 293.

134. A constable's return, under oath, of a sale of liquor without a license is sufficient warrant for the court to send an indictment to the grand jury. *Davidson v. Comm'th*, 5 Cent. 484.

135. To an indictment for selling liquor without a license a plea of *non volo contendere* is equivalent to a plea of guilty. *Comm'th v. Holstine*, 132 P. S. 357; s. c. 25 W. N. C. 423.

136. Though the act of 13 May 1887 (Brightly's Purdon 1229) repealed the act of 12 April 1875, yet a defendant could be convicted under the latter act for selling liquor without a license, up to 30 June 1887. *Thomas v. Comm'th*, 11 Atlan. 63.

137. Upon an indictment for selling liquor without a license, the court refused to disturb a verdict putting the costs upon a person who had given the information to the constable. *Comm'th v. Weber*, 7 Lanc. 172. See *Comm'th v. Stiffel*, *Ibid.* 193.

138. The second section of the act of 9 April 1869, providing a punishment for the sale of liquor without a license in certain boroughs, is unconstitutional, the title of the act being "An act to prohibit the issuing of licenses to sell." The sale of liquor without a license in said boroughs is punishable under the act of 13 May 1887 (Brightly's Purdon 1229). *Comm'th v. Frantz*, 135 P. S. 389.

139. The right to import liquor into a state and sell it therein in its original packages, cannot be interfered with by prohibitory or license laws. *Leisy v. Hardin*, 38 P. L. J. 35. For interesting reviews of this decision, see articles by C. Stuart Patterson and A. H. Wintersteen, Esqrs., in 26 W. N. C. 205, 289.

140. Whether a barrel of beer or whiskey in pint bottles, can be sold in single bottles as "original packages" was not decided. *Comm'th v. Zelt*, 138 P. S. 615; s. c. 27 W. N. C. 131; *Comm'th v. Swihart*, 138 P. S. 629; *Comm'th v. Pendergast*, *Ibid.* 633.

141. Where a person who has a brewer's license, sells liquor not of his own make

but as the employee of an unlicensed person, he is to be sentenced, if convicted, to the punishment prescribed by the act 13 May 1887 (Brightly's Purdon 1229) for unlicensed offenders. *Comm'th v. Zelt*, 138 P. S. 615.

142. Where a defendant in a prosecution for the unlicensed sale of liquor made prior to the act of Congress of 8 August 1890, set up as a defence that he was the agent of an importer selling the liquor in the original packages as imported; it was held, that he assumed the burden of establishing such agency by competent evidence to such an extent as to throw a reasonable doubt upon the commonwealth's case. *Comm'th v. Zelt*, 138 P. S. 615; *Comm'th v. Pendergast*, 138 P. S. 633; *Comm'th v. Bishman*, 138 P. S. 639; *Comm'th v. Silverman*, 138 P. S. 642.

143. Persons convicted of penal offences under the act 13 May 1887 (Brightly's Purdon 1229) may be sentenced, under the act of 8 March 1871, to imprisonment in the Allegheny county workhouse. *Comm'th v. Zelt*, 138 P. S. 615.

144. A bottler duly licensed may sell to any retail dealer in any part of the commonwealth, provided that such sales are made at the bottler's place of business in the county for which his license is granted; the goods may be ordered by mail and delivery may be made either by a common carrier or by the defendant's own wagon. *Comm'th v. Hess*, 148 P. S. 98; *Comm'th v. Brauning*, 148 P. S. 111; *Comm'th v. Miller*, 148 P. S. 113.

145. Upon an indictment for selling liquor without a license, where the defence was that defendant sold as a steward of an incorporated club, it was proper to charge the jury that if they believed that the alleged club was a mere sham or device to evade the license laws, it was their duty to find the defendant guilty. The rights of a *bona fide* club not being involved in this case, were not considered. *Comm'th v. Tierney*, 148 P. S. 552; affirming s. c. 29 W. N. C. 194.

146. The sale at a picnic, by a member

of a club to other persons than members, of tickets exchangeable for beer, is indictable as a sale without license. It was not decided whether a club has the right to sell liquors to its own members at a profit. *Comm'th v. Loesch*, 153 P. S. 502.

147. It is an indictable offence to sell liquor without a license even where such sale is made by a club organized in good faith, through its officers or employees and to one of its own members; such a transaction is a sale whether the liquor be paid for in cash or is charged to a member and paid for at the end of a month or other stated period. *Comm'th v. Steffner*, 2 Dist. Rep. 152; s. c. 10 Lanc. 92.

148. A sale of liquor by a steward of a club is unlawful, and a wholesale dealer who sells to such a person thereby endangers his license. *Erie Licenses*, 4 Dist. Rep. 167.

149. The statute 1 Henry V. chap. 5, requiring that the estate, degree or mystery of a defendant must be stated in the indictment, does not apply to an indictment for selling liquor without a license. *Comm'th v. Murphy*, 12 C. C. 131.

(b) Selling on Sunday.

150. An action under the act of 26 February 1855, for the penalty for selling liquor on Sunday, cannot be commenced before the justice by *capias*. *Comm'th v. Schweitzer*, 1 Northam. 375.

151. Where the defendant is committed to jail upon a *capias ad satisfaciendum* issued on a judgment for a penalty for selling liquor on Sunday in violation of the act 26 February 1855 (Brightly's Purdon 1230), he can only be released under the insolvent laws. *Comm'th v. McAleese*, 12 C. C. 147.

152. The act 13 May 1887, sec. 17 (Brightly's Purdon 1230), does not prohibit the use of liquors by a private citizen on his own table on Sunday, or make it a misdemeanor to furnish them to his family or his guests in his own house. *Comm'th v. Carey*, 151 P. S. 368.

153. The act 13 May 1887 (Brightly's

Purdon 1230) is not applicable to the table or the personal habits of citizens within their own homes; a person who gave liquors to another on Sunday while soliciting votes could not be convicted under that act. *Comm'th v. Heckler*, 168 P. S. 575; s. c. 36 W. N. C. 363; reversing s. c. 14 C. C. 465.

(c) Selling to minors and intemperate persons.

154. The seventeenth section of the act of 13 May 1887 (Brightly's Purdon 1230) is not confined to dealers, it is directed against any person; to the excepted classes no man may lawfully sell or give liquor. *Altenburg v. Comm'th*, 126 P. S. 602. See *Comm'th v. McGee*, 7 C. C. 162.

155. A person licensed under the act of 8 May 1854 to sell liquor was indictable under the act of 13 May 1887 (Brightly's Purdon 1230) for selling liquors to minors and intemperate persons. *Comm'th v. Sellers*, 15 Atlan. 891; *Comm'th v. Kramer*, 2 Mona. 198.

156. An indictment under sec. 17 of the act of 13 May 1887 (Brightly's Purdon 1230) for furnishing liquor to a minor or to a person of known intemperate habits, need not state that the liquor was "knowingly and wilfully" furnished. *Comm'th v. Sellers*, 130 P. S. 32.

157. An acquittal upon an indictment charging the furnishing of liquors on Sunday cannot be pleaded as a former acquittal upon the trial of an indictment for furnishing it to men visibly affected with intoxicating drink; but the jury should be instructed that the evidence submitted of sales on Sunday should not be considered by them upon the second trial. *Altenburg v. Comm'th*, 126 P. S. 602.

158. The sale of liquor to a person of known intemperate habits is not excused by the fact that he was sober when the sale was made. *Konetzki's License*, 6 Montg. 82; *Monaghan's License*, Ibid. 84.

159. Upon an indictment for furnish-

ing liquors to a person of known intemperate habits, the commonwealth need not bring home to the defendant the knowledge of such habits; it is sufficient to prove that the party was known in his neighborhood as an intemperate man. *Comm'th v. Zelt*, 138 P. S. 615; s. c. 27 W. N. C. 131; *Comm'th v. Swihart*, 138 P. S. 629; *Comm'th v. Pendergast*, *Ibid.* 633.

160. The title of the act of 13 May 1887 (Brightly's Purdon 1230) is sufficient, under article III., sec. 3, of the constitution, to sustain sec. 17 of that act, prohibiting the furnishing of liquors to minors or intemperate person by sale, gift or otherwise. *Comm'th v. Silverman*, 138 P. S. 642.

161. State laws prohibiting the sale of liquors to minors and to persons of known intemperate habits are valid regulations as applied to imported liquors sold in the original package. *Comm'th v. Zelt*, 138 P. S. 615; *Comm'th v. Silverman*, 138 P. S. 642.

162. Upon the trial of an indictment for selling liquor to a minor, it is not material whether the defendant had knowledge of the minority or not. *Comm'th v. Steffner*, 2 Dist. Rep. 152 s. c. 10 Lanc. 92.

163. Where the defendant sold liquor to an adult who, in his presence, handed a part of it to a minor and, without remonstrance, the defendant furnished the same person almost immediately thereafter with two glasses of beer, one of which was given to the boy; it was *held*, that the defendant was guilty of selling liquor to a minor. *Comm'th v. Steffner*, 2 Dist. Rep. 152; s. c. 10 Lanc. 92.

164. Minors may be convicted of furnishing liquor to minors or to older persons. *Comm'th v. Kirby*, 12 C. C. 175.

165. Where it appeared that a person of known intemperate habits asked for liquor at the defendant's bar, which was refused, and he was ordered to leave, which he did, and that afterwards the same person in company with others entered a room adjoining the bar, where

they were all furnished drinks, and it further appeared that the defendant did not know of such person's presence in the room; it was *held*, that a conviction of furnishing liquor to a person of known intemperate habits would be sustained; it was the duty of the innkeeper to know to whom his liquor was to go. *Comm'th v. Dowling*, 9 Lanc. 142.

166. Under the act 13 May 1887, sec. 17 (Brightly's Purdon 1230), any furnishing of liquors, other than by a sale to persons or on the days excepted, is not unlawful or prohibited, unless it appear that the furnishing was an evasion of the law forbidding a sale, and in the absence of a wrongful intent there can be no conviction. *Comm'th v. Herman*, 4 Dist. Rep. 412.

EXECUTION.

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XVI. When a subsequent execution will be entitled to preference.

I. General Principles.

1. Equity will not, as a general rule, interpose and prevent a sale of a defendant's interest in land under an execution against him. *Small's Appeal*, 9 Atlan. 337.

II. Practice.

(a) When execution may issue.

2. Upon a judgment on a general verdict, execution may be issued at once, subject to be superseded by a writ of error. *O'Hara v. Union Ben. Mut. Aid Society*, 134 P. S. 417; affirming s. c. 5 Kulp 454.

3. A judgment entered on a bond and warrant more than ten years old, without affidavit and motion as required by rule of court, will be allowed to stand on filing the affidavit *nunc pro tunc*, but an execution issued thereon will be set aside

upon the petition of a subsequent execution creditor. *Woods v. Woods*, 126 P. S. 396.

4. A judgment being entered for want of a plea and the damages subsequently assessed, the twenty years within which a *feri facias* must issue by the act of 19 May 1887 (Brightly's Purdon 828) begins to run from the assessment of damages, and not from the entry of judgment. *Walker v. Wardell*, 25 W. N. C. 131.

5. Where judgment is entered on a single bill, payable three months after date, execution cannot issue until after the day upon which the note becomes due. *Zearfoss v. Lynn*, 12 C. C. 400.

6. Upon a judgment entered upon a judgment note payable within a year in instalments, execution may issue during the year for any instalments that may be due and unpaid; it is better practice to move the court for leave to issue such an execution, but this is not absolutely necessary. *Cochran v. Elliott*, 6 Del. 79.

7. Where a judgment is given as indemnity by a principal to his surety, execution may be issued thereon before the surety is actually damnified. *Hoffman v. Jacobs*, 12 Lanc. 25.

8. Where judgment is entered for the payment of a bond by virtue of a warrant of attorney, execution may issue without a *scire facias*; such an execution is within the control of the court and is issued at the peril of the plaintiff. *Reger v. Williams*, 8 Montg. 87.

9. An execution issued upon a transcript of a justice without a previous execution before the justice and a return of *nulla bona*, is not void but voidable; it is an irregularity of which the defendant alone can take advantage. *Stroudsburg Bank v. Labar*, 7 C. C. 163.

10. If a judgment before a magistrate be upwards of five years old, an execution cannot issue without a *scire facias* to revive has been first laid out. *Park v. Wilson*, 3 L. I. June 10, 1846.

11. Under the act 19 May 1887 (Brightly's Purdon 828) real estate cannot be taken in execution under a judgment

more than five years old prior to a revival of such judgment; the issuing of a *scire facias* on the same day as the *feri facias* will not answer the requirements of the act. *Miller v. Miller*, 147 P. S. 545. See *Miller v. Miller*, 147 P. S. 548; *Eisen v. Benner*, 2 Dist. Rep. 363.

(b) Upon the decease of the judgment debtor.

12. If a judgment be revived after the death of the defendant, execution should issue upon the original judgment; but if issued upon the revival it is a mere irregularity, which will not affect the purchaser's title. *Grover v. Boon*, 124 P. S. 399.

13. After the decease of a judgment debtor an execution cannot be legally issued upon the judgment without a *scire facias* to his personal representatives, and a foreign administrator cannot give his consent to the issuing of such an execution, especially where there is a domestic administrator refusing assent. *Bomberger v. Raymond*, 12 C. C. 460.

(c) When an execution will be set aside.

14. An agreement in writing not to issue an execution except on a specified contingency, will be enforced by setting aside an execution issued in violation of the agreement. *Feagley v. Norbeck*, 127 P. S. 238.

15. It is not error to refuse to set aside a writ of *feri facias* upon the allegation of the defendant that a levy has been made upon real estate and none upon his personal property. *Clark v. Fell*, 139 P. S. 469.

16. Where a judgment for costs in favor of the defendant was attached by the defendant's creditor, and after the date of the attachment the defendant issued a *feri facias* and subsequently the judgment was set aside; it was held, that the levy on the *feri facias* should also have been set aside. *Hower v. Ulrich*,

156 P. S. 410; *Ulrich v. Hower*, 156 P. S. 414.

17. Where default is made in the payment of interest on a mortgage, a writ of *feri facias* on the bond will not be set aside upon the allegation that the debtor was prevented from making the payment of the interest in time by the action of the plaintiff's clerk in promising to inform the debtor of the amount of interest due. *Busch v. Groswith*, 159 P. S. 623.

18. An execution issued on a regular judgment of record cannot be set aside on the mere oath of the defendant without giving the plaintiff a reasonable opportunity to be heard. *National Furniture Co. v. McClintock*, 162 P. S. 141; reversing s. c. 10 Montg. 149.

19. A *feri facias* will not be set aside upon the application of subsequent lien creditors, on the ground that the writ was issued on the *præcipe* of an attorney-at-law not admitted to practice in the county in which it was issued. *Hooven Mercantile Co. v. Morgan*, 15 C. C. 567.

20. The court refused to set aside the execution of a lien creditor and permit the real estate of the defendant to be sold by his assignee for creditors. *Evans's Estate*, 7 Lanc. 347.

21. An executed *feri facias* for costs cannot be set aside at the instance of one who has paid the money to the sheriff. *Freyman v. Bean*, 6 Montg. 163.

(d) For what amount execution should issue.

22. In a proceeding upon a recognizance for maintenance in a desertion proceeding, judgment should be entered for the full amount of the penalty, but execution should issue for liquidated arrears only; subsequent default must be followed by a subsequent liquidation either by *scire facias* or petition and rule, before a second writ of *feri facias* can issue. *Comm'th v. Seiders*, 1 Dist. Rep. 264.

(e) Of the levy and lien.

23. A levy made on sight or in potential control of the goods is valid only when followed up by actual possession within a reasonable time. *Dixon v. White Sewing Machine Co.*, 128 P. S. 397.

24. A levy upon goods bailed or demised is such a disturbance of the bailee's possession as to constitute a trespass though the goods be not actually taken. *Ibid.*

25. If the goods be claimed by a stranger, the sheriff may either abandon the levy or restrict it to the defendant's interest and may so alter his levy, and return accordingly. *Ibid.*

26. In an action against a sheriff who, after seizing goods pointed out to him, relinquished his levy and made a return of *nulla bona* without having made a demand on the plaintiff for indemnity; it was *held*, that it was error to refuse to permit him to show that the goods belonged to a stranger to the writ. *Dornin v. McCandless*, 146 P. S. 344.

27. A valid levy is not destroyed by the death of the defendant. *Connell v. O'Neil*, 154 P. S. 582.

28. Where a sheriff levies an attachment upon perishable goods without disturbing the goods, and subsequently sells the goods under an order of court as perishable goods, he is liable only for nominal damages. *Central National Bank v. Gallagher*, 163 P. S. 456.

29. Where a levy is not actually made and the sheriff never has the goods in his possession, the execution will not defeat the claim of a creditor or a subsequent purchaser; even after an actual levy, a failure to proceed for fifteen months would render the levy absolutely void as against a subsequent purchaser. *Glazier v. Sawyer*, 11 C. C. 34.

30. Where a paper enumerating certain bank stock to be levied upon was placed in the hands of the sheriff at the time a writ of execution was issued, and the sheriff made the levy, but left the stock in the possession of the debtor and

the list of stock was lost; it was *held*, upon the distribution of the assigned estate of the debtor, that parol evidence was admissible to prove the contents of the paper which was lost. *Braden's Estate*, 165 P. S. 184.

31. Where execution is issued and at a later hour on the same day an assignment for creditors is delivered to the assignee, the execution becomes a lien on all the personal property of the debtor until the following return day, but the lien then expires unless an actual levy is made in the interval. *Braden's Estate*, 165 P. S. 184.

32. Where an execution reaches the sheriff's hands after an assignment for creditors has been recorded, it is no lien on the goods covered by the assignment. *Plank's Estate*, 10 Lanc. 201.

33. Where an execution is issued in good faith and without fraud or collusion, it becomes a lien on the personal property of the defendant, from the time it comes into the sheriff's hands; the actual levy and seizure can be made at any time before the return day without postponing the writ. *Simpson v. Snyder*, 11 Montg. 115.

34. Where a sheriff levies on specific articles, naming them without more, he will be confined to his levy, but where he adds "all goods on premises," an article not specifically named will be held to be covered by the levy. *Simpson v. Snyder*, 11 Montg. 115.

35. Where executions are placed in the sheriff's hands, and before actual levy and seizure, other executions are placed in the hands of a constable, who makes a levy and sale after notice from the sheriff of his writs and an actual levy by him, the proceeds are first to be applied to the sheriff's writs and upon a refusal of the constable to pay, he is liable to the sheriff in an action of assumpsit. *Simpson v. Snyder*, 11 Montg. 115.

See EXECUTION, III.

(g) Execution against corporations.

36. Where real estate is held by a cor-

poration in fee, and is sold at sheriff's sale for the payment of its debts, the proceeds are to be distributed amongst lien creditors according to priority of lien, and not *pro rata*. *First National Bank v. New York & W. G. C. & C. Co.*, 137 P. S. 601.

37. A sheriff's sale of the corporate franchises and property of a corporation will not be set aside on the petition of a stockholder which fails to aver when the petitioner became a stockholder and his holding, or to charge collusion, misconduct or inability to act on the part of the directors. *Southwest Natural Gas Co. v. Fayette Fuel Gas Co.*, 145 P. S. 13.

38. A sale under a judgment confessed by an insolvent corporation will not be restrained on the ground that a sale of the company's property can be more advantageously conducted, in the interests of all the creditors, by receivers. *Fairpoint Mfg. Co. v. Philadelphia Optical & Watch Co.*, 161 P. S. 17; *Lowry v. Philadelphia Optical & Watch Co.*, 161 P. S. 123.

39. An execution against a corporation, under the act 7 April 1870 (Brightly's Purdon 431), does not create a lien; it is a mere process to convert the property for the payment of debts by an equal distribution among the creditors, and this rule applies to business corporations as well as public corporations. *McKee v. McKee's Rocks Oil Co.*, 13 C. C. 375.

40. Under the act 7 April 1870 (Brightly's Purdon 431) personal, mixed or real property (except lands held in fee), franchises and rights of a corporation, may be levied upon and sold upon a writ of *feri facias* without a return of *nulla bona* to a former writ. *Williams v. Lawrenceville and Evergreen Pass. Ry. Co.*, 9 Montg. 126.

See CORPORATION.

(h) Execution against life estates.

41. A sale of a life estate under a *levari facias* upon a mortgage given by the life tenant, without notice to the life tenant and without leave of court, passes a good title to the purchaser. The act of 24

January 1849 (Brightly's Purdon 850) has no application to a sale under a mortgage. *Dateman's Appeal*, 127 P. S. 348.

42. Sequestration of a life estate, under the act 24 January 1849 (Brightly's Purdon 850), is unnecessary where there is adverse possession in hostility to it, or where the debtor claims to hold in fee, or where the creditor has reasonable ground to believe that the debtor owns in fee. In such cases the land may be sold on an ordinary execution. *Lawrence v. Keener*, 149 P. S. 402.

43. The sale of a life estate will pass no title where it has been made without notice and leave of court, as required by sec. 4 of the act 24 January 1849 (Brightly's Purdon 850). *Henry v. McClellan*, 146 P. S. 34; *McClellan's Estate*, 158 P. S. 639.

44. A sheriff's sale of a life estate will be set aside where the record fails to show that the court directed the writ; and this, though in fact the court did so direct. *Conrad v. Edwards*, 7 C. C. 342.

45. Upon an application for a writ of *venditioni exponas* to sell a defendant's life estate, the notice required by the act 24 January 1849 (Brightly's Purdon 850) may be served upon his attorney in the suit. *Goodell v. Ehresman*, 11 C. C. 400.

46. A judgment creditor may proceed by a writ of *venditioni exponas* against a life estate without the appointment of a sequestrator, but he is not bound to do so, and has the right, if he so desires, to sequester the returns from the estate. *Gaige v. Reynolds*, 2 Lack. Jur. 170.

See ESTATE FOR LIFE.

III. Stay of execution.

47. A plea of freehold for stay of execution must set forth that the real estate is in the county; it need not, however, aver that it is clear of encumbrances, the burden of disproving which is upon the plaintiff. *First National Bank v. Fine*, 2 Northam. 10.

48. Stay of execution is to be computed from the first day of the term to which the action is commenced and not from the day of judgment. *Wright v. Laufer*, 2 Northam. 236.

49. Upon a judgment entered for want of an affidavit of defence, an execution may issue immediately; the act 11 March 1809, sec. 6 (Brightly's Purdon 830), does not apply. *Oswego River Pulp Co. v. Delaware Water Gap Pulp Co.*, 10 C. C. 312.

50. Where a railroad company enters upon land to construct its road, relying upon the grant of the right of way from an alleged owner and without acquiring the right by condemnation proceedings, a subsequent grantee of the real owner may afterwards maintain ejectment against the company, but upon a recovery the supreme court will stay execution for a sufficient time to enable the railroad company to condemn the right of way. *Richards v. Buffalo, N. Y. & P. R. R. Co.*, 137 P. S. 524.

51. Where a married woman obtains a stay of execution for the purpose of ascertaining the amount due by the plaintiff in another suit, she will not be permitted, after obtaining judgment in such second suit, to repudiate her own proposal of such a mode of settlement, on the faith of which the stay of execution was granted. *Miller v. Klopp*, 141 P. S. 375.

52. A levy under an execution on a judgment subsequent to an assignment for creditors upon goods of the debtor not embraced in the appraisal, will not be stayed, when the question of title as between the plaintiff and claimant is in dispute. *Long v. Wilson*, 15 C. C. 68.

53. The entry of bail for stay of execution is a waiver of the right of appeal, even within the twenty days. *Upland Borough v. New Chester Water Co.*, 4 Del. 241.

54. In an action upon a judgment rendered in another state, an affidavit of defence that an appeal has been taken from such judgment, which is a *superseas* to any proceeding thereon, is not

sufficient to prevent judgment in this state, but the court will stay the execution here pending the final determination of the appeal. *Wood Mowing & Reaping Co. v. Berry Harvester Co.*, 6 Del. 101.

55. Where a *certiorari* and appeal were not applied for until more than three weeks after judgment, and the *certiorari* was not served until after the plaintiff had issued execution, but it was filed and served before the sheriff did anything under the execution; it was *held*, that the defendant was entitled to have the writ stayed upon payment of the execution costs that had accrued at the time the *certiorari* was filed and served. *Rand v. Long*, 6 Kulp 299.

56. A judgment note for a whole sum payable in one day, is limited by a contemporaneous agreement that it shall be paid in instalments, and an execution issued thereon will be stayed. *Cowan v. Watkins*, 1 Lack. Jur. 129.

57. If a judgment be attached by a creditor of the plaintiff, proceedings on the judgment will not be stayed, but the proceeds thereof will be ruled into court. *Durham v. Walsh*, 7 Lanc. 30.

58. A writ of execution may be stayed without the consent of the wage claimants; their liens do not attach until the sale when they are entitled to be first paid out of the proceeds. *Mettfett v. Mohn*, 37 W. N. C. 87; reversing s. c. 11 Lanc. 249.

59. Upon a confession of judgment containing a privilege to enter bail for stay of execution within thirty days, execution may be issued forthwith, liable to be stayed upon entry of bail and payment of costs thereon. *Kaylor v. Holloway*, 5 Kulp 432.

60. Where execution was entered upon a bond which contained the words "without stay of execution," it was *held*, that an execution thereon would not be set aside in the absence of precise and indubitable proof of an allegation on the part of the defendant of an agreement that execution should not issue until the happening of a certain event. *Shrews-*

bury Savings Institution v. Seitz, 2 York 153.

61. Execution will not be stayed upon the evidence of the defendant, and the justice who wrote it, that at the time the judgment note was given a written agreement was entered into by the plaintiff not to issue execution for a year, where such written agreement was not produced, and its execution was denied by the plaintiff. *Hummer v. Laucks*, 8 York 38.

62. The act 17 February 1876 (Brightly's Purdon 141), authorizing the court granting an order of sale of assigned real estate to stay execution on all liens that may be divested by such sale, covers executions on judgments as to which, since that act, stay of execution has been expressly waived. *Pauley's Estate*, 149 P. S. 196. See *Carl's Assignment*, 15 C. C. 143.

63. Where lands have been assigned for creditors, the court has no power to stay an execution for their sale unless an order of sale has been granted under the act 17 February 1876 (Brightly's Purdon 140). *Athens National Bank v. Frost*, 3 Dist. Rep. 601.

64. Though a creditor had a lien by virtue of a levy at the time of the defendant's death, the preference is lost by subsequently staying the writ of execution. The lien could not be preserved by an agreement of the executor or his counsel. *Hughes's Estate*, 1 Lack. Jur. 317.

65. Upon a contest between an execution creditor and the assignee for creditors of the defendant, the title to the property cannot be determined upon a rule to show why the execution should not be stayed. *Oswego River Pulp Co. v. Delaware Water Gap Pulp Co.*, 10 C. C. 312.

66. The bail for stay of execution on a judgment against the maker of a promissory note, who pays it at the expiration of the stay, has no right to be subrogated to the rights of the plaintiff in a judgment against the indorser. *Allegheny Valley Railroad Co. v. Dickey*, 131 P. S. 86.

67. Where a judgment was entered

against a principal debtor and two sureties and another party became surety for stay of execution at the request of the principal debtor and without the knowledge or consent of the original sureties; it was *held*, that the original sureties were thereby released, and that the bail paying the judgment could have no recourse upon them. *Mowery v. Brumbaugh*, 14 C. C. 257.

68. A forfeited recognizance of bail is a debt due to the commonwealth, and after judgment thereon the defendant is not entitled to a stay of execution. *Comm'th v. Markert*, 12 Lanc. 281.

IV. *Capias ad satisfaciendum*.

69. A defendant who transfers a judgment as collateral security, and subsequently satisfies the same himself of record, paying nothing to his creditor, may be arrested on a *capias ad satisfaciendum*. *Rife v. Sharp*, 4 Del. 166.

70. If the form of an action before a justice be trespass, but the transcript shows the cause of action to be for "goods sold and delivered," a *capias ad satisfaciendum* cannot issue. *Rhomanitz v. Ejudasmas*, 5 Kulp 538.

71. The fine under the act of 16 March 1847, for disturbing a religious society, cannot be collected by process against the goods and chattels of the defendant. The only execution is a *mittimus* to arrest the person. *Comm'th v. Sorber*, 5 Kulp 373.

72. Where three defendants were charged in the declaration with the wrongful conversion of plaintiff's property, and with conspiring to cheat and defraud the plaintiff, a verdict and judgment against one only will sustain a writ of *capias ad satisfaciendum*; and this, though the other two be acquitted, by the verdict, of conspiracy. *Kalbfus v. Rundell*, 134 P. S. 102. See *Rundell v. Kalbfus*, 125 Ibid. 123.

73. In a proceeding for divorce brought by the husband under the act 8 May 1854, for cruel and barbarous treatment, payment of alimony allowed the wife may be

enforced by a *fieri facias* or attachment; there is no act, however, which authorizes the employment of a *capias ad satisfaciendum* for such purpose. *Elmer v. Elmer*, 150 P. S. 205; reversing s. c. 11 C. C. 623.

74. Where a *capias ad satisfaciendum* was issued and returned "stayed," and it appeared that the sheriff had undertaken to arrest the defendant, but had been so intimidated that he had let the defendant go free; it was *held*, that the issue of an *alias capias* was proper and that the court was not in error in refusing to quash it. *Long v. Cherington*, 161 P. S. 248.

75. Where an amicable action of ejectment is grounded solely upon a breach of a lease by the tenant in sub-letting without the consent of the lessor, the costs in the case are merely a species of damages arising from a breach of contract and a *capias ad satisfaciendum* for such costs will not lie against the tenant. *Lang v. Finch*, 166 P. S. 255.

76. A writ of *capias ad satisfaciendum* may issue in an action of trespass by an employee against his employers for negligence in supplying dangerously insufficient means for carrying out the work at which he was employed. *Romberger v. Henry*, 167 P. S. 314; s. c. 36 W. N. C. 215.

77. A *capias ad satisfaciendum* will lie to enforce the collection of a judgment in an action of trespass for injuries negligently caused by the defendant to a horse and carriage which he had hired from the plaintiff. *Dungan v. Read*, 167 P. S. 393.

V. *Fieri facias*.

78. No *testatum fieri facias* can issue upon a judgment entered upon an exemplification from another county, nor upon a judgment of revival thereon. *Nelson v. Guffey*, 131 P. S. 273; reversing s. c. 37 P. L. J. 65.

79. Goods in a storage warehouse are not subject to attachment execution. The proper proceeding is by *fieri facias*. *Cherry v. Nolan*, 25 W. N. C. 132.

80. In a proceeding for divorce brought by the husband under the act 8 May 1854, for cruel and barbarous treatment, payment of alimony allowed the wife may be enforced by a *feri facias* or attachment; there is no act, however, which authorizes the employment of a *capias ad satisfaciendum* for such purpose. *Elmer v. Elmer*, 150 P. S. 205; reversing s. c. 11 C. C. 623.

81. A *feri facias* pending is no bar to the issuance of an attachment execution. *Landis v. Wettig*, 7 Lanc. 283.

VI. What may be taken in execution.

82. National bank stock may be seized and sold under an execution issued under the state laws. *Braden's Estate*, 165 P. S. 184.

83. Where a pensioner drew his pension money and applied it to the purchase of real estate and took the title in the name of his wife; it was *held*, that such real estate was liable to seizure and sale for the payment of his debts. *Burtch v. Burtch*, 14 C. C. 482.

84. The earnings and services of a wife in her husband's business do not belong to him, and property bought with such earnings are not subject to levy and sale by a husband's creditors. *Smith v. Aze*, 14 C. C. 532.

85. Under the act 8 May 1876 (Brightly's Purdon 2077) an attachment execution cannot issue against wages upon a judgment for board, unless it appear that the plaintiff was the keeper of a hotel, boarding-house or lodging-house. *McCourt v. Brenaman*, 11 C. C. 645.

86. Under the act 8 May 1876 (Brightly's Purdon 2077), allowing wages to be attached for four weeks' board, a judgment for board cannot be split up and two separate executions issued for four weeks' board. *Hawk v. Rock*, 14 C. C. 490.

87. Where the garnishee in his answer admitted an indebtedness to the defendant, but claimed that it was for wages due, the court dissolved the attachment. *Benedick v. Fake*, 7 York 193.

88. Where a tenant sold an organ and the purchaser leased it to the tenant's daughter, and the tenant informed the landlord of the sale and lease and obtained a release from the landlord of all claim to the organ; it was *held*, that the notice of ownership was sufficient, under the act 13 May 1876 (Brightly's Purdon 834), to exempt the organ from distraint and sale for rent subsequently accruing. *Rohrer v. Cunningham*, 138 P. S. 152.

89. Money retained by the sheriff to pay a landlord rent, cannot be levied upon in the hands of the sheriff under an execution against the landlord. *Hooke v. Freeman*, 12 C. C. 310.

90. Equity will not enjoin the sale under a *feri facias* of manure made upon a farm and necessary to preserve its fertility, to the prejudice of a prior mortgage. *Bergey v. Kline*, 4 Montg. 160.

91. The sheriff may levy upon and sell the interest of the defendant in chattels in the hands of third persons who have a qualified interest therein and an absolute right of possession; he need not take the property in his possession. *Trevathan v. Ithaca Organ Co.*, 7 C. C. 347.

92. Stock, assigned as collateral, cannot be sold under execution against the assignor, and it can only be attached by filing an affidavit and recognizance and summoning the person in whose name it is held as garnishee. *Evans v. Browncombe*, 8 C. C. 456; s. c. 5 Kulp 518.

93. An agreement for the lease of household goods at a certain stipulated rental, with the provision that the title shall remain in the lessors until the conditions are complied with and a further provision that, upon a compliance with the provisions of the lease, a bill of sale shall be executed, is a bailment and not a conditional sale and vests no title in the lessee, and such goods are not subject to execution by a creditor of the lessee. *Wieder v. Roeschman*, 13 C. C. 94.

94. Where a chattel has been rented or loaned to another person, its posses-

sion by the lessee will not justify its seizure and sale as his, upon the execution by a creditor whose debt was contracted before the loan or transfer was made. *Davis v. Turner*, 7 Kulp 85.

95. Upon a *feri facias* against a furnace company engaged in the manufacture of pig-iron, such property may be sold as is not reasonably necessary to the exercise of its corporate franchise. *Philadelphia & Reading Railroad Co.'s Appeal*, 3 Atl. 838.

96. The property of a corporation in actual use for the purposes prescribed by its charter, is not liable to levy, apart from the franchises of the company. *Boyd's Appeal*, 15 Atl. 736; affirming *Patrol v. Boyd*, 44 L. I. 252.

97. Where the defendant was the owner of a quarry and had thereon certain cars, iron rails on a tramway and scales, and these articles were placed thereon by him for use in mining, removing and marketing limestone from his lands and were necessary for that purpose; it was held, that they were part and parcel of the freehold and not subject to execution as against a judgment creditor who had a lien upon the real estate prior to the issue of the execution. *Ritchie v. McAllister*, 14 C. C. 267.

98. Under the act 27 April 1855 (Brightly's Purdon 664) the lessee of a colliery may mortgage the lease itself, together with all buildings, fixtures and machinery thereon and the word "fixtures" will be held applicable to mine-cars and all such machinery and appliances as are essential to the operation of the colliery; such property covered by such a mortgage and in actual possession of a trustee in pursuance of its terms cannot, after default, be seized and sold by the sheriff upon a writ of *feri facias* issued by a judgment creditor of the mortgagor. *Baker v. Atherton*, 15 C. C. 471.

99. A sheriff's sale under a mechanic's lien against the separate property of a married woman will pass a good title, which is not subject to a previous sher-

iff's sale under a judgment against her husband. *Pierce v. Schoonover*, 149 P. S. 115.

See EXECUTION, XIII.

VII. Exemption.

(a) Waiver of exemption.

100. Where an agreement to waive the exemption is not made at the time the debt is contracted, but is made subsequently, it must be clearly shown that such agreement was based on a good consideration. *Klein v. Daney*, 3 Northam. 75.

101. The addition of a waiver of exemption to an amicable *scire facias* to revive a judgment does not destroy the continuity of its lien. *Early v. Zeiders*, 137 P. S. 457; s. c. 26 W. N. C. 533; reversing s. c. 7 C. C. 569.

102. A judgment containing a waiver of the exemption law may be set off against a judgment which does not contain such a waiver. *Riehl v. Vockroth*, 10 C. C. 657.

103. Where, upon a rule to open judgment, the testimony of the maker and subscribing witness of a judgment note containing a waiver of exemption showed that the maker intended to make a plain judgment note; that he was an illiterate man and that it was represented to him to be a plain judgment note, the court refused to open the judgment, but struck the waiver of exemption from the record. *Brewing Co. v. Keziah*, 5 Del. 11.

104. Where the waiver of the exemption law appears on the judgment note, the defendant is estopped from alleging non-waiver in any action against the sheriff, but the burdon is on the sheriff to show the waiver; the mere notation on the docket or writ by the officer would, it seems, not be evidence of such waiver, the best evidence of which is the paper itself. *Garretson v. Felix*, 6 Kulp 211.

105. The joint owners of a certificate of stock, pledged for a joint debt, cannot claim the exemption of three hundred

dollars out of the proceeds of a sheriff's sale of the stock; a pledge of personal property implies a waiver of the exemption. *Hawley v. Hampton*, 160 P. S. 18; affirming s. c. 9 Montg. 150.

106. The reservation in an assignment for creditors of the assignor's right to the exemption must be exercised at the time of the appraisement, and if it is not then claimed, it will not inure to the benefit of a subsequent execution creditor upon a judgment with a waiver of exemption. *Long v. Wilson*, 15 C. C. 68.

107. Upon a sale of real estate by an assignee under the act 17 February 1876 (Brightly's Purdon 140), if there be a waiver of exemption in any judgment discharged by the sale, such waiver inures to the benefit of all the judgments; it is unimportant that there was a reservation in the deed of assignment and a setting apart by appraisers. *Jame-son's Estate*, 1 York 119.

108. Upon the distribution of an assigned estate, an attachment execution issued upon a judgment waiving the exemption, attaching the interest of the assignor in the real estate fund by virtue of his claim under the exemption laws, will be postponed to the liens of judgment creditors, binding the real estate, which also contain a waiver of the exemption. *Pollinger's Estate*, 1 York 197. See *Bressler's Appeal*, 2 York 57.

109. That a magistrate, in entering judgment for rent on a lease, noted a general waiver of the exemption therein, did no injury to the defendant. *Beatty v. Rankin*, 139 P. S. 358; s. c. 38 P. L. J. 239.

110. A claim to the sheriff for rent under a lease with a waiver does not prevent the defendant from having his exemption as against the execution. *Temple v. Gough*, 9 C. C. 85.

111. A waiver of exemption in a lease will be enforced in a suit for rent. *Smith v. Mishler*, 7 Lanc. 169.

112. Where a lessee of certain green-houses subsequently agreed to lease five additional greenhouses to be erected, at

an increased rental for the premises as a whole; it was held, that a waiver of exemption in the original lease was binding upon a distress under the subsequent agreement which contained no waiver. *Conroy v. Bitner*, 10 Lanc. 185; s. c. 5 Del. 261.

113. A waiver of exemption as to one levy inures to the benefit of a prior levy; and this, without regard to the relative dates of the judgments. *Miller v. Getz*, 135 P. S. 558. See *Hallman v. Hallman*, 124 P. S. 347.

114. A judgment debtor who has waived the benefit of the exemption law cannot be permitted to buy a judgment against the plaintiff in which there is no waiver, and set it off, in spite of the latter's claim for the exemption. The right to set off one judgment against another is an equitable right. *Shoemaker v. Fossier*, 8 C. C. 479; s. c. 5 Kulp 437.

115. Where execution was issued upon a judgment without waiver, and before the writ was returned, execution was issued upon another judgment with waiver between the same parties, made up in part of the same debt, the court refused to open the latter judgment, or to set aside the execution thereon. *McHugh v. McHugh*, 12 C. C. 380.

116. Where two executions were issued upon judgments by confession and only the second contained a waiver of the exemption, and the amount realized by sale was less than the exemption, the costs of the second execution were first deducted and the balance was distributed to the first execution creditor. *Kiefer v. Kiefer*, 14 C. C. 545.

117. A waiver of exemption as to any lien will inure to the benefit of a prior lien; where a creditor held the first and third judgment against a defendant, who had waived his exemption in the second judgment, and he issued execution on the third judgment and the fund realized was less than the first judgment; it was held, that the defendant was not entitled to his exemption. *Valley Nat. Bank v. Shumaker*, 10 Lanc. 52.

118. Where real estate was sold under the second of three judgments, of which the first and third contained waivers of the exemption, and the proceeds of the sale amounted to a little more than enough to pay the first and second liens; it was held, that the defendant could not claim his exemption, although the third lien creditor had given a verbal promise not to claim the benefit of the waiver and had subsequently filed a formal written disclaimer thereof. *Reiter v. Heffner*, 11 Lanc. 113.

119. In the distribution of the proceeds of a sheriff's sale of real estate, where the defendant has waived the benefit of the exemption law in three judgments, he cannot claim it as against a judgment in whose favor there is no waiver. *Weaver v. Steacy*, 4 York 205.

(b) When the exemption is allowed.

120. A debtor's exemption is entitled to priority over the costs of execution. *Hain v. Rhoads*, 7 C. C. 568; *McCloskey v. Moulder*, 8 Ibid. 156.

121. A debtor may claim his exemption out of the proceeds of his real estate, though the plaintiff has permitted the entire personalty to be unlevied upon. *McNair v. Reisher*, 8 C. C. 494.

122. Though a debtor converts his securities and leaves home with a large amount of money, he is entitled to his exemption if he leave behind him sufficient to meet the demands of the writ and the exemption claimed. Ibid.

123. A defendant being allowed one hundred dollars exemption against an attachment execution is entitled to but two hundred dollars exemption as against a concurrent writ of *feri facias*. *Battle v. Gibbons*, 4 Del. 193.

124. The right of exemption is not prejudiced by a waiver of inquisition. *Hartman v. Holstein*, 2 Northam. 49.

125. Upon an execution for costs in the orphans' court, the defendant is entitled to his exemption. *Taylor's Estate*, 48 L. I. 25; contra, *Danner v. Fritz*, 2 Northam. 67.

126. If a justice's record snows a judgment for more than four weeks' board, the plaintiff, by taking execution for but four weeks' board, cannot, under the act of 4 April 1889 (Brightly's Purdon 834), deprive the defendant of his right of exemption. *Tredennick v. Jones*, 7 C. C. 548.

127. The act of 4 April 1889 (Brightly's Purdon 834), preventing exemption on judgments for board, does not apply to judgments obtained before its passage. The act is not retrospective. *Brown v. Reiser*, 8 C. C. 416.

128. Where real estate is sold in partition, one of the joint owners may make his claim for exemption against a judgment before the auditor appointed to distribute the proceeds of the sale. *Krauter's Estate*, 150 P. S. 47; reversing s. c. 3 Northam. 57.

129. Although a debtor cannot claim the benefit of the exemption law against a purchase money obligation, which is being enforced against the land for which it was given, it seems that he can do so where the obligation is being enforced against other lands belonging to him or against his personalty. *Gibbons v. Gaffney*, 154 P. S. 48.

130. Where a bill in equity to restrain a trespass is dismissed with costs, the plaintiff may claim the benefit of the exemption against an execution issued against him to recover the amount of the master's fee. *Bradley v. West Chester Street Ry. Co.*, 160 P. S. 72.

131. The right of a defendant to the benefit of the exemption law cannot be defeated by the justice's record calling the action trover when, in point of fact, it is predicated upon a contract. *McCormick v. Alexander*, 3 Dist. Rep. 149.

132. A debtor who has claimed his exemption and had personal property set apart for him, may again claim his exemption against the same judgment out of the proceeds of the sale of real estate sold under a partition proceeding; and this, without showing that the property first set apart has been consumed or destroyed.

Krauter's Estate, 150 P. S. 47; reversing s. c. 3 Northam. 57.

133. Where property first set apart under a debtor's exemption has been consumed and its place taken by other property subsequently acquired, the debtor is entitled to have such other property set apart as against another execution, even on the same judgment. *Filbert v. Bowman*, 1 Dist. Rep. 355.

(c) When not allowed.

134. A claim for exemption cannot be made against a borough's lien for paving. *Hartman v. Holstein*, 2 Northam. 49.

135. The defendant is not entitled to the exemption as against an execution issued upon a judgment on a replevin bond. *Pierce v. Lewis*, 9 C. C. 250; s. c. 27 W. N. C. 400.

136. A defendant in ejectment cannot claim an exemption as against an execution for the costs. *Danner v. Fritz*, 2 Northam. 67; contra, *Taylor's Estate*, 48 L. I. 25.

137. Upon distribution, a lien for paving being sandwiched between a confessed judgment and the judgment under which the sale was made; held, that the lien being free from exemption, it could not be claimed as to the other judgments. *Hartman v. Holstein*, 2 Northam. 49.

138. A judgment entered against a vendor after he has signed articles to sell, and before the execution of the deed, is a lien upon the land, and the vendor is not entitled to his exemption against it. *Godshalk v. Bailey*, 4 Montg. 211.

139. A partner cannot claim the benefit of the exemption law out of firm property. *Hubbard v. Evarts*, 12 C. C. 132.

140. Where a debtor sold certain real estate to his daughter, and a creditor, who alleged that the conveyance was in fraud of creditors, had his debtor's interest in the property sold by the sheriff and the purchase money paid into court; it was held, that the debtor was not entitled to any portion of the fund under the exemption laws. *Moore v. Baker*, 5 Del. 74.

141. A defendant in an attachment

execution who has claimed his three hundred dollar exemption, but afterwards assigned it for the benefit of creditors, cannot reclaim it on the ground that his assignment was illegal; such an assignment will be considered as an abandonment of his claim even though the assignees withdraw their claim to it. *Good's Estate*, 8 Lanc. 345.

142. Where judgment was obtained before a justice for rent due under a lease waiving the exemption, and a transcript of the judgment was entered in the common pleas and execution issued thereon; it was held, that the defendant would not be allowed to claim the exemption. *Reagler v. Salziger*, 10 Lanc. 323.

143. Where the defendant in an execution alleges that the property sold is that of his wife, he is not entitled to claim the benefit of the exemption law out of the proceeds of the sale. *Inners v. Hartman*, 2 York 35.

(d) Of the claim.

144. A claim for the benefit of the exemption law need not be in writing. *Hart v. Hart*, 167 P. S. 13.

145. A verbal notice to the sheriff of a claim of exemption out of real estate is insufficient. The plaintiff is entitled to notice through the record. *McCloskey v. Moulder*, 8 C. C. 156.

146. If the defendant be absent temporarily, the wife may make his claim for him; but not if he has permanently abandoned his wife. *McNair v. Reisher*, 8 C. C. 494.

147. Where the execution was issued on May 23, and a verbal demand for the exemption on June 9 was followed by a written demand on June 19, it was held to be in time, no day of sale having been fixed, no advertisement posted and no other expense incurred. *Williamson v. Krumbhaar*, 132 P. S. 455; s. c. 25 W. N. C. 415.

148. A claim for the exemption is too late where the fund has been paid into court by the sheriff and an auditor appointed and the audit nearly concluded

before the claim is made. *Gibbons v. Gaffney*, 154 P. S. 48.

149. Where a defendant's real estate is about to be sold under an execution, he is not barred by a delay of ten days in making his claim of exemption, where the sale has not been thereby delayed nor any costs incurred, which might have been avoided by an earlier presentation of the claim. *Snyder v. Schmick*, 166 P. S. 429.

150. A claim for the exemption is sufficient if made within a reasonable time after the defendant has been notified of the writ, provided it does not delay the sale of the goods or the land levied on. *Hart v. Hart*, 167 P. S. 13.

151. A claim of exemption against real estate must be made before inquisition, and an appraisement requested. *McCloskey v. Moulder*, 8 C. C. 156.

152. A claim for the exemption is too late after the property has been levied upon and duly advertised for sale. *Hubbard v. Evarts*, 12 C. C. 132.

153. A debtor is entitled to his exemption even after advertisement of sale, where there was another execution out, upon which there was a waiver, but under which no levy had been made. *Burke v. Wolfe*, 4 Del. 285.

154. A claim of the exemption was held to be in time, though not made until the sheriff called to put up the sale bills. *Gerhab v. Blank*, 5 Montg. 126.

155. A sheriff's sale of real estate will be set aside on terms, where the sheriff failed to have the debtor's exemption appraised until after the condemnation and issuance of the *venditioni exponas*. *Conard v. Edwards*, 7 C. C. 334.

156. Where a debtor denies his ownership of the goods seized in execution, but subsequently claims them under the exemption laws, the proper practice is for the plaintiff to indemnify the sheriff, sell the goods and submit the facts in dispute to a jury in a suit upon the bond. *Fisher v. Hummel*, 12 C. C. 234.

(e) In attachment execution.

157. Where a defendant in attachment execution appears at the hearing before a justice and claims the benefit of the exemption law, and the justice disallows the claim and enters judgment against the garnishee, from which judgment the defendant takes no appeal, he cannot afterwards question the validity of the judgment by a rule to show cause why the money paid into court by the garnishee should not be withdrawn by the defendant. *Boland v. Spitz*, 153 P. S. 590.

158. Where an attachment execution was not served upon the defendant, and he had no knowledge of the proceedings; it was held, that he was not deprived of his exemption by his failure to file his claim until eight months after the writ had issued. *Behler's Estate*, 12 C. C. 393.

159. The defendant must claim his exemption upon an attachment execution during the term to which the writ is returnable; an oral claim to the garnishee without notice to the officer serving the writ, or in court at the proper term, is not sufficient. *Uhrich v. Gockley*, 2 Dist. Rep. 350.

160. If the defendant in an attachment execution before a justice, on the day of the hearing claims the exemption, it is the duty of the justice to allow it; otherwise the proceedings will be reversed. *Stern v. McHale*, 5 Kulp 387.

161. On a judgment for manual labor, under the act of 4 March 1887 (Brightly's Purdon 834), salary due the defendant for clerical services is not entitled to exemption on attachment execution. *Wilson v. Hasley*, 7 Lanc. 98.

162. Where a will directed the executors to invest a balance and pay the interest semiannually for life to the testator's son, and after his death to divide the principal among all the testator's children; it was held, that such interest was liable to attachment by creditors of the son, and that the son could not claim the three hundred dollar exemption out of each payment of less

than three hundred dollars as it accrued. *Bremer v. Mohn*, 169 P. S. 91; affirming s. c. 12 Lanc. 98.

163. Where a judgment for board has been regularly obtained under the act 8 May 1876 (Brightly's Purdon 2077) and wages have been regularly attached under such judgment, the defendant is not entitled to claim his exemption under the act 4 April 1889 (Brightly's Purdon 834). *Weisman v. Weisman*, 133 P. S. 89; *McCarty v. Dougherty*, 16 C. C. 86; s. c. 1 Mag. & Con. 39; *Dillon v. Treverton*, 16 C. C. 89.

164. Where an attachment is issued against wages with a summons in a suit for board, the exemption may be claimed against such attachment, but the act 4 April 1889 (Brightly's Purdon 834) takes away the right of exemption when judgment has first been obtained, and an attachment execution is then issued on the judgment. *Thomas v. Glasgow*, 13 C. C. 167.

165. The act 23 May 1887 (Brightly's Purdon 834), prohibiting a citizen of this state from assigning a claim against a resident for the purpose of having the same collected by attachment in the courts of another state, with the intent to deprive the debtor of his right of exemption, and imposing a penalty therefor, is not unconstitutional. *Sweeny v. Hunter*, 145 P. S. 363.

(g) Of the appraisement.

166. In appointing appraisers the sheriff should select competent and disinterested persons not of the blood of the defendant. *First Nat. Bank of Strasburg v. Keene*, 11 C. C. 47.

167. An inquisition will be set aside where the sheriff refuses to appraise and allow the defendant his exemption; the sheriff cannot inquire as to the defendant's right to claim the benefit of the exemption law. *Inners v. Hartman*, 2 York 170.

(h) Effect of allowance.

168. The sheriff is not responsible to the plaintiff for allowing the defendant's

exemption, unless a waiver, or some other specific act of the defendant, is called to his notice which clearly and without doubt deprived him of his right. *Williamson v. Krumbhaar*, 132 P. S. 455; s. c. 25 W. N. C. 415.

169. Land being set aside to the debtor in bankruptcy proceedings, under the exemption laws a subsequent transfer by him in trust for his children is not fraudulent as to creditors; and this, though his discharge was subsequently refused. *Boyd v. Martin*, 3 Del. 601.

170. If the defendant claim the benefit of the exemption law and the real estate levied on is found to be of less value than three hundred dollars, the execution will be stayed. *Constable v. Norris*, 6 Kulp 16.

171. Where the whole property of the defendant in an execution is a life estate which has been appraised at less than three hundred dollars and set apart to him, the court will not, subsequently, grant a writ to sequester the rents, issues and profits of the same property. *Sener v. Scherff*, 10 C. C. 529.

VIII. Interpleader.

(a) Rule for an interpleader.

172. If objection be made and the goods are in the exclusive possession of the defendant, the claimant may be required to file a specific affidavit of his claim before an issue will be awarded. *Burk v. Wallace*, 4 Del. 5; s. c. 5 Kulp 227.

173. In a proper case the court will make absolute a rule on the claimants to submit to cross-examination on the question of their ownership. *Kibbe v. McKinley*, 47 L. I. 4.

174. A sheriff not having applied for a rule to interplead but proceeding to sell, cannot, on being sued in trespass by the claimant, claim the benefit of the interpleader act. *Lewis v. Protheroe*, 17 Atlan. 200.

175. So long as a claim to the property remains undetermined, the sheriff has a right to an interpleader. *Hall v. Vanderpool*, 156 P. S. 152.

176. Where a claim is made to the sheriff that goods levied upon have been transferred to the claimant prior to the levy for a debt still unpaid, but the claimant agrees to release the sheriff from all responsibility for the sale, a rule for an interpleader will be discharged, and the sheriff will be ordered to sell the right, title and interest of the defendant in the goods. *Victor v. Excelsior Hosiery Co.*, 10 C. C. 325.

177. Where the sheriff levied upon goods as the property of a defendant and a third party claimed to be a mortgagee of the goods and entitled to possession, a rule for the sheriff's interpleader was discharged. *Manning v. Boothe*, 14 C. C. 95.

178. Upon a rule for an interpleader, where it appeared that the defendants in the execution and their father had agreed that the execution should proceed upon default of payment of a fixed sum, without let or hindrance, and had waived all right to the proceeds, and afterwards one of the defendants, the father, and the wife of another defendant, made a claim to the property, but failed to set out how they derived title to it; it was held, that the rule for an interpleader would be discharged. *Halberstadt v. Progressive Printing Co.*, 2 Dist. Rep. 264.

179. Where a person erects a culm separator plant, consisting of buildings and machinery, under a contract to clean and prepare the merchantable coal in a culm bank for market, and there is an express agreement that he may remove them at any time within six months after the termination of the agreement, such machinery and other appliances are personal chattels and may be the subject of a sheriff's interpleader. *Advance Coal Co. v. Miller*, 7 Kulp 541.

(b) Of the appraisalment.

180. In Lancaster county, where an issue has been granted, the sheriff must file, within ten days thereafter, an inventory of the goods claimed without being notified to do so, and without consulting

the parties, and the claimant must file his declaration and give bond within twenty days after issue granted, or the claim will be deemed to have been abandoned and the sheriff will be ordered to sell the goods. *Conley v. Gartner*, 8 Lanc. 201.

181. Where the rules of court provided that after the issue had been formed, the sheriff should cause an appraisalment to be made by two disinterested persons, the court refused to sustain exceptions to the appraisalment supported by the evidence of but one witness, there being no allegation of fraud or misconduct. *Warfel v. Bear*, 10 Lanc. 401.

182. A sheriff's appraisalment will not be set aside where the petition does not allege any fraud or misconduct on the part of the sheriff or appraisers. *Stauffer v. Souder*, 11 Lanc. 323.

(c) Effect of an interpleader.

183. After a sheriff's interpleader has been awarded and bond given, the sheriff cannot, until the issue is disposed of, sell the goods under a subsequent execution, subject to the first. *Ware v. Deacon*, 7 C. C. 368.

184. A sheriff's interpleader, will not be vacated on the motion of claimants, though the execution debt has since been made on other process, if there be unsatisfied wages claims filed in the first execution; the wages claimants have a right to continue the issue. *Riley v. Kolling*, 7 C. C. 193.

185. A plaintiff in an interpleader, who has given bond for the forthcoming of the property, acquires a right of possession to the property, which includes a right of removal until the issue be determined against him. *Hildebrand v. Smith*, 8 Lanc. 179.

186. Where a sheriff's interpleader is awarded and a bond is filed by the claimant, the latter is entitled to the possession, but such possession is subject to the lien of the execution, and where the levy is subsequently abandoned, all proceedings

founded thereon fall with it, and the claimant, if he desires to obtain possession, must bring replevin; in such an action he cannot recover until he has given proof of his title, and the fact that he gave bond in the interpleader proceedings is not of itself sufficient to entitle him to recover. *Passavant v. Gummey*, 32 W. N. C. 217.

187. Where the claimant of a horse failed to secure bail on the interpleader and the horse was sold by order of the court, and it was subsequently found by the jury to have been the property of the claimant; it was held, that the sheriff could not retain out of the proceeds of the sale the costs of the keeping and sale of the horse and of the interpleader issue; in such a case, if the sheriff wished to save himself, he should have demanded indemnity, to which he was entitled from the plaintiff. *Comm'th v. Sides*, 12 Lanc. 145.

(d) Interpleader bonds.

188. The claimant may file her own bond though she be a married woman. *Cherry v. Nolan*, 47 L. I. 70.

189. If the claimant be the defendant's wife she must state in her affidavit the manner in which she acquired title, before she will be allowed to file her own bond. *Rutschmann v. Schloss*, 25 W. N. C. 358.

190. The wife of the defendant will be permitted to file her own bond upon filing an affidavit that the chattels are her sole property and that the defendant has no interest direct or indirect in them, and that she did not derive title by, from, through or under him; it is not necessary that she set out affirmatively her manner of acquiring title. *Grabau v. Hirshfield*, 12 C. C. 208; contra, *Souders v. Stauffer*, 11 Lanc. 323.

191. Where the claimant is a married woman, she will not be permitted to file her own bond in the absence of a statement in her affidavit as to the manner in which she acquired title to the goods. *Garrison v. Settle*, 12 C. C. 665.

192. A married woman will be per-

mitted to file her own bond upon affidavit that she is the sole and absolute owner of the property levied on, and that she has not derived her title from or through the defendant. *Atkinson v. McNaughton*, 27 W. N. C. 438.

193. A defeated claimant in a sheriff's interpleader who, pending an appeal, is sued on his bond and pays the creditor's claim, taking an assignment of the latter's judgment, cannot, on reversal of the judgment in the interpleader, recover back the money so paid. *Ditman v. Raule*, 134 P. S. 480.

194. A claimant will not be ordered to submit to cross-examination before the time allowed for filing his bond. *Stokes v. McKinney*, 34 W. N. C. 128.

195. Upon a rule to allow the claimant to file his own bond, the court will allow the claimant to be cross-examined and will also permit counter affidavits to be filed. *Clymer v. Shaw*, 11 C. C. 352.

(e) Evidence.

196. On an issue to determine the ownership of personal property claimed by a married woman, both the husband and wife are competent to testify in support of the wife's title. *Evans v. Evans*, 155 P. S. 572.

197. In interpleader proceedings where the goods were claimed by the defendant's wife, she is a competent witness to support her title where the husband disclaims ownership; it is otherwise, however, where the husband claims the property and is on the side of the execution creditor. *Norbeck v. Davis*, 157 P. S. 399.

198. Where the plaintiff in an execution dies after a levy is made, and his administrator is substituted on the record as defendant in an interpleader, the plaintiff in the interpleader claiming title by purchase from the defendant in the execution is an incompetent witness, but the defendant in the execution is a competent witness as to the sale, as he is not a person whose interest is adverse to the right of the deceased. *Smith v. Rishel*, 164 P. S. 181.

199. Upon the trial of an interpleader, where it was alleged that the defendant in the execution transferred the property to the claimant in fraud of his other creditors; it was *held*, that the defendant could not be called by the plaintiff in the execution for cross-examination, as a person whose interest was adverse to the party calling him, his interest being in equipoise. *Krall v. Doutrich*, 3 Dist. Rep. 12.

200. Upon the trial of a sheriff's interpleader, where the goods were found in the possession of a decedent at the time of his death; it was *held*, that the claimant was not a competent witness to prove title thereto in himself. *Hause v. Sloyer*, 3 Dist. Rep. 320.

201. The title of the claimant cannot be defeated by the declarations of his assignor, the defendant in the execution. *Widdal v. Garsed*, 125 P. S. 358.

202. Upon the trial of a sheriff's interpleader, where the claimant is the wife of the defendant in the execution, the latter's declarations adverse to his wife's claim are not admissible in evidence. *Martin v. Rutt*, 127 P. S. 380.

203. If upon the trial of a sheriff's interpleader the plaintiff in the execution calls the execution debtor as a witness to prove collusion, and the latter denies it, he cannot contradict him. *Unangst v. Goodyear*, 141 P. S. 127; affirming s. c. 2 Northam. 90. See *Tisch v. Utz*, 142 P. S. 186.

204. Upon the trial of a sheriff's interpleader, declarations as to ownership made by a deceased person, through whom the defendants claim, are inadmissible to affect the right of a claimant. *Udderzook v. Harris*, 140 P. S. 236.

205. In a feigned issue where the plaintiff claims title by a sheriff's sale under judgment in his own favor, fraud cannot be established by a bill of sale unaccompanied by possession given by the debtor as security for the judgment, prior to the sheriff's sale. *Tisch v. Utz*, 142 P. S. 186.

206. The plaintiff must prove title to the goods; it is not sufficient to show

mere possession. *Bloomington v. Victor*, 147 P. S. 371; affirming s. c. 10 C. C. 177.

207. Upon the trial of a sheriff's interpleader, where a transfer of the property is alleged to have been fraudulent, such an inference is not sustained by the mere proof of inadequacy in price, but that fact may be considered by the jury in connection with the other facts in the case. *Goddard v. Weil*, 165 P. S. 419.

208. Upon the trial of a sheriff's interpleader the claimant may attack the *bona fides* of the judgment upon which the execution was issued, and show that the same was fraudulent, where the claimant's title is founded upon transactions between him and the defendant in the execution. *Hartley v. Weideman*, 3 Dist. Rep. 336.

209. Upon the trial of a sheriff's interpleader as to the ownership of growing crops and corn in crib, the claimant may show by parol that the lease which was signed by the defendant in his own name was really signed by him as the claimant's agent, and that the defendant had no interest in the property. *Galbraith v. Bridges*, 168 P. S. 325.

(9) Trial of the issue.

210. An issue under the sheriff's interpleader act of 10 April 1848 (Brightly's Purdon 840) is not subject to the compulsory arbitration law of 16 June 1836 (Brightly's Purdon 125). *Van Auken v. Buxton*, 1 Mona. 399.

211. Upon the trial of a sheriff's interpleader, where the claimant had purchased the farm of the execution defendant at sheriff's sale and taken possession, and afterwards bought from the latter the property on the farm, subsequently leasing both the farm and the personalty to the wife of the execution defendant, who was his sister, and had employed the execution defendant as his hired man, it was for the jury to say whether the sale of personalty was in good faith, and whether the change of possession was all that could reasonably be expected. *Renninger v. Spatz*, 128 P. S. 524.

212. If the purchaser at sheriff's sale leaves the goods in the hands of the execution defendant, it is not a fraud in law or in fact as against other creditors of the defendant. *Rohland v. Rooke*, 127 P. S. 139.

213. Upon a bill of sale in New Jersey of personal property without delivery of possession, and a subsequent lease to the vendor, the property on its removal to Pennsylvania cannot be seised in execution by the latter's creditors. *Cornish v. Grubb*, 2 Northam. 240.

214. In a feigned issue to test the ownership of personal property levied on, the court may refuse to charge that if the jury find that when the alleged transfer of "business" took place there was no actual change of possession, the verdict should be for the defendants. *Widdall v. Garsed*, 125 P. S. 358.

215. Where the wife of the defendant claims the goods in a sheriff's interpleader, and bases her right under the act of 4 May 1855 (Brightly's Purdon 903) by reason of her husband's profligacy, the question of whether the husband had neglected or refused to provide for her, is for the jury. *Bernhart v. Mitchell*, 7 Atlan. 283.

216. Upon the trial of a sheriff's interpleader the issue must correspond with the claim and the plaintiff can only sustain the issue by proving the claim as made; where the plaintiff claimed the goods by affidavit and the evidence showed that he held the goods as agent for another, it was *held*, that the verdict must be for the defendant, and the court refused an amendment substituting the name of the principal as plaintiff. *Campbell v. Wasserman*, 9 C. C. 381.

217. Upon the sale of a refrigerator, it was *held*, that an agreement between the seller and purchaser, that the refrigerator should not become part of the realty but remain the personal property of the seller, could not affect the title of a mortgagee without notice. Upon the trial of an interpleader between the mortgagee, who purchased at sheriff's sale, and the

seller, who subsequently purchased under his judgment; it was *held*, that the mortgagee was not estopped from claiming the refrigerator as realty because, by rule of court, he was compelled in his declaration to describe it as goods and chattels. *Frank Malting Co. v. York Manufacturing Co.*, 12 Lanc. 213.

218. Where a manufacturer of machinery contracted to erect at a brewery certain refrigerating machinery on foundations to be built by the owner of the brewery, and the latter promised to pay a certain sum in stipulated instalments with an express condition that the title, ownership and possession should not pass until all of said payments had been made, and it was further provided that when the last instalment had been paid, the manufacturer should give a bill of sale, and the manufacturer reserved the right to remove and sell the machinery on default and to collect the balance due, less the proceeds of such sale; it was *held*, that the transaction was a conditional sale and not a bailment, and that the machinery, while in the possession of the owner, could not be claimed by the manufacturer in a sheriff's interpleader as against an execution creditor of the owner of the brewery. *Ott v. Sweatman*, 166 P. S. 217; affirming s. c. 15 C. C. 97.

219. Where a bailor under an instalment contract, after an instalment had become due, entered judgment under the warrant of attorney in the agreement and subsequently entered and took possession of the goods, and about one hour after the goods were taken judgment was entered against the bailee by the defendant, and a writ of *feri facias* was issued thereon and under said writ, the bailor claimed the goods; it was *held*, upon the trial of a sheriff's interpleader, that the defendant had no lien upon the goods. *Durr v. Replogle*, 167 P. S. 347.

220. Upon the trial of a sheriff's interpleader, where it appeared that the goods had been consigned to certain bankers, that the claimants paid the price of the

goods to the bankers and directed them to be delivered to the defendant in the execution, who gave the claimants a receipt acknowledging the goods to be the claimants' property, and agreeing to sell the same and pay over the proceeds to the claimants, and the defendant in the execution was to have a share of the profits; it was *held*, that the transaction was a bailment and not a sale, and that the goods were not subject to be taken in execution as the property of the bailee. *Monjo v. French*, 163 P. S. 107. See *Brown v. Billington*, 163 P. S. 76.

221. Where some of the goods of an insolvent debtor were sold at sheriff's sale and bought in by certain creditors, who formed a company to resell them, and the president of the new company agreed that other goods of the debtor pledged to another creditor should be stored in the new company's store, and should not be levied on; it was *held*, in a sheriff's interpleader, that another creditor corporation, of which the president of the new company was also president, could not levy upon such goods so as to defeat the rights of a creditor to whom they were pledged. *Tradesmen's National Bank v. Indiana Bicycle Co.*, 166 P. S. 554.

222. Where upon the trial of a sheriff's interpleader, the goods were claimed by the wife of the execution defendant under a trust deed from the purchasers, at a sheriff's sale under judgments against the husband, one of which was in favor of the wife; it was *held*, that the trust being to pay the grantor's claims and apply the balance in support of her family, it was necessary to show, in order to defeat the claimant, either that the grantors did not acquire a good title under the sale or that the assignment to the claimant was fraudulent and intended by the grantors to hinder and delay the then existing creditors of the claimant's husband. *Evans v. Kilgore*, 147 P. S. 19.

223. Upon the trial of an interpleader, where it appeared that the household goods had been in possession of the

claimant, a married woman, for over thirty years, and that she received them from her first husband; it was *held*, that the fact that the second husband replaced various articles which were worn out by use, did not change the wife's title. *Norbeck v. Davis*, 157 P. S. 399.

224. Where the claimant claims as vendee from the defendant in the execution, it is error to make the validity of the transaction as between the vendor and vendee a test of its validity as against the execution creditor. *Janney v. Howard*, 150 P. S. 339.

225. Where an execution was levied in 1887 on the stock of a fur and hat store, and upon an interpleader at the instance of the wife a verdict was rendered on 6 April 1891 in favor of the plaintiff in the execution, and it appeared that, pending the interpleader, the business was carried on by the defendant in the execution until April 1890, when the goods then in the store were levied on under other executions; it was *held*, that the presumption was that the goods levied on under the second levy were essentially different goods and not bound by the first levy, and the proceeds of the sale were awarded to the junior executions. *Guyer v. Graham*, 39 P. L. J. 186.

226. Where the claimant in a sheriff's interpleader showed that he purchased the property at a sheriff's sale as the property of one W. and that he let it remain with W. as a loan with the understanding that he could remove it at any time, and that W. might become the owner on payment of what the property cost; it was *held*, that the testimony was for the jury, and it was error to charge as a matter of law that the arrangement constituted a conditional sale and to direct a verdict for the defendant. *Stoddart v. Price*, 143 P. S. 537.

227. Where the evidence is that the property was delivered to the defendant in the execution, to be used in the construction of a building, and the plaintiff claims that the property was sold to him and not to the defendant in the execution, the case

must be submitted to the jury. *Keiser v. Esterly*, 160 P. S. 100.

228. Upon the trial of a sheriff's interpleader, where it appears that the claimants and the defendants in the execution, who were two firms, had negotiated for the combination of the firms, and that during said negotiations the claimants' goods were moved to the premises of the other firm, but the agreement was never consummated and the goods were never mingled with those of the defendant; it was *held*, that the case was properly submitted to the jury. *Heere v. Penn National Bank*, 160 P. S. 314.

229. Upon the trial of a sheriff's interpleader, where the testimony showed a symbolic delivery of the stock of goods and the assumption by the vendee of immediate and exclusive control, followed by a change of all indications of the former ownership; it was *held*, that the question of delivery was for the jury. *Goddard v. Weil*, 165 P. S. 419.

230. Upon the trial of a sheriff's interpleader, a conflict of testimony as to the ownership of the property must be submitted to the jury. *Houghton v. Moyer*, 7 Kulp 68.

231. In a sheriff's interpleader for horses, wagons and harness, claimed under a bill of sale from the defendant in the execution, where it appeared that the vendor declared in the presence of witnesses that he delivered possession to the vendee and delivered the key of the stable and went away and stayed away, and the vendee went into possession, but employed the vendor's drivers, that the lease for the stable continued in the vendor's name, but the vendee paid the rent, and the vendor's name remained on the stable and wagons; it was *held*, that it was not error to refuse to give binding instructions that there had not been a sufficient change of possession. *Janney v. Howard*, 150 P. S. 339.

232. Upon the trial of a sheriff's interpleader, it was *held*, that the question of change of possession was for the jury, taking into consideration the character

of the property, the position of the parties, the place where the property was kept before the sale, the absence of the vendor from the county for a considerable period after the sale, and the use made of the property by the other members of the family of the vendee. *Mandeville v. Dodge*, 7 Kulp 13.

233. Where an artesian well borer was transferred to the plaintiff by a judgment debtor, and it appeared that the plaintiff paid no money for it, and that after the sale there was a joint operation of the machine by the vendor and vendee; it was *held*, in a sheriff's interpleader between the vendee and a purchaser at sheriff's sale under a judgment against the vendor, that the evidence tended to show a fraudulent transfer of ownership. *Gantz v. McCracken*, 4 York 184.

234. If the claimant prove title to himself in all the goods and a lease to the defendant in the execution, he is entitled to a verdict for all; and this, though he had agreed with a third person to pay him a portion of the rent. *Shive v. Finn*, 134 P. S. 158. See *Campbell v. Clevestine*, 149 P. S. 46.

235. Upon the trial of a sheriff's interpleader, where the evidence showed that the goods were derived from three sources, and the verdict was so worded as to give the plaintiff the goods derived from two sources, but did not cover those derived from the third source, the court discharged a rule for a new trial on condition that the plaintiff relinquish on the docket all claim to the articles not covered by the verdict. *Lehman v. Hildebrand*, 10 Lanc. 249.

(h) Costs.

236. If the verdict be for the claimant the costs will be put upon the plaintiff in the execution unless he had probable cause to make the levy, which amounted to more than a mere suspicion. *Renninman v. Hood*, 5 Kulp 251.

237. Upon a sheriff's interpleader, if the goods are found in the possession of the defendant and the execution creditor

releases them as soon as the true title is disclosed, the claimant should not recover costs. *Cleaver v. Blaker*, 5 Montg. 179.

238. Where the verdict in a sheriff's interpleader was for the plaintiff for some of the articles and for the defendant for the balance, the costs were divided. *Grover v. Wolf*, 5 Kulp 250.

239. Where horses levied on are claimed by a third party, the sheriff may reimburse himself out of the proceeds of other property for their keep until an issue was granted. Such expenses are not "costs" required to be paid in Lancaster county before issue granted, neither are the costs of a first appraisement set aside by agreement. *Landis v. Bear*, 8 Lanc. 41.

240. Where the plaintiff is only partially successful, the costs are in the discretion of the court; but where he has been entirely successful and has been guilty of no bad faith, the costs will not be imposed upon him. *Shellenberger v. Fleisher*, 11 C. C. 36.

241. Where personal property is claimed by a wife and a verdict is rendered in her favor, the record costs and the costs of her own witnesses will be put upon her. *Mitchell v. Jobes*, 11 C. C. 160.

242. The plaintiff, if successful, is entitled to his costs; and this, although the defendant had good reason to believe that the goods belonged to the defendant in the execution. *Auerbach v. Sartorius*, 14 C. C. 529.

243. The costs of an interpleader are in the discretion of the court; they may be ordered to be divided equally between the plaintiff and defendant. *Campbell v. Clevelantine*, 3 Dist. Rep. 166.

244. Where the execution creditor has not acted oppressively, but with reasonable cause, and he fails upon the interpleader, the costs will not all be put upon him, but each party will be ordered to pay his own witness fees. *Eberly v. Aultman*, 12 Lanc. 275.

IX. Inquisition and extent.

(a) Of the inquisition.

245. Where the plaintiff, on notice to the sheriff, attends the inquisition and examines witnesses and then withdraws the writ, the defendant is liable for the costs to the time of meeting, and the plaintiff to all subsequent costs of the proceeding. *Van Storch's Estate*, 5 Kulp 389.

246. A levy on real estate and inquisition under a *feri facias*, issued more than five years after judgment without revival, will be set aside. The act of 19 May 1887 (Brightly's Purdon 828), allowing *feri facias* within twenty years, is confined to personal property. *Pierce v. Wunder*, 25 W. N. C. 466.

247. Where a life interest in real estate is levied on, and the defendant fails to give written notice to the plaintiff, the failure of the inquest to make an appraisement of the yearly value is no ground for setting aside a subsequent sale. *Conard v. Edwards*, 7 C. C. 342.

248. A waiver of inquisition in a judgment will bind the defendant so long as he is the owner of the land bound by the lien of the judgment, but it will not bind his vendee. *Rohrer v. Rohrer*, 14 C. C. 332.

249. An inquisition will be set aside where the sheriff refuses to appraise and allow the defendant his exemption; the sheriff cannot inquire as to the defendant's right to claim the benefit of the exemption law. *Inners v. Hartman*, 2 York 170.

(b) Extent.

250. If, upon a judgment against husband and wife for necessities, the separate property of the wife be extended, notice permitting the defendants to retain should be served upon the wife as well as the husband. *Cole v. Kolb*, 5 Kulp 413.

251. Interest on money paid into court, on the extension of real estate, ceases from the time of payment. *Van Storch's Estate*, 5 Kulp 389.

X. Mandamus execution.

252. A justice has no jurisdiction of an action against a county to enforce the payment of costs in a criminal prosecution for which the county is claimed to be liable; the proper remedy is by mandamus. *Walton v. Lerch*, 2 Northam. 388.

253. An irregular judgment entered on the same day the verdict was rendered, will not support a mandamus execution. *Moravian Seminary v. Bethlehem*, 153 P. S. 583; reversing s. c. 3 Northam. 351.

254. A portion of a judgment against a municipality being assigned of record to a third person, the defendant paid the whole judgment to the plaintiff, and the court refused to allow a mandamus for the portion assigned. A municipality is not bound to recognize an assignment of part of its obligation. *Schuck v. Pittsburgh*, 11 Atlan. 651.

255. A mandamus execution directing the payment of a judgment against a school district, cannot be issued after the lapse of five years from the entry of the judgment, unless the judgment be duly revived by *scire facias*. *O'Donnell v. Cass Township School District*, 133 P. S. 162; s. c. 26 W. N. C. 186.

256. A mandamus will not issue from the court of common pleas to enforce an order from the quarter sessions to open a public road; the quarter sessions has ample power to enforce its own order. *Comm'th v. Holland*, 153 P. S. 233.

257. A petition for a mandamus to compel county commissioners to pay road damages is an execution process, and is not affected by the statute of limitations. *Boyer's Petition*, 15 C. C. 531.

258. In proceedings to open a borough street, where the report does not precisely ascertain whether or not there be damages and benefits, and the amount of the same and the names of the property owners so damaged or benefited, it is an imperfect performance of the office of viewer and a mandamus execution will not issue upon such a report unless specific amounts are

assessed against or in behalf of certain persons. *Pringle Street*, 167 P. S. 646; s. c. 36 W. N. C. 314; reversing s. c. 7 Kulp 346; 6 Del. 14.

259. Where the officer to whom a writ of mandamus execution is directed goes out of office without paying the judgment, an alias writ should issue directed to his successor. *Bonner v. Foster Township*, 10 C. C. 447.

260. Where a policeman has obtained judgment against a city for his services, the city cannot object to a mandamus execution on the ground that the contract of employment was invalid; so, where the city has sufficient funds in its treasury applicable to the payment of the debt, it cannot object that when the appropriation was made, the existing force of policemen was seventeen, that plaintiff and four others were subsequently employed, and that if plaintiff's claim were paid, the fund would be insufficient to pay the original seventeen during the whole year. *Comm'th v. Hinkson*, 161 P. S. 266; affirming s. c. 5 Del. 417.

261. The money of a township received for liquor licenses must be applied to keeping the roads in good repair. It is not subject to mandamus execution upon a judgment for damages. *Dailey v. Wilkes-Barre*, 6 Kulp 43.

262. One having a judgment against a township is entitled to collect debt and interest to the date of actual payment; but where the judgment has been included in a schedule of debts marshalled against the township, on the basis of which a special tax has been ordered to pay all debts and interest to the date of the decree, the courts will not by mandamus order the township treasurer to pay interest which may accrue after the decree imposing the special tax. *In re Plains Township*, 7 Kulp 234.

263. Mandamus is the proper remedy to enforce a claim upon the public treasury for sheep killed by dogs. *Bundage v. Blakely School District*, 1 Lack. Jur. 222.

264. Where the directors and treasurer of a school district are commanded to pay

a judgment out of the first unappropriated money of the district, they must use diligence to get the money and pay the debt; unnecessary delay and obstructive operation would be a contempt of court, for which they might be either removed or imprisoned for contempt. *Burgess v. Northmoreland Township School District*, 2 Lack. Jur. 106.

265. A final judgment against a city is a sufficient voucher on the city treasurer to pay; and this, although the money in the treasury has been appropriated for other purposes. *Lancaster County v. Lancaster City*, 12 Lanc. 201. See s. c. 170 P. S. 108.

XI. Sheriffs' sales.

(a) Of the writ.

266. Pending a rule for a new trial, after a verdict in favor of the plaintiff, upon an issue awarded after opening a judgment, a *venditioni exponas* should not issue. The case is not then determined. *Windsor v. Tillottson*, 135 P. S. 208.

(b) Notice of sale.

267. By the act 27 March 1824 (Brightly's Purdon 848), still in force, a sheriff's sale on a *levari facias* must be advertised once a week for three full weeks. *Good v. Maule*, 8 C. C. 624. This act does not apply to Philadelphia.

268. The act 1705, sec. 4 (Brightly's Purdon 660 n), requiring that upon sales of mortgaged premises under writs of *levari facias*, ten days' notice shall be given by the sheriff to the defendant and by posting, is still in force, and must be complied with or the sale will be set aside. *Gibbons v. Williams*, 10 C. C. 299.

269. The sheriff must advertise his sales of real estate as directed by the act 16 June 1836 (Brightly's Purdon 848), unless otherwise directed, as provided by the act 18 April 1861 (Brightly's Purdon 848 n). *Arnold v. Joslin*, 5 Kulp 317.

270. Where the sheriff neglects to notify the defendant of the sale of his property as required by the act 16 June 1836, sec. 62 (Brightly's Purdon 847), the sale

will be set aside; and this, though a handbill was posted at the hotel where he last resided and he was seen about the court-house immediately preceding the sale. *Fitzsimmons v. Fitzsimmons*, 2 York 121. See *Mayer v. Spangler*, 2 York 154.

271. Under the act 16 June 1836, sec. 63 (Brightly's Purdon 848), which requires that a sheriff's sale shall be advertised once a week during three successive weeks; it was held, that an advertisement in each of three successive weeks is sufficient; and this, although the advertisements were not all on the same day of the week, and there was not twenty-one full days between the first advertisement and the day of the sale. *Hollister v. Vanderlin*, 165 P. S. 248.

272. Under the act 16 June 1836, sec. 63 (Brightly's Purdon 848), the advertisement of a sale of real estate must occupy between the date of the first advertisement and the date of the sale three full weeks or twenty-one days; an advertisement published on the 9th day of a month for a sale on the 30th is one day too short. *Athens National Bank v. Frost*, 3 Dist. Rep. 601.

273. A sheriff's sale of real estate was set aside where the defendant had no actual notice of the sale, and a misleading statement was made at the time of the sale and the property was bought by the plaintiff for an inadequate price. *Moore v. Dodd*, 2 Lack. Jur. 245.

274. Where a deceased wife's real estate was sold for the payment of her debts and the balance of the purchase money was charged on the land during the husband's life, the interest to be paid to him as curtesy; it was held, that his interest might be sold under execution without an order from the court for the issuing of the writ or ten days' notice of the application therefor, or ten days' notice of the sale. *Diller v. Groff*, 11 Lanc. 73.

275. A sheriff's advertisement sufficiently describes lands by reference to their warrant numbers. *Morse v. Freck*, 7 C. C. 456.

276. Where a defendant's interest in chattels, in the hands of third parties, is levied on, the sheriff's advertisement must give their location, or the sale will be set aside. *Trevathan v. Ithaca Organ Co.*, 7 C. C. 345.

277. The sheriff's notice of sale must state where the lands lie. Handbills in newspaper type are not sufficient. *Jane v. Storm*, 7 Lanc. 332; s. c. 2 Lack. Jur. 103.

See EXECUTION, XI. (e).

(c) Conduct of the sale.

278. It seems that the crier of the court may demand the right to cry the sheriff's sales and receive the fee allowed by law for that service. *In re Court Officers*, 3 Dist. Rep. 196.

279. It is not the duty of the sheriff or the plaintiff to state at the sale the amount of the debt or whether the property is clear of encumbrances. *Herr v. Draucher*, 7 Lanc. 383.

280. Where personal property is sold under an execution, it should be sold in parcels; where the sheriff sold property worth fifteen hundred dollars in a lump under an execution for twenty-six dollars, and there was evidence of an agreement between the purchaser and the defendant that the defendant was to be given an opportunity to redeem his property; it was held, that, in an action of replevin by the purchaser against the defendant for certain of the goods, it was for the jury to say whether the sale was fraudulent, and if so, the plaintiff took no title by the sale. *Grim v. Reinbold*, 148 P. S. 446. See s. c. 12 C. C. 223.

281. Where one mortgage covers four pieces of land and another covers only three of them, the latter mortgagee may, at sheriff's sale on the former, compel the sheriff to first sell the piece on which the selling mortgage has the sole lien; equity will compel a creditor who has a lien on two funds, as against a creditor who has a lien on one only, to resort to the fund on which he has the sole lien. *Lehman v. Tammany*, 7 Kulp 235.

282. Where a mortgagor is dead, his administratrix cannot, at a sheriff's sale under the mortgage, compel the sale of the mansion house last; the act 29 March 1832, sec. 33 (Brightly's Purdon 598), does not apply to such a case. *Lehman v. Tammany*, 7 Kulp 235.

283. A sheriff's sale of personal property will be set aside where it appears that inadequate opportunity was allowed for an inspection of the goods, and that the sheriff sold the goods in large lots. *Wolf v. Hano*, 11 C. C. 204.

(d) Return of sale.

(1) Effect of the return.

284. If the sheriff's return shows that the money was paid to him in satisfaction of the judgment, it is conclusive of that effect, and the defendant has no standing to ask that the money be paid into court upon an allegation that he paid the money for a different purpose. *Skiver v. Wolansky*, 5 Kulp 368.

285. Upon the distribution of a fund in court, the proceeds of a sheriff's sale, it may be shown that the date of the levy was added to the sheriff's return to the execution after the return thereof; this is not a contradiction of the return, but simply a showing as to what the return originally was. *Henderson v. Henderson*, 133 P. S. 399; s. c. 25 W. N. C. 557; reversing s. c. 4 Del. 54.

286. The sheriff has control over his return so long as the writ is in his hands and until he finally files it; but delay in filing it after *lis mota* takes away the presumption in his favor to which ordinarily the return is entitled. *Dixon v. White Sewing Machine Co.*, 128 P. S. 397.

287. Leave to a sheriff to amend a false return to an execution is within the discretion of the court, and will not be granted where such amendment would work injustice to other parties. *Phillippe v. Anstett*, 1 Northam. 78.

288. Under the act 21 April 1846 (Brightly's Purdon 857) the sheriff has no standing as a petitioner unless he has

an interest in having the execution amended, and an amendment will only be allowed when equity and justice require it. *Lawenstein v. Krell*, 162 P. S. 267.

(2) Of the special return upon a sale to a lien creditor.

289. Upon a special return under the act of 20 April 1846 (Brightly's Purdon 852), if it appear that the sheriff's vendee is not entitled to the proceeds, and the purchaser fails to pay the purchase money, the sale will be set aside and an *alias fieri facias* will issue for a resale. *Fry v. Specht*, 1 Atlan. 441; s. c. 3 Cent. 610.

290. If a lien creditor be the purchaser, the sheriff should make the special return provided by the act; if he takes the purchaser's receipt, he does so at his own risk, and if afterwards obliged to pay liens not disclosed by the searches, he cannot recover them from the purchaser. *Mark v. Osmer*, 138 P. S. 1; s. c. 27 W. N. C. 51; 38 P. L. J. 144. See *Krumbhaar v. Yewdall*, 153 P. S. 476.

291. Where a special return is made under the act 20 April 1846 (Brightly's Purdon 852), that the purchaser is a lien creditor, the persons interested questioning or disputing may either have an auditor appointed or an issue; they are not entitled to both; an issue will not be granted after two years of controversy before an auditor and an adverse report. *Second National Bank v. Pennsylvania Anthracite Coal Co.*, 140 P. S. 628.

292. Upon exceptions to a special return under the act 20 April 1846 (Brightly's Purdon 852), where the exceptions are ascertained by the auditor to be unfounded, but it appears that special circumstances existed affording probable cause for excepting to the return, the costs of audit should not be imposed on the exceptant, but they are properly paid out of the fund. *Sansenbacher v. Schickendantz*, 141 P. S. 418.

293. Under the act 20 April 1846 (Brightly's Purdon 852), where the exe-

cution creditor purchases the property and franchises of a corporation in proceedings under a mortgage, a subsequent judgment creditor has no standing to except to a special return. *Mellon v. Shengango Natural Gas Co.*, 157 P. S. 627.

294. In a suit by a lien creditor against the sheriff to recover the cash proceeds of land sold at sheriff's sale to another lien creditor, the plaintiff is entitled to offer in evidence the sheriff's return showing a misapplication; and this, without offering the record of the reading of the return and an acknowledgment of the deed. *Comm'th v. Robinson*, 7 Kulp 250.

295. Where land is bought by a lien creditor at sheriff's sale for a price greater than the amount of his lien, the sheriff has a right to make distribution of the cash proceeds of the sale, but in so doing he takes the risk of misapplication; the fact that his return is read in open court and the deed acknowledged without objection will not protect him. *Comm'th v. Robinson*, 7 Kulp 253. See *Barker v. Robinson*, 7 Kulp 467.

(c) Setting aside the sale.

(1) Power to set aside a sale.

296. After a sheriff's deed has been acknowledged and delivered and the purchaser has taken possession of the premises, the court has no power, upon a rule to show cause, to set aside the sale. *Keating v. Keating*, 6 Kulp 178.

(2) Who may move to set aside a sale.

297. A defendant who has been heard on his objections to a sheriff's sale cannot, on the principle of *res adjudicata*, be heard on the same reasons, on a motion to set it aside. *Morse v. Freck*, 7 C. C. 456.

298. A sale of real estate will not be set aside at the instance of an unsecured creditor, though he would give more than the price bid, on a chance of a profit. *Schwartz v. Weinsheimer*, 2 Northam. 210.

299. Where a debtor has an estate for life and assigns it for creditors, the court

will not appoint a sequestrator upon the petition of a lien creditor and will not upon the petition of such lien creditor set aside the sheriff's sale of such life estate under another judgment, especially where the petitioner is a volunteer and purchased his judgment eighteen months after the assignment and almost two months after the issuing of the writ of *venditioni exponas* and with full knowledge of both of those facts. *Landis v. Lewis*, 3 Dist. Rep. 241.

300. A sheriff's sale of personal property will not be set aside for irregularities, at the instance of creditors who had no lien on the goods. *Hirsh v. Hirsh*, 11 Lanc. 270.

(3) Of the petition.

301. A petition to set aside a sheriff's sale is not too late though made after the payment of the purchase money and the delivery of the deed. *Carl v. Strine*, 1 York 141; affirmed in *Peeling's Appeal*, 2 York 75.

302. It is not error to permit a prothonotary to affix his signature to the jurat to an answer to a petition to set aside a sheriff's sale, as of the date it was actually sworn to. *Cake v. Cake*, 156 P. S. 47.

(4) When a sale will be set aside.

303. A sheriff's sale made by collusion to defraud creditors was set aside in order to subject the land sold to the payment of a judgment subsequently obtained by a *bona fide* creditor. *Millspaugh's Appeal*, 1 Atlan. 277.

304. A sheriff's sale of real estate will be set aside on terms where the sheriff failed to have the debtor's exemption appraised until after the condemnation and issuance of the *venditioni exponas*. *Conard v. Edwards*, 7 C. C. 344.

305. Where the sheriff neglects to notify the defendant of the sale of his property as required by the act 16 June 1836, sec. 62 (Brightly's Purdon 847), the sale will be set aside; and this, though a handbill was posted at the hotel where

he last resided and he was seen about the court-house immediately preceding the sale. *Fitzsimmons v. Fitzsimmons*, 2 York 121. See *Mayer v. Spangler*, 2 York 154. See EXECUTION, IX.

(5) Misdescription.

306. Where the sheriff's bills described a property as "buildings, improvements and lot, southwest corner 61st and Lombard streets, forty feet front on Lombard street, eighty feet deep," and the lot was forty feet front on 61st street and eighty feet on Lombard street and the buildings were a store and dwelling, a warehouse and a stable, the sale was set aside. *Hoeflich v. Hoeflich*, 12 C. C. 370.

307. Where it is not alleged that there was any misdescription of the land or that it sold for an inadequate price, the sale will not be set aside on the ground that the improvements were not stated in the advertisement. *Parker v. Lynch*, 13 C. C. 86.

308. A sheriff's sale will not be set aside because of an omission in the advertising of the fact that the dwelling-house was new and had modern improvements, and that there were a large number of fruit trees and some small fruit upon the premises. *Dougherty's Case*, 16 C. C. 214.

309. A sheriff's sale will not be set aside because of the description of a stone slaughter-house as a frame one, in the absence of evidence that such misdescription affected or was calculated to affect the sale disadvantageously. *Landis v. Lewis*, 3 Dist. Rep. 241.

310. A sheriff's sale will not be set aside merely because the description omitted to mention a spring-house, and described the property as containing "138 acres, more or less," instead of 139 acres. *Herr v. Draucher*, 7 Lanc. 383.

311. A sale will not be set aside on the ground of misdescription where the description in the writ was furnished by the defendant himself. *Johnson v. Johnson*, 7 Lanc. 331.

312. A sheriff's sale will be set aside

where a lot of three acres was described as one of forty acres, and a lot of two acres as one of twenty. *Landis v. Longenecker*, 7 Lanc. 402.

313. Where the price was not inadequate, the court refused to set a sheriff's sale aside because of the fact that the property was described and sold as the property of A, whereas he was only owner of the undivided half, and the description failed to notice that the defendant had, in common with an adjoining owner, the use of a three-foot-wide alley on one side of the premises. *Sides v. Shultz*, 8 Lanc. 289.

314. An omission in the sheriff's advertisement of a sale of the use of the property as a cemetery, coupled with gross inadequacy of price, is sufficient grounds for setting aside the sale. *Wilcox v. Bancroft*, 27 W. N. C. 20.

315. A sale under a mechanic's lien will be set aside on the ground of an insufficient description, where it appears that the property was described as located on a tract or piece of land containing three acres situate etc., but without describing the land as being the curtilage attached to the building. *Lichty v. Wolf*, 1 York 202.

316. A sheriff's sale will not be set aside on account of a misdescription which is trifling and unimportant. *Bear v. Boeckel*, 5 York 70.

See EXECUTION, XI. (b).

(6) Inadequacy of price.

317. Upon a rule to set aside a sheriff's sale for inadequacy of price, the defendant's testimony as to the value of adjoining property may be rebutted by testimony of what the surrounding property had brought at sheriff's sale. *Bartolet v. Saylor*, 12 Atlan. 854; s. c. 11 Cent. 787.

318. A sheriff's sale will not be set aside for mere inadequacy of price. An order setting aside a sale may be revoked. *Weaver v. Lyon*, 3 Cent. 263.

319. Where an application to set aside a sheriff's sale is made promptly, and is accompanied by an offer to bid an in-

crease of five hundred dollars over the price of twenty-five hundred dollars, brought at the sale, it seems that the application should be granted; but such an application is within the discretion of the court, and the supreme court will not review its refusal in the absence of an abuse of the discretion. *Germer v. Ensign*, 155 P. S. 464.

320. Where a sheriff's sale is in all respects regular and no fraud is shown, it will not be set aside for mere inadequacy of price. *Cake v. Cake*, 156 P. S. 47.

321. Where an application to set aside a sheriff's sale is made immediately after the sale and before the acknowledgment of the deed, and the price is grossly inadequate, the court will seize upon any other circumstance in order to give relief; it will take into consideration the fact that a rule to stay the writ was pending and that the defendant and certain persons who expected to bid, by reason of the rule, either did not attend the sale or did not prepare themselves to bid. *Ritter v. Getz*, 161 P. S. 648.

322. Where it appeared that only one hundred and ninety-five dollars was bid for a property at a sheriff's sale, and the application to set the sale aside was accompanied by an offer to bid fifteen hundred dollars, and it also appeared that counsel for a mortgage creditor neglected to bid under a mistaken impression that the mortgage would not be discharged; it was held, that the setting aside of the sale was not an abuse of judicial discretion. *Phillips v. Wilson*, 164 P. S. 350.

323. Mere inadequacy of price without more is not sufficient ground for setting aside a sheriff's sale. *Hollister v. Vanderlin*, 165 P. S. 248.

324. Where a property is bought by the first judgment creditor, who receipts to the sheriff for the amount of his bid, and another party offers to increase the bid, the court may permit the purchaser to give an additional credit on his judgment and then discharge a rule to set aside the sale. *Hollister v. Vanderlin*, 165 P. S. 248.

325. The confirmation of a sheriff's sale will not be reversed by the supreme court where it appears that the land sold as a whole was made up of the unsold lots and streets of a land association, that the evidence as to the inadequacy of price was conflicting and that defendant had given no available assurance that a better price would be realized by the proposed resale. *Fidelity Ins. Trust & Safe Deposit Co. v. Byrnes*, 166 P. S. 496.

326. A sheriff's sale under a mortgage will not be set aside for mere inadequacy of price, where such second sale would simply impose second costs on the mortgagee without benefiting the defendant by leaving him a residue. *Long v. Miller*, 10 C. C. 586.

327. Where the owner of an undivided half interest in land, subject to a mortgage on the whole property given by a prior owner, was led to believe that the sale on the mortgage would not divest his interest, the court set aside the sale on his giving security for an advanced bid. *Scranton Savings Bank & Trust Co. v. Pier*, 1 Lack. L. N. 87.

328. A sheriff's sale of real estate will not be set aside for mere inadequacy of price; and this, though a higher bid is offered to be secured. *Gantz v. Carpenter*, 8 Lanc. 286.

329. Where the defendant averred that he had been misled at the sheriff's sale by supposing that the property had been knocked down at his bid, the sale was set aside on his entering security that the property would bring at the next sale five hundred dollars more. *Pennsylvania Co. v. Black*, 29 W. N. C. 410.

330. A sheriff's sale will be set aside where great inadequacy of price is coupled with the fact that the bidding was actually going on at the time the property was struck off, and that there was an outstanding bid of twenty-five cents per acre, which it is supposed that the sheriff did not hear. *Mayer v. Spangler*, 2 York 154.

331. A sheriff's sale will not be set aside on account of inadequacy of price,

where such inadequacy is attributable to an outstanding life estate and notice was given at the sale that the title was in dispute. *Bear v. Boeckel*, 5 York 70.

(7) *Misapprehension of purchaser.*

332. A sheriff's sale was set aside on terms, upon the application of the purchaser, where he purchased under the erroneous belief that the sale would discharge the lien of the purchase-money due on the land. *Vincent v. Hunsinger*, 7 C. C. 331.

333. If the plaintiff be misled as to amount of liens by the erroneous statement of the sheriff, the sale will be set aside on the plaintiff's application. *McEnroe v. McCoy*, 7 C. C. 431.

334. A sale of real estate was set aside, and the petitioner directed to pay the costs, where it appeared that he purchased under the erroneous belief that all liens would be discharged by the sale, and that he had no actual notice that the property would be sold subject to certain mortgages. *Fry v. Patrick*, 13 C. C. 297.

335. Where the auctioneer at an orphans' court sale inaccurately stated that the ground-rent to which the property was subject, was redeemable, the court relieved the purchaser from the performance of his contract. *Howe's Estate*, 14 C. C. 574; s. c. 35 W. N. C. 16.

336. A sheriff's sale will be set aside where the purchaser labored under such a manifest misapprehension as to the discharge of prior liens as would work a great injustice if the sale were sustained. *Niederhofer v. Bange*, 1 York 38.

337. Where the plaintiff in an execution purchased the defendant's property under the mistaken idea that the money would be applied to the payment of his judgment, the court set aside the sale. *Carl v. Strine*, 1 York 141; affirmed in *Peeling's Appeal*, 2 York 75.

(8) *Invalidity of the judgment.*

338. Where a defendant twice applied for an order of court to stay an execution, on grounds which did not involve the va-

lidity of the judgment, and he succeeded the first time, but on the second attempt failed; it was *held*, that he could not be allowed after a sheriff's sale to attack the validity of the judgment in a proceeding to set the sale aside. *Lehman v. Tammany*, 7 Kulp 235.

339. The court refused to set aside a sheriff's sale and relieve the purchaser on the ground that the judgment was taken for want of an appearance and affidavit of defence against a mortgagor who was an administrator, where the record shows that the mortgage was given by the administrator under an order of the orphans' court for the payment of debts and that the money was so applied. *Miller's Case*, 14 C. C. 479.

(9) Costs.

340. In setting aside a sale of personal property, the court may impose a condition that the costs of the sale be paid by the defendants. *Totten v. Cooper*, 129 P. S. 314.

(g) Payment into court.

341. The sheriff is entitled to notice of an order directing him to pay money into court, and where such an order is made without previous notice and the sheriff subsequently presents a petition praying for leave to answer the motion, which the court below refuses, the supreme court will reinstate the petition and order a *procedendo*. *Dewoody v. Dewoody*, 157 P. S. 603. See *Gilfillan v. Dewoody*, 157 P. S. 601.

342. Distribution will not be made of the proceeds of real estate without payment into court, under the act 28 June 1871 (Brightly's Purdon 855), unless by agreement of all the parties interested. *Pierman v. Schmoltze*, 9 C. C. 473.

343. In a contest over the proceeds of a sheriff's sale upon a *feri facias*, the court has no right to direct the sheriff to make distribution; it can only require the sheriff to pay the fund into court. *Leinau v. Albright*, 10 C. C. 171; s. c. 28 W. N. C. 165.

344. Where the proceeds of a sheriff's sale were ruled into court by the claimant, who had an auditor appointed and found in favor of the plaintiff in the execution; it was *held*, that the entire fund was payable to the plaintiff and that the costs of the audit were chargeable upon the claimant. *Kraemer v. Mullin*, 12 C. C. 190.

345. Where money is ordered into court by a judgment creditor who asks for the appointment of an auditor, the costs of the audit should be paid out of the fund; and this, although the judgment of such creditor be subsequently set aside. *Griffis v. Griffis*, 12 C. C. 390.

346. Where a sheriff fails to pay money into court and distributes the fund to the injury of a lien creditor, he may be sued for the loss without his bondsmen being joined in the action. *Enterline v. Comrey*, 15 C. C. 627.

347. The sheriff cannot pay the proceeds of an execution of personal property into court without a special order; such payment will not relieve the sheriff; it is his duty to make distribution unless upon cause shown he is relieved by the court; he will be permitted to pay the money into court, however, when there are any conflicting claims to the funds in his hands. *Lynch v. English*, 4 Del. 481.

348. The proceeds of real estate will be ruled into court if the petition discloses a reasonable ground of controversy; the court will not try the truth of the allegations upon the hearing of the petition. *Dickerman v. Edinger*, 13 C. C. 541; s. c. 3 Dist. Rep. 11.

349. Money will not be ordered into court upon the application of one, who, in any event, will not be entitled to any portion of it. *Hoffsomer's Estate*, 5 Kulp 472.

350. A sheriff will not be ordered to pay the money into court where he is willing to make distribution at his own risk. *Morris v. Doyle*, 6 Kulp 446; *Tisch v. Raisch*, 7 Kulp 131.

351. Where the garnishee in an attachment execution suggested in his answer

that the money in his hands was claimed by third parties, and, at the instance of the plaintiff and the claimant, he paid the money into court, an interpleader was awarded to determine the ownership of the fund upon a rule taken by the claimant; and this, though the garnishee made no application for the interpleader. *Stern v. Jones*, 7 Kulp 19.

352. Where the defendant is a mere stakeholder, and suit is brought against him to recover money, which is claimed by rivals as between whom the defendant has no interest, he will be permitted to pay the money into court, and an interpleader will be framed between the claimants. *Moore's Petition*, 7 Kulp 97.

353. Where a garnishee by the allowance of the court pays the money into court, he is thenceforth discharged from further responsibility upon the attachment, and it is error in the further contest with regard to the fund to involve the garnishee in it. *Rothchild v. Morrison*, 2 Lack. Jur. 183; s. c. 4 Del. 573.

354. An application for a rule to pay money into court comes too late, when made long after the return day of the writ and after the sheriff has, in good faith, applied the moneys to the liens. *Tisch v. Raisch*, 7 Kulp 131.

355. An attaching creditor, who has given notice that the goods would be sold subject to his attachment, is estopped from ruling the money into court after the sheriff has distributed the fund. *Tisch v. Raisch*, 7 Kulp 131.

356. Upon an application for a rule on the sheriff to pay money into court, the petitioner must show that he has an interest in the distribution. *Miner v. Clark*, 7 Kulp 140.

357. A rule to return a writ of *fiery facias* should precede a rule to pay the money into court. *Barker v. Robinson*, 7 Kulp 467.

358. Where a sheriff applied to pay the proceeds of an execution into court, and upon leave being refused he notified the claimant and the defendant in the execution to make a similar application, which

was not done, and then under a threat of suit he paid the proceeds to the execution creditor, and it subsequently appeared that the judgment was for more than was due; it was *held*, in an action by the defendant against the sheriff for the difference, that an affidavit of defence setting forth the above facts was sufficient to prevent judgment. *O'Donnell v. Rorer*, 12 Lanc. 79. See *O'Donnell v. Fisher*, 12 Lanc. 78.

359. Where the proceeds of a sheriff's sale are paid into court by agreement, the costs should be placed upon the fund; an unsuccessful claimant who has not made the audit necessary should not be visited with the costs. *Hartman v. Garner*, 7 Montg. 199.

360. The proceeds of an execution against personal property will not be ordered into court except on the application of a lien creditor, who shows some reasonable ground to dispute the right of the execution plaintiff; where a judgment was confessed by a married woman; it was *held*, that a subsequent lien creditor would not be heard to contest the validity of the judgment on the ground of her coverture; such a judgment is only void as against her. *Harding v. Douglass*, 2 Northam. 407; s. c. 2 Lack. Jur. 108.

361. If an attaching creditor, under the act of 17 March 1869 (Brightly's Purdon 70), can show that a previous sheriff's sale of the debtor's property was in fraud of creditors, the court will order the payment of the proceeds of such sale into court for distribution. *Stanley v. Ritter*, 26 W. N. C. 188.

362. Where a party is clearly entitled to the balance of a fund for distribution, the court will not subject it to the costs of audit, but will order the sheriff to pay such balance over to the party legally entitled to it. *Weaver v. Steacy*, 4 York 205.

363. Where several executions were prior to an attachment under the act 17 March 1869, and the validity of one of the judgments was not disputed, and it

was larger than the proceeds of the sale; it was *held*, that the attaching creditor had no standing to have the money paid into court; upon such an application the finding of the lower court will not be set aside by the supreme court except for manifest error. *Jones v. English*, 168 P. S. 438.

See EXECUTION, IX.

XII. Sheriff's deeds.

364. Where the records of the court show a return to a writ of *venditioni exponas* and the entry of the acknowledgment of the deed by the sheriff, it will be presumed that the sheriff duly acknowledged and delivered a deed to the purchaser. *Robisson v. Miller*, 158 P. S. 177.

365. Upon the hearing of exceptions to the acknowledgment of a sheriff's deed, the inquiry will be limited to questions affecting the validity and regularity of the sale; the court will not inquire into the validity of the judgment under which the sale was effected. *VanBilliard v. VanBilliard*, 10 C. C. 620.

366. Under the act 17 May 1866 (Brightly's Purdon 1634) a sale of land to enforce the payment of owelty cannot be made without notice to all the parties interested in the sum secured, and a decree should not be entered without evidence that the money had not been paid to the petitioner. The *levari facias* cannot be issued without an order of court awarding the writ and fixing the return day thereof, and the sheriff's deed cannot be acknowledged in the common pleas, but must be acknowledged in the orphans' court. *Oviatt's Estate*, 14 C. C. 611.

367. Where the plaintiff in an execution, a trustee, purchases the property, and uses the judgment to satisfy his bid, but dies before the acknowledgment of the deed, the court will order the sheriff to acknowledge the deed to a trustee subsequently substituted. *Richardson v. Remington*, 1 Lack. Jur. 431.

368. The application of the description in a levy and sheriff's deed to the land is

a question for the jury. *Stroup v. McCloskey*, 3 Cent. 613.

XIII. Purchasers at sheriff's sales.

(a) Title of the purchaser.

369. After a sheriff's sale under a mortgage and the delivery of the deed to the purchaser, it is too late to question the validity of the acknowledgment of the mortgage or the regularity of the proceeding under the *scire facias* prior to the acknowledgment and delivery of the sheriff's deed. *Benninghoeff v. Stephenson*, 161 P. S. 440.

370. As between a purchaser at sheriff's sale and the defendant in the execution, the title does not actually pass until the acknowledgment of the sheriff's deed. *Collins v. London Assurance Corporation*, 165 P. S. 298.

371. The strong presumption always is that a sheriff's deed amounts to an absolute conveyance of the defendant's interest; but it may be shown by clear, precise, and indubitable testimony to be in fact but a mortgage. *Saunders v. Gould*, 134 P. S. 445; s. c. 26 W. N. C. 121. See s. c. 124 P. S. 237.

372. The bond of a married woman, wherein her husband joins, given for repairs to her separate estate, being void, a purchaser at sheriff's sale thereunder is not entitled to her possession. *Vandyke v. Wells*, 3 Atlan. 451; s. c. 103 P. S. 49.

373. A judgment note by a husband and wife for money loaned to the husband to purchase land is good for nothing as against the wife; and a sheriff's sale thereunder of land purchased with the money in the wife's name will pass no title. *Bigler v. Wilson*, 5 Cent. 253.

374. Where the record of a judgment shows that the defendant is a married woman but does not affirmatively show her liability on a contract within the act 3 June 1887, the judgment is void and a sale of her property upon an execution thereon will confer no title upon the purchaser. *March v. McCardle*, 1 Dist. Rep. 677.

375. A sheriff's sale of land under a judgment against an administratrix, if made without a *scire facias* to the widow and heirs, is void at the instance of any of the creditors of the decedent. *Mangan's Appeal*, 11 Atl. 805; affirming *Mangan's Estate*, 4 Kulp 149.

376. If the justice had jurisdiction, a constable's sale under his execution will pass a good title, notwithstanding the existence of irregularities and errors for which the judgment ought to have been reversed. *Kramer v. Wellendorf*, 129 P. S. 547. See s. c. 20 W. N. C. 331.

377. Where, after a sheriff's sale and purchase by plaintiff of firm property under an individual judgment note given by a member of the firm for a firm debt, the firm subsequently gives its own note for the same debt, upon which there is a second sale and repurchase by plaintiff; the first sale was no satisfaction, and the second sale was not in fraud of other creditors but merely perfected the purchaser's title. *Stevens v. Diehl*, 127 P. S. 416.

378. A sheriff's sale of whiskey in a distillery bonded warehouse passes the title of the distiller, though the sheriff was not permitted by the United States to get a view of the goods. *Keil v. Harris*, 5 Cent. 865; affirming s. c. 1 C. C. 171.

379. The title of a purchaser at a sheriff's sale is paramount to all conveyances or encumbrances attempted subsequently to the judgment under which the sale is made. *Lance v. Gorman*, 136 P. S. 200; s. c. 27 W. N. C. 45.

380. Where property has been attached under the act 12 July 1842 (Brightly's Purdon 1136) and it is afterwards levied on and sold by the sheriff under an execution against the same debtor at the suit of another creditor, the effect of the sale is to transfer the lien of the attachment from the property to the fund; and if the judgment be *bona fide* and the execution creditor becomes a purchaser, he takes a title which the attaching creditors cannot impeach by levying on the same goods as

the property of their debtor. *Tisch v. Utz*, 142 P. S. 186.

381. Where the plaintiff's affidavit in an attachment fails to aver that the defendant is a non-resident of the commonwealth, the attachment will be quashed; but if the defendant appears and judgment is rendered for plaintiff on the merits, a subsequent sale will divest the defendant's title. *Bollinger v. Gallagher*, 144 P. S. 205.

382. Where a person entitled to a purport takes possession of the purport under an agreement with the other parties in interest, before entering into a recognizance for the money charged upon the land, he takes an equitable interest in the purport, a right to have the full legal title on paying or securing to the other parties the valuation money less the share awarded to him, and when he enters into such a recognizance, such full legal title vests in him. In such a case where a levy was made before the recognizance; it was *held*, that a purchaser at a sale under a *venditioni exponas* issued after the recognizance was entered, took a good title. *Robisson v. Miller*, 158 P. S. 177.

383. Where a testator devised his residence to his daughter and two sons and gave his daughter the option to purchase the shares of the sons at a certain valuation, and twelve days after the testator's death the daughter exercised her option and bought the share of one of her brothers, and subsequently an execution was issued against the latter upon a judgment obtained against him in his father's lifetime; it was *held*, that the purchaser under such an execution took no title against the testator's daughter. *Bayer v. Walsh*, 166 P. S. 38.

384. A purchaser at sheriff's sale takes the title of the defendant in the execution; he is not entitled to any advantage which the debtor had not, and cannot hold the property against an equitable owner. *Miller v. Baker*, 166 P. S. 414.

385. A sheriff's sale under a judgment for want of an appearance against an executrix and devisee upon a *scire facias*

to revive a judgment against the decedent is not rendered invalid by a subsequent inquisition in lunacy finding that she had been a lunatic for four or five years previously. *Shannon v. Newton*, 132 P. S. 375; affirming s. c. 5 Montg. 167.

386. Where an inquisition found a person to have been a lunatic for more than two years prior thereto, and a judgment had been entered against the lunatic prior to the two years and execution issued thereon within the two years, when the lunatic gave money to the defendant to pay the judgment, which he promised to do, but instead thereof, he allowed the property to be sold at sheriff's sale and bid it in himself; it was *held*, that no title passed to the defendant. *Everly v. Harrison*, 167 P. S. 355.

387. A sale of land to collect an assessment for a main sewer in a third class city will pass a good title whether the owner be named or not. *Haus's Estate*, 12 C. C. 74.

388. Where a judgment has lost its lien before the date of the sheriff's sale, the sale is invalid and passes no title to the purchaser. *Hockemeyer v. Hartman*, 2 York 173. See *Carl v. Strine*, 1 York 141, 2 York 75.

389. Where the property of a defendant was described as ninety-eight acres situate in a certain township, and was further described as one tract; it was *held*, that the sale passed a good title to the purchaser for the whole ninety-eight acres; and this, though it was afterwards discovered that the defendant's real estate was divided into two tracts, one of eighty-five acres and one of thirteen acres, and the smaller tract was situate in another township. *Wildasin v. Bare*, 8 York 1.

390. The fact that a purchaser at sheriff's sale gave his own mortgage for a subsisting mortgage which was then satisfied, is confirmatory of other evidence that he bought subject to the original mortgage. *Holman's Appeal*, 127 P. S. 209.

391. Where land is held by a vendee under articles and it is sold under a

judgment upon a mechanic's lien against the vendee and bought in by the plaintiff, the title of the plaintiff is subject to the payment of the balance of the purchase money due the vendor; where the vendor assigned his judgment for the balance of the purchase money due, it was *held*, that the assignee was not entitled to the balance of the fund produced by the sheriff's sale until the vendor had made to the vendee a deed for the land subject to the equitable estate of the purchaser at the sheriff's sale, and an assignment was made by the assignee of the purchase-money judgment to enable the original vendee, who stood merely as a surety, to enforce it against the lands in the hands of the purchaser at the sheriff's sale. *Gibbons v. Gaffney*, 154 P. S. 48.

392. Where the interest of an heir in real estate is sold at sheriff's sale, and notice is given at the sale that the sale is subject to the equity of the payment of the heir's debts to the decedent's estate, the amount of such debts may be charged upon the purpart subsequently allotted in partition proceedings to the sheriff's vendee. *Donaldson's Estate*, 158 P. S. 292; affirming s. c. 40 P. L. J. 260.

393. A director occupies a fiduciary relation towards a corporation and its stockholders which forbids him to acquire title to the corporate property as against the latter by purchase at a sheriff's sale, but such a director is entitled to reimbursement for what he has outlaid in the acquisition of the property, and equity will not compel him to surrender title or possession except on condition that he be made whole. *Sebring v. Joanna Heights Ass'n*, 2 Dist. Rep. 629.

(b) What will affect a purchaser's title.

394. One who really holds in trust for his brothers may recognize the claims of the latter by an amicable partition; a purchaser at sheriff's sale, under a judgment against the trustee, has no standing to prevent it. *Dougherty v. Mortland*, 11 Atl. 234.

395. Upon a notice at a sheriff's sale, claiming the property, a bidder is chargeable with notice of all that an inquiry of the person giving the notice as to his title would have disclosed. *Ferguson v. Rafferty*, 128 P. S. 337. See *Lance v. Gorman*, 136 P. S. 200; s. c. 27 W. N. C. 45.

396. Where a mortgagee has taken a mortgage without notice of a resulting trust, a purchaser at a sheriff's sale on the mortgage will be protected by the mortgagee's want of notice; and this, though such purchaser was a surety on the bond secured by the mortgage and cognizant, at the time the mortgage was given, of the facts raising the trust. *Logan v. Eva*, 144 P. S. 312.

397. Where a purchaser at sheriff's sale purchases under an agreement that he will convey to the defendant, a married woman, upon repayment to him of any money he may pay to perfect and defend the title or to prevent litigation in reference to the title, and there is an outstanding title in a purchaser at a previous sale under a judgment against her husband, and this title is not within the contemplation of the parties, the trustee will not upon a conveyance to the wife be allowed the money expended by him in the purchase of such outstanding title after having been notified by the wife not to make such purchase. *Pierce v. Schoonover*, 149 P. S. 115.

398. A purchaser of an oil lease at a sheriff's sale takes subject to all the covenants and conditions contained in the lease; he is bound to inquire, and failing to do so, he is fixed with notice of all that an inquiry would have disclosed. *Aderhold v. Oil Well Supply Co.*, 158 P. S. 401.

399. A contract between two or more lien creditors, by which one of them is not to bid at a judicial sale, made without the knowledge and consent of the defendant, is contrary to public policy and void; and a lien creditor who has entered into such a contract is not entitled to be subrogated to the rights of the defendant as

against third parties whose interests have been affected by the lessened competition in the bidding. *Hays's Estate*, 159 P. S. 381; affirming s. c. 41 P. L. J. 7, 92.

400. Where the son of one partner became a defaulter and the firm obtained judgment against him, but before such judgment was obtained by the firm, the son and his wife executed a mortgage to the other partner, which was subject to a building society mortgage; it was held, that on a sale of the property under the building society mortgage, the executor of the mortgagee partner had a right to purchase the property and take title clear of any trust in favor of the firm. *Shoe v. Ziegler*, 159 P. S. 461.

401. The assignee of a mortgage or the purchaser at sheriff's sale under a mortgage is not affected by a secret trust in favor of a third person of which he did not have notice. *Dunning v. Reese*, 7 Kulp 201.

402. One who held an assignment of a partnership interest and a judgment note for the same sum, and who entered judgment on the note and sold the partnership interest at sheriff's sale, and was awarded the proceeds, was estopped from claiming any interest by virtue of his assignment; and this, though he gave notice of it at the sale. *Van Stavoren's Appeal*, 12 Atlan. 499. See *Wetherald v. Shupe*, 109 P. S. 389.

403. If the purchaser at a sheriff's sale for a nominal sum give notice at the sale that the property does not belong to the defendant but to himself, the sale, as against him, does not divest liens. *Hiestand v. Williamson*, 128 P. S. 122; affirming *Williamson v. Hiestand*, 1 Northam. 148.

404. The purchaser at a sheriff's sale under a judgment against a husband, entered while the title is in his name, is not affected by an equitable estate in the wife, unless he had notice of the same at the time he bought the property. *Lance v. Gorman*, 136 P. S. 200; s. c. 27 W. N. C. 45.

405. A notice at a sheriff's sale that

the property is the property of the defendant's wife, is referable, in case she has a record title, only to such title and no other. *Ibid*.

406. Where real estate was conveyed to a wife by a stranger and this conveyance to her was recited in the deed from her and her husband; it was *held*, that a purchaser at sheriff's sale under a judgment and execution against the husband after the conveyance to the wife, was not entitled to recover in ejectment on simply showing his title. *Kinyon v. Leonard*, 149 P. S. 318.

407. At a sheriff's sale of real estate as the property of a husband, a notice that the property belonged to the wife or her heirs, brought home to a purchaser at a second sheriff's sale, is not sufficient to prevent the purchaser at the second sale from taking the husband's title, whatever it was. *Lawrence v. Keener*, 149 P. S. 402.

408. Where no formal notice was given at the sheriff's sale that the defendant's wife claimed the property, but the purchaser testified that he heard it said before he purchased the land and on the day of sale that the wife held the title; it was *held*, that this was a sufficient notice to the purchaser that the title was in the wife. *Hockemeyer v. Hartman*, 2 York 173.

409. If a judgment appears unsatisfied of record, a purchaser at sheriff's sale is not bound to go beyond it, and is not affected with notice of a receipt for the same on the sheriff's private docket. *Saunders v. Gould*, 134 P. S. 445; s. c. 26 W. N. C. 124. See s. c. 124 P. S. 237.

410. In the absence of knowledge or notice of secret equities a purchaser at sheriff's sale has a right to rely upon the record. *Budd v. Olver*, 148 P. S. 194.

411. Where a person advises the defendant in an execution to permit his property to be sold at sheriff's sale, and agrees to buy the property in for him, a repudiation of such agreement makes him a trustee *ex maleficio* for the former owner. *Shallcross v. Mawhinney*, 7 Atl. 734.

412. An oral agreement to purchase for another at a sheriff's sale will not, in the absence of fraud, or the payment of the purchase money, establish a trust. *McCall's Appeal*, 11 Atl. 206.

413. Where a defendant's wife, having an equitable interest in the land, was induced to confide in the verbal promises of a creditor of her husband that he would purchase for her benefit at a sheriff's sale, and, in pursuance of this, allowed him to become the holder of the legal title, a subsequent denial by the latter was such a fraud as will convert him into a trustee *ex maleficio*. In ejectment by the purchaser, however, the court will direct a verdict for the plaintiff to be vacated, and judgment for the defendant on the payment of the indebtedness due the plaintiff in specified instalments. *Cowperthwaite v. First National Bank*, 2 Cent. 795. See s. c. 102 P. S. 397.

414. A purchaser at a sheriff's sale cannot be converted into a trustee *ex maleficio* of the debtor, unless the fraud exist at the time of the sale, and the evidence of it be clear and unequivocal. *Huffnagle v. Blackburn*, 137 P. S. 633; s. c. 27 W. N. C. 60.

415. The plaintiff's attorney at a sheriff's sale having reached the limit of bid authorized by his client, is at liberty to make with the purchaser such arrangement as he thinks best for his client. *Bartolet v. Saylor*, 12 Atl. 854; s. c. 11 Cent. 787.

416. A life tenant may purchase the premises at a sale on a mortgage, though the same be foreclosed by reason of his own default in the payment of the interest. *Fidelity Ins. Trust & S. D. Co. v. Deitz*, 132 P. S. 36.

417. Creditors who each claim a superior lien may unite in purchasing a property at sheriff's sale for their joint benefit for the purpose of preventing subsequent litigation between themselves in the distribution of the proceeds. *Huber v. Crossland*, 140 P. S. 575.

(c) Rights of purchasers.

418. Where land is purchased at sheriff's sale, the purchaser may enter if he can do so peaceably, but the tenant in possession under the defendant in the execution is only bound to surrender when proceedings under the statute or a judgment in ejectment require it. *Frick v. Fiscus*, 164 P. S. 623.

419. Where a legacy is explicitly charged on land but the claim is not set up until nearly four years after the probate of the will, the burden will be held to be upon the legatee to overcome the presumption of payment; but in such case it is sufficient to prove that with the consent of the parties then owning the land, the personalty was distributed to the exclusion of the legatee; and this, even against subsequent purchasers at sheriff's sale. *Parker's Estate*, 12 C. C. 436.

420. Where a purchaser at sheriff's sale permits the judgment defendant to remain in possession and to grow crops on the land as theretofore, neither such purchaser nor his vendee can enter and remove any portion of the crops so grown. *Potter v. Lambie*, 142 P. S. 535.

421. Where a tenant of a defendant in an execution, after the acknowledgment of the sheriff's deed and service of notice to quit, cut hay on the premises; it was held, that he was liable for the value thereof to the sheriff's vendee. *Hewitt v. McIlvain*, 10 C. C. 562.

422. Where an assignee for creditors leased land to a tenant on shares and the land was afterwards sold under a judgment entered prior to the assignment, and on the day of the sheriff's sale the tenant cut and gathered six-sevenths of a crop of corn which had been planted after the assignment, and afterwards cut the other seventh; it was held, that the sheriff's vendee was entitled to the whole crop of corn. *Hoover v. Hoover*, 10 C. C. 563.

423. Manure, fencing and timber pass by a sheriff's sale of the land. They will not pass under a sale of "balance" under

a writ of *feri facias*. *Gourley v. Lukens*, 4 Montg. 15.

424. Upon a sheriff's sale of land growing crops pass to the purchaser as appurtenant to the land unless they have previously been severed from the freehold. *Peeling v. Young*, 1 York 218.

425. The engine machinery and appliances of an electric light plant do not pass to the purchaser of the real estate at sheriff's sale under a mortgage, unless it was the intention to make the plant a part of the realty when it was erected. *Vail v. Weaver*, 132 P. S. 363.

426. Rent accruing after a sheriff's sale of the reversion belongs to the purchaser; and this, although the landlord may have assigned it to a third person. *Murphy v. Cawley*, 7 Kulp 128.

427. A purchaser of real estate at a sheriff's sale is entitled to the rent of the premises due under a lease subsequent to the delivery of the sheriff's deed. *Herr v. Binkley*, 8 Lanc. 234.

428. Where damages were assessed to A for opening a street through his property, and after the time for appeal had elapsed without A having appealed, although appeals of other owners were pending, A's property was sold by the sheriff, and subsequently the court ordered the street to be opened on payment of the damages; it was held, that the portion assessed for A's property was payable to A and not to the vendee of the purchaser at the sheriff's sale. *Arnold v. Schaum*, 10 Lanc. 377.

See EXECUTION, VI.

(d) Suits by and against purchasers.

429. In an action against a constable for levying on personal property which the plaintiff claims to have purchased at a previous sheriff's sale, neither the plaintiff nor the sheriff are competent witnesses to show by parol that the property was sold at the sheriff's sale, where neither the levy nor the return of sale included the property in question. *Heinbaugh v. Powell*, 13 C. C. 360.

430. Where the assignee of the lessee went into possession and thereafter the lessor executed a mortgage upon the property, and it appeared that after assignment of the lease and before the sheriff's sale under said mortgage the lessor received the rent regularly from the assignee, and accepted him as his tenant, and by parol released the lessee from all future liability; it was *held*, in an action by the purchaser at sheriff's sale against the original lessee, that judgment was properly entered for the defendant. *People's Bank v. Alexander*, 140 P. S. 22.

431. In an action of ejectment against a sheriff's vendee, evidence is not admissible that the description of the improvements on the property in the sheriff's notices of the sale was inadequate. *Shearer v. Peffer*, 155 P. S. 501.

432. In an action of trespass against a purchaser at sheriff's sale and the sheriff and his deputy, for unlawfully entering upon the defendant's land and tearing down a house thereon; it was *held*, that the sheriff and his deputy were not liable for the destruction of the house unless they were shown to have some other connection with it than merely that of putting the purchaser in possession. *Frick v. Fiscus*, 164 P. S. 635.

(e) Defaulting purchasers.

433. A defaulting purchaser at an assignee's sale, if the assignee elects to rescind and the premises are resold, can recover back the excess of the money paid by him over and above the deficiency in the price at the second sale. *Jacoby v. Stettler*, 2 Cent. 607.

434. The liability of a defaulting purchaser at a sheriff's sale for a loss on a resale of the property is to the sheriff, and an action to enforce such liability must be brought in the sheriff's name. *Smith v. Wilson*, 152 P. S. 552.

435. Where real estate is bound by a mortgage and subsequent judgments and is bid in by the mortgagee at a sale under the mortgage, who fails to pay the pur-

chase money and the land is resold, the amount of the mortgagee's default cannot be set off against his mortgage upon a distribution of the fund raised by the second sale. *Smith v. Wilson*, 152 P. S. 552.

436. Where a purchaser at the sale of real estate by an assignee for creditors defaults, he cannot be held liable for any difference between the price at which he bought and the price at the second sale, where the resale is not on the terms of the first sale. *Ramsay v. Hersker*, 153 P. S. 480.

437. A sheriff cannot maintain an action for the amount of a bid for real estate after he has made a return of the writ under which the sale was made that the defendant had failed to pay his bid, and after a subsequent sale and deed of the same property to another purchaser under a writ issued on another judgment and distribution of the purchase money realized from the second sale. *Connell v. Shryock*, 167 P. S. 483.

XIV. Summary proceedings to obtain possession.

438. The refusal of a rule for possession under the local act of 13 May 1871 is no bar to an action of ejectment by the purchaser at sheriff's sale. *Bartolet v. Saylor*, 12 Atlan. 854; s. c. 11 Cent. 787.

XV. Distribution and discharge of encumbrances.

(a) Principles of distribution.

439. If the plaintiff in a judgment receives the amount of the same from the sheriff out of the proceeds of the sale of defendant's real estate thereunder, he may retain the whole amount, though it be more than the amount actually due on the judgment, but not more than enough to extinguish the indebtedness due by the defendant; and this against the previous purchaser of the land from the defendant, who had no knowledge of the lien and

who had paid the whole purchase money. *First National Bank v. Fair*, 127 P. S. 324.

440. Where land is sold at sheriff's sale under a judgment recovered subsequent to a fraudulent conveyance, and there is no reconveyance made to the defendant, liens in existence when the conveyance was made are not divested. *Heistand v. Williamson*, 128 P. S. 122; affirming *Williamson v. Heistand*, 1 Northam. 148.

441. Where a conveyance is made in fraud of creditors and the land is subsequently sold at sheriff's sale as the property of the grantor, a judgment, a portion of which is for a consideration prior to the conveyance, is entitled to participate in the distribution to the extent to which the transaction tended to defraud the holder thereof. *Henderson v. Henderson*, 133 P. S. 399; s. c. 25 W. N. C. 557; reversing s. c. 4 Del. 54.

442. Where a judgment is confessed to secure the debtor's several creditors, the moneys collected upon it to be distributed "among all my creditors, share and share alike," it may be shown on distribution that the intention of both the debtor and trustee was to secure only certain specified claims scheduled in writing at the time, and that by mistake certain words which would have so restricted the security were omitted from the confession. *Jenkins v. Davis*, 141 P. S. 266; reversing s. c. 6 Montg. 56.

443. Where, by an agreement of sale, the grantee was to give six thousand dollars for a farm by paying encumbrances, and if the farm was sold, the proceeds were to be divided equally between the grantor and grantee; and after the grantee had paid one thousand dollars the premises were sold by the sheriff; it was *held*, upon distribution, that the grantee could claim only half the proceeds after allowing for the six thousand dollars of encumbrance he was obliged to pay. *Potter v. Langstrath*, 151 P. S. 216; reversing s. c. 7 Montg. 95.

444. Where a fund is raised by the

sheriff's sale of decedent's real estate, the balance after the payment of liens must be paid to the executor or administrator of the decedent and cannot be distributed by an auditor appointed by the common pleas; the jurisdiction of the orphans' court is exclusive; but it seems that when the case gets into the orphans' court, the issue before the auditor, although it fell with the proceedings in the common pleas, may be used to inform the conscience of the court. *Weimer v. Karch*, 153 P. S. 385.

445. Where money which is due to a person is paid to him without fraud, he may retain it although he could not have recovered it at law. Where the sheriff paid to the plaintiff in an execution the amount due to him as disclosed by the searches and it was afterwards discovered that a city claim was a prior lien and the sheriff was compelled to pay such lien, it was *held*, that the sheriff could not recover the amount of the claim from the plaintiff in the execution. *Krumbhaar v. Yewdall*, 153 P. S. 476.

446. Upon the distribution of the proceeds of real estate of a joint stock company and a contest between judgment creditors, it was *held*, that the company did not acquire title until the execution and delivery of a deed from the grantor (a married woman) as required by statute. *Gardner v. Meadville Glass Works*, 8 C. C. 199.

447. In a contest over the proceeds of a sheriff's sale upon a *fiery facias*, the court has no right to direct the sheriff to make distribution; it can only require the sheriff to pay the fund into court. *Leinaw v. Albright*, 10 C. C. 171; s. c. 28 W. N. C. 165.

448. If real estate of a decedent be sold under execution, the proceeds, over and above the execution and costs, should be paid to the executor or administrator upon his entering security. The money will not be ordered into court. *Phillips v. Phillips*, 4 Del. 348.

449. The personal representatives of a deceased defendant are entitled to the

balance of the proceeds of a sheriff's sale of real estate; it is the duty of such representatives to distribute the money to the persons entitled. *Phillips v. Phillips*, 4 Del. 476.

450. An orphans' court sale for the payment of debts discharges liens against the interest of the heirs, and the orphans' court will award the share of an heir to a judgment creditor. *Miller's Estate*, 6 Kulp 75.

451. That the auditor awarded the fund to a claimant without identifying his lien, was held not to be a fatal irregularity which a person could complain of, who was shown to have no right to participate in the distribution. *Helison's Estate*, 6 Kulp 466.

452. Upon the distribution of a fund arising from the sale of real estate of a decedent under an execution, the same should be distributed as real estate, and it should not be charged with any of the expense of administration. *Kennedy's Estate*, 1 Lack. L. N. 135.

453. A commissioner appointed to make distribution of the proceeds of a sheriff's sale has a right to pass upon the evidence and to reject evidence of his own motion. *Bowman v. Bowman*, 1 York 215.

454. Where, at the time of the delivery of an assignment for creditors, the stock of the assignor had been levied on by virtue of several executions against the assignor, and the sheriff delivered the goods to the assignee under agreement to be by him sold and the proceeds applied to the satisfaction of the several executions according to the order of priority of lien; it was held, that the prior right of the first execution creditor could not be defeated on the ground that his execution was prematurely issued; such an irregularity can only be taken advantage of by the defendant. *Hanika's Estate*, 138 P. S. 330.

455. Creditors who have not reduced their claims to judgment have no standing to restrain by injunction the distribution of a sheriff's sale, on the ground that the

judgment under which the sale was made was fraudulent and collusive. *Kelly v. Herb*, 157 P. S. 41.

456. Where the owner of land which is charged with liens makes a conveyance which is fraudulent as against creditors, a sheriff's sale under a judgment subsequently obtained against the grantor passes only the title of the fraudulent grantee and the prior liens are not affected. *Niederhofer v. Bange*, 1 York 38.

457. A constable cannot levy upon goods subject to a prior levy of the sheriff so as to entitle his execution to share in the distribution of the proceeds of the sheriff's sale. *Vanvalzal v. Croman*, 1 Dist. Rep. 190.

458. A special *feri facias* against corporate franchises, under the act 7 April 1870 (Brightly's Purdon 431), cannot issue until an ordinary *feri facias* has been issued and returned unsatisfied; but if the officers and creditors of a corporation permit a sale under a special *feri facias* without the issuance of a previous ordinary writ and bid in the property themselves, they cannot object after the rights of such third parties have vested; in such a case the execution creditors in the order of priority are entitled to the proceeds of the sale to the exclusion of the general creditors. *Valle v. Arnold Manufacturing Co.*, 6 Del. 69.

459. Where the report of an auditor distributing the proceeds of a sheriff's sale has been lost after confirmation *nisi*, the court may inquire into the nature of the report and determine the validity of the exceptions without remitting the case to the auditor. *Andrews v. Fishing Creek Lumber Co.*, 161 P. S. 204.

460. Where the proceeds of a sheriff's sale of real estate is in court for distribution, it is not proper practice to impound a portion of the fund to await the trial of a *scire facias sur mechanic's lien* at some future time. *Andrews v. Fishing Creek Lumber Co.*, 161 P. S. 204.

461. A rule will not be granted upon the sheriff to pay over the money made on a writ of *feri facias* until the sheriff

has made a return of his writ. *Freed v. Wells*, 6 Kulp 206; s. c. 4 Del. 451.

462. Under the act 10 April 1862, providing for the distribution of the proceeds of sheriff's sales in Allegheny county, if the sheriff report a schedule of distribution not in accordance with the list of liens as certified by the proper officers, the act of the court in confirming the schedule is not conclusive and he may be held liable in an action of damages; and this, whether the error in the schedule was intentional or by mistake. *Campbell v. McCleary*, 166 P. S. 1; affirming s. c. 15 C. C. 220.

(c) **Marshalling of assets.**

463. Where a life estate and remainder are sold together under a mortgage for the debt of the life tenant and there remains a surplus, the same may be distributed in two ways; either the life estate may be valued and each receive their share in cash, or the surplus may be treated as real estate, and its investment directed until, with its accumulations, it reaches the value of the land, and then award the interest to the life tenant and at his death the corpus to the remaindermen. *Datesman's Appeal*, 127 P. S. 348.

464. Upon a sheriff's sale of the entire estate, a life tenant is not entitled out of a surplus in the hands of the sheriff, to an amount expended for trifling permanent improvements without the consent of the remaindermen. *Ibid*.

465. Where land bound by a judgment is sold subject to it, the judgment debtor's own land is primarily liable and the vendee's land sustains the relation of surety. But if the latter be subsequently sold at sheriff's sale the said judgment will be paid thereout, but the amount thereof will be deducted from the amount of a judgment held by the original judgment debtor against his vendee, the defendant in the execution. The judgment creditors of the latter are entitled to be subrogated to the rights of the original judgment creditor against his debtor. *Wolf v. Ferguson*, 129 P. S. 272.

466. There being two funds on different executions against two distinct properties of the same defendant, an auditor appointed to distribute one fund may receive evidence as to the other, and marshal the assets and adjust the claims with reference to both funds. *Kendig v. Landis*, 135 P. S. 612; s. c. 26 W. N. C. 353; affirming s. c. 7 Lanc. 217.

467. Where properties in West Virginia and in Pennsylvania were assigned by a general assignment for creditors, the proceeds of a subsequent sale were distributed so that creditors secured by a trust deed of the West Virginia property were first paid thereout, and the proceeds of the Pennsylvania property were then distributed to the judgment-creditors remaining unpaid in the order of their priority. *Moss's Estate*, 138 P. S. 646; s. c. 27 W. N. C. 300.

468. Where, after the entry of a judgment, portions of the land bound thereby were demised for oil and gas production, and upon the issue of an execution, the grantees, under the act 22 April 1856 (*Brightly's Purdon* 1095), applied for an order on the plaintiff to sell first the unaliened land or otherwise on payment of the judgment, to assign the same, and the petitioners paid the money into court; it was held, that independently of the act 22 April 1856 the petitioner having paid the money into court in compliance with an order made at the plaintiff's instance, such payment was the equivalent of a payment to the plaintiff and it was not error for the court to enter a final order for the assignment of the judgment to the petitioner. *Porter v. Vanderlin*, 146 P. S. 138.

469. Where a wife's land is mortgaged for the husband's debt, a subsequent judgment creditor of the husband cannot claim that the mortgagee shall proceed first against the property of the wife, nor can he claim to be subrogated to the mortgagee's security against the wife; in such a case the wife is but a surety for the mortgagee for the husband. *Zeller v. Henry*, 157 P. S. 1.

470. Where the owner of a second mortgage has released the timber on the land from the lien of his mortgage and then taken an assignment of the judgment on the first mortgage, he will not be permitted to issue an execution on the judgment and sell both the land and timber, but the court will confine the execution to the land alone in the first place and will only order a sale of the timber if the proceeds of the first sale are insufficient to satisfy the first mortgage. *Pratt v. Waterhouse*, 158 P. S. 45.

471. Where a lessee under an oil lease has bought judgments which were liens upon the leased premises prior to the execution of the lease, he has a right to issue execution on the judgments and to sell the property subject to the leasehold estate; in such a case he has an equity to have the estate of the defendant in the judgments sold in the inverse order of the conveyances made by him, and the court, under the act 22 April 1856 (Brightly's Purdon 1095), has authority to make an order enforcing this equity. *Porter v. Vanderlin*, 158 P. S. 146.

472. Pieces of land subject to a common encumbrance, when sold successively, are liable for the encumbrance in the inverse order of alienation; a mortgagee who, with knowledge of a sale and conveyance by the owner, of a portion of the mortgaged premises, subsequently releases other portions of the land, cannot levy his debt out of the portion of the land first sold. *Turner v. Flenniken*, 164 P. S. 469.

473. Where a debtor conveys a portion of his property subject to a general lien, and the balance is subsequently sold at sheriff's sale; upon distribution, the creditors with a lien only upon the portion sold at sheriff's sale cannot compel the general lien creditor to look to the portion first conveyed. *Hoffman v. Leach*, 5 Kulp 313.

474. Where one mortgage covers four pieces of land and another covers only three of them, the latter mortgagee may, at sheriff's sale, on the former compel the

sheriff to first sell the piece on which the selling mortgagee has the sole lien; equity will compel a creditor who has a lien on two funds, as against a creditor who has a lien on one only, to resort to the fund on which he has the sole lien. *Lehman v. Tammany*, 7 Kulp 235.

475. Where the liens against the defendant were, first, a judgment on all his realty in favor of K; second, a mortgage on part only in favor of V; and third, a judgment on all in favor of Z; and K's judgment was paid in full without designating any particular fund; it was held, that it would not be presumed that K first exhausted that fund upon which V had no lien, where such a presumption would work injury to the rights of Z. *Keesey v. Noedel*, 2 York 165.

(d) Costs.

476. Upon distribution of a fund in court, made on execution, the fees of the plaintiff's attorney are not entitled to be paid out of the fund. *Philadelphia & Reading Railroad Co.'s Appeal*, 3 Atlan. 838.

477. Upon the distribution of the proceeds of a sheriff's sale, the costs of the audit should not be imposed upon a judgment creditor who succeeds in excluding as fraudulent a judgment prior in date to his own. *Hummel v. Hummel*, 155 P. S. 198.

478. Upon the distribution of the proceeds of the sheriff's sale of real estate, the costs of audit will not be allowed to the reduction of the plaintiff's claim, the first lien creditor, where the ground of contest was merely a suspicion of fraud and collusion, unsupported by evidence. *Duffy v. Duffy*, 9 C. C. 256.

479. Where money is ordered into court by a judgment creditor who asks for the appointment of an auditor, the costs of the audit should be paid out of the fund; and this, although the judgment of such creditor be subsequently set aside. *Griffs v. Griffs*, 12 C. C. 390.

480. Where the proceeds of a sheriff's sale were ruled into court by the claim-

ant, who had an auditor appointed and found in favor of the plaintiff in the execution; it was *held*, that the entire fund was payable to the plaintiff and that the costs of the audit were chargeable upon the claimant. *Kraemer v. Mullin*, 12 C. C. 190.

481. Where two executions were issued upon judgments by confession and only the second contained a waiver of the exemption, and the amount realized by the sale was less than the exemption, the costs of the second execution were first deducted and the balance was distributed to the first execution creditor. *Kiefer v. Kiefer*, 14 C. C. 545.

482. Where no sale is made or money paid upon a writ of execution, but the plaintiff satisfies the judgment upon receiving security for the debt, interest and costs which is made a lien upon the defendant's land, the sheriff is not entitled to commissions upon the debt. *Irvin v. Jones*, 16 C. C. 97; s. c. 3 Dist. Rep. 782.

483. Where there are several liens against the land which is sold by the sheriff upon a junior lien and the sale does not produce enough to pay off the senior lien, the sheriff's costs on the writs of *feri facias* and *venditioni exponas* on which the money was raised are payable out of the proceeds of the sale. *Drake v. Hayes*, 2 Lack. Jur. 297.

484. Where exception is made by lien creditors to the sheriff's return upon the ground that the judgment upon which the sale was made is invalid, and the auditor finds against the exceptants, the costs of the audit will be charged against the fund where it appears that the exceptants had probable cause to object to the return. *Drake v. Hayes*, 2 Lack. Jur. 297.

485. Where the proceeds of a sheriff's sale are paid into court by agreement, the costs should be placed upon the fund; an unsuccessful claimant who has not made the audit necessary should not be visited with the costs. *Hartman v. Garner*, 7 Montg. 199.

(e) Wages.

(1) Notice of claim.

486. A notice which does not set forth a business of the defendant coming within the statute, or the nature or kind of labor, or that the property seized was used in the defendant's business, is insufficient. Defects in the notice cannot be cured by affidavits. *Zealberg's Appeal*, 3 Cent. 253.

487. Upon an assignment for creditors in order to give preference to wages claims; it was *held*, under the acts 9 April 1872, 13 June 1883 and 3 June 1887 (since further amended by the act 12 May 1891, *Brightly's Purdon* 2074), that the claim filed must set forth the amount of wages due and preferred; the character of the services, and that the same were rendered in and about the business carried on; that the labor was done within six months; so the process must sufficiently be set out and described and the claimant must set forth that his claim is a lien on the specific property levied on or assigned. As to such persons not engaged in the operations mentioned in the first section of the later acts, the act 22 April 1854 (*Brightly's Purdon* 140), allowing the preference of one hundred dollars, is still in force. *Paul's Estate*, 148 P. S. 121.

488. Upon the distribution of the proceeds of real estate assigned for creditors, no claim for wages is entitled to preference unless it has been filed in the prothonotary's office within three months after the same became due and owing. This proviso was originally contained in the act 7 April 1872 but was repealed by the act 8 May 1874, and again re-enacted by the act 13 June 1883, which re-enactment was *held* to be in conflict with article III. sec. 6, of the constitution, and the act 3 June 1887 was *held* to repeal the act 8 May 1874 by implication. *Brown's Estate*, 152 P. S. 401. The proviso was again re-enacted by the act 12 May 1891 (*Brightly's Purdon* 2075).

489. A notice is sufficient which sets

forth a levy of all the goods and chattels of the defendant, his business of hotel-keeping, the character of the labor and services, the times when they were done or rendered, the amount due, and then claims a lien upon the property. *Timmes v. Metz*, 156 P. S. 384.

490. A notice stating the capacity in which the claimant was employed, and designating the business as a "manufactory," is sufficient. *Whitney v. Cope*, 8 C. C. 560.

491. A notice of claim of wages by husband and wife may be included in one notice signed by the husband. *Wiand v. Himmelwright*, 8 C. C. 663.

492. In a notice of a claim for wages, the kind of business in which the defendant is engaged should be set forth or the notice will be *held* to be insufficient. *Leinaw v. Albright*, 10 C. C. 171; s. c. 28 W. N. C. 165.

493. A notice of a claim for wages is sufficient if it recite the first execution by the names of the parties and without the number of the term; it is not necessary that the notice should recite all the executions under which the levy was made. *Wilson v. Gibson*, 10 C. C. 191.

494. A notice of a wages claim should show the officer and others interested that the labor was performed within the time limited by the act, and in a business defined therein; it should also show the sum due and that the property subject to the preferred lien is embraced in the levy. *Garretson v. Harris*, 13 C. C. 333.

495. Upon a sale of personal property by an assignee for creditors, labor claimants are not required to give the assignee notice of their claim, they are simply required to prove their right to preference before the auditor appointed to distribute the fund. *McCleaster's Estate*, 15 C. C. 121.

496. A claim for work done in and about the lumber yard of the defendant or for work performed in and about the stable and house of the defendant, is insufficient as not sufficiently describing the premises; so, the notice should spe-

cifically mention the particular kind of work done, a claim for "work done" is not sufficient. *Kauffman v. Mosser*, 3 Dist. Rep. 90.

497. A notice of a claim for wages is fatally defective which fails to set out the process by which the goods are under execution, or that the amount claimed is a lien on the property. *Coates v. Wright*, 3 Dist. Rep. 392.

498. Under the act 9 April 1872, sec. 3 (Brightly's Purdon 2075), where an employer becomes insolvent, the lien for wages extends to all his property, and in such a case it is not necessary for the claimant in his notice to the sheriff to connect the property levied upon with the special employment in which his wages were earned. *Wolf v. Tillinghast*, 3 Lack. Jur. 209.

499. A notice that the wages were earned as stable boss in connection with a circus and in attending to horses used in a circus was *held* to be sufficiently specific as to the character of the labor and the business of the employer. *Humphreville v. Humphreville*, 11 Lanc. 177.

500. A notice of claim for wages should state expressly that the property subjected to the lien is embraced in the levy. A description of the business of the defendant as a "merchant" is sufficient. *Crater v. Deemer*, 1 Northam. 112.

501. Where a claim for wages stated that it was against the property of the defendant doing business at a certain place, and was for wages for labor and services rendered by him as a laborer and clerk for said defendant in and about said business within six months preceding the date of sale, clerking in store, etc.; it was *held*, that the claim was sufficient. *Osenbach v. Heckman*, 4 Northam. 396.

502. A notice of a claim for wages should be sufficiently full and clear to show that the labor was performed within the time limited by the act, in a business defined therein, the sum due, and that the property subject to the preferred lien

is embraced in the levy. *Wilson Laundry Machine Co. v. Stacks*, 7 York 137.

503. For a proper form of a claim for wages, see note to *Kauffman v. Mosser*, 3 Dist. Rep. 92.

(2) When the claim attaches.

504. A writ of execution may be stayed without the consent of wage claimants; their liens do not attach until the sale when they are entitled to be first paid out of the proceeds. *Mettfett v. Mohn*, 37 W. N. C. 87, reversing s. c. 11 Lanc. 249.

(3) When preference is allowed.

505. Under the act 12 May 1891 (Brightly's Purdon 2074) a labor claimant is not deprived of his preference because he is neither a citizen nor a resident of the state. *McCleaster's Estate*, 15 C. C. 121.

506. Where the claimants were tailors working in a tailor shop connected with a merchant tailoring store, and the shop and store were carried on as part of the same business, and the contents of the store were sold under execution; it was *held*, under the act 13 June 1883 (amended by the act 12 May 1891, Brightly's Purdon 2074), that the claimants were entitled to a preference for their wages out of the fund. *Sproul v. Murray*, 156 P. S. 293.

507. A household servant who is employed to be paid what her services are worth, is entitled to a preference for what they are worth. *Timmes v. Metz*, 156 P. S. 384.

(4) When not allowed.

508. The wages of a common farm laborer were not preferred under the acts of 9 April 1872 or 13 June 1883. *Schwartz v. Rhoades*, 3 Del. 593; s. c. 6 Lanc. 202; *Boyer v. Rensinger*, 4 Del. 368; s. c. 2 Northam. 335; *Noblett v. Groff*, 4 Del. 37; contra, *Wiand v. Himmelwright*, 8 C. C. 663.

509. Farm laborers are entitled to a preference for their wages where their

employment was permanent and not temporary in its character; haymakers and threshers, temporarily employed, are not within the act. *Wilson v. Gibson*, 10 C. C. 191.

510. The act 12 May 1891 (Brightly's Purdon 2074) is constitutional, and includes farm laborers and all other kinds of laborers who work for wages or salaries. *Purefoy v. Brown*, 13 C. C. 281.

511. Wages earned as hostler and laborer in a travelling circus are entitled to preference out of the proceeds of an execution against the employer. *Humphreville v. Humphreville*, 11 Lanc. 177.

512. Where the defendant conducted a job printing office and stationery store, one who canvassed for advertisements and subscriptions to a newspaper and did some reporting, was held to be entitled to a preference for his wages under the acts of 9 April 1872 and 13 June 1883. *Union v. Gracie*, 7 C. C. 188.

513. A book-keeper employed by a manufacturing firm is a clerk within the acts of 9 April 1872 and 13 June 1883. *Parker v. Edwards*, 5 Kulp 419.

514. A millwright employed by the day by a mill furnishing company to put up machinery in flour mills at different places is entitled to a preference for wages earned within six months out of the proceeds of a sheriff's sale of the mill furnishing company's property. *Egleston v. Levan*, 15 C. C. 206.

515. The grading of a railroad under contract is a business contemplated by the act 12 May 1891 (Brightly's Purdon 2074), and laborers employed at such work are entitled to a preference. *Strang v. Adams*, 16 C. C. 21.

516. Where an order for wages was not accepted in writing by the employer as required by the act 10 May 1881 (Brightly's Purdon 221), and the property of the employer was sold under a subsequent execution; it was *held*, that the laborer was entitled to the amount of his order, and that it was immaterial that he might have agreed to pay the money, when drawn, over to the same persons in whose

favor the order was drawn. *Osborne v. Atkinson*, 15 C. C. 639; s. c. 4 Dist. Rep. 291.

517. A postmaster's clerk's wages were not preferred by the acts of 9 April 1872 and 13 June 1883. The act of 1883 includes only clerks employed in stores. *Cary v. Ewing*, 7 C. C. 1.

518. A person employed to sell goods, paying his own expenses and receiving house and road commissions, is a traveling salesman; he is not a clerk employed in a store or elsewhere within the meaning of the act 12 May 1891 (Brightly's Purdon 2074), giving a preference for wages. *Mulholland v. Wood*, 166 P. S. 486.

519. Labor performed by a blacksmith at his shop in shoeing horses and making and repairing tools and implements used upon a farm is not entitled to a preference. *Baldwin v. Baldwin*, 10 C. C. 194.

520. A draughtsman is not a person who is entitled to a preference for his wages. *Leinaw v. Albright*, 10 C. C. 171; s. c. 28 W. N. C. 165.

521. A travelling salesman who sells on commission for a furniture manufactory cannot claim a preference for commissions out of a fund raised by an execution against his employer. *Witmer v. Miller*, 12 C. C. 363.

522. The act 12 May 1891 (Brightly's Purdon 2074) does not apply to the use and expense and wear and tear of a steam engine and separator used in threshing. *Henry v. Sheaffer*, 14 C. C. 237.

523. Under the act 12 May 1891 (Brightly's Purdon 2074) a father cannot claim wages for his own use for labor done by his minor son. *Henry v. Sheaffer*, 14 C. C. 237.

524. Notes given by the defendant to the assignee of wages certificates were held to operate as a release of the preferred lien. *Montgomery's Appeal*, 5 Cent. 200.

525. Upon a sale in this state under execution of the assets of a New Jersey corporation, the New Jersey statute giving a prior lien to wages will not be

enforced. *Baker v. United States Foreign & Domestic Fruit Co.*, 7 C. C. 309.

(5) What wages are preferred.

526. Claims for wages earned after levy and before sale are not entitled to a preference. *Union v. Gracie*, 7 C. C. 188.

527. Wages earned in a manufacturing establishment, where the sheriff does not take actual possession, are entitled to a preference up to the time of the sheriff's sale. *Dixon v. Bellefonte Glass Co.*, 7 C. C. 235.

(6) To what properly the claim extends.

528. Claims for wages against a firm rendered after an individual assignment by a member are invalid as against the assigned estate of the latter. *Fox's Appeal*, 11 Atlan. 228.

529. Under the act 12 May 1891 (Brightly's Purdon 2074), a creditor for wages has no lien on personal property transferred in good faith by an insolvent debtor in payment of his debts; upon an issue between the execution creditor for wages and the transferee of the debtor, evidence is admissible tending to show that the transfer was not made in good faith. *Wilkinson v. Patton*, 162 P. S. 12.

530. Where the defendant's office, store, and house were sold on execution; it was held, that a household servant's preference for wages extended to all the property of the defendant sold. *Union v. Gracie*, 7 C. C. 188.

531. Under the act 12 May 1891 (Brightly's Purdon 2074), laborers employed in peeling bark and squaring timber have a lien for wages upon the fund raised by the sale of the contractors' teams and camp equipage. *Weed v. Robinson*, 14 C. C. 7.

(g) Rent.

532. The lessor in a coal mining lease, reserving a right for coal for domestic

purposes, such a right is discharged by a sheriff's sale of his interest in the land. *Hull v. Delaware & Hudson Canal Co.*, 2 Cent. 786.

533. Upon a sheriff's sale of partnership property under a judgment against the firm, one partner is not entitled to priority of payment for rent of the premises owned by him and leased to the firm. *Barr v. McFall*, 131 P. S. 304.

534. The landlord is entitled to a preference to an amount not exceeding one year's rent, and the fact that by mistake or accident he gives notice of a small sum in excess of the amount due does not destroy his right. The plaintiff in the execution cannot demand that the landlord shall distrain upon the goods of third persons on the premises, so that all the defendant's goods may be sold for the satisfaction of the plaintiff's debt. *Timmes v. Metz*, 156 P. S. 384.

535. Where an execution has priority to an assignment for creditors, it may be agreed between the assignee, the execution creditors and the sheriff, that the assignee shall sell the property levied upon and turn over the proceeds to the sheriff; in such a case the assignee becomes the agent of the sheriff, and a notice by the landlord of the assignor, under the act 16 June 1836 (*Brightly's Purdon* 842), is equivalent to a notice to the sheriff. *Leidich's Estate*, 161 P. S. 451.

536. A clause in a lease that if the tenant make an assignment for creditors or be sold out by the sheriff, the whole rent for the balance of the term shall become due and payable in advance of other claims, is valid, and will be sustained in favor of the landlord upon a distribution of the proceeds of a sheriff's sale of the tenant's property. *Platt v. Johnson*, 168 P. S. 47; affirming s. c. 15 C. C. 587.

537. Where a tenant's goods have been levied upon, a landlord can only claim the amount of rent due at the time of the levy; and this, notwithstanding a clause in the lease, that should the lessee remove his goods or attempt to

vacate during his term, then the whole rent for the unexpired term should at once become due and collectable by distress or otherwise. *Lowry v. Evans*, 2 Lack. Jur. 43.

538. There is no preference for rent accruing subsequent to the date of levy. *Minnig v. Sterrett*, 7 C. C. 73.

539. Upon the distribution of proceeds of sheriff's sale, a landlord is entitled to his rent up to the time of the levy. *Oran's Estate*, 5 Kulp 423.

540. Where a son-in-law of A made a parol lease of A's premises, the principal being known; it was held, that a claim for rent could be properly made either in the name of the agent to the use of his principal or in the name of the principal alone. *Hartman v. Garner*, 7 Montg. 199.

541. Where a landlord fails to notify the sheriff of his claim for rent, he cannot subsequently maintain an action against the execution creditor who has purchased the tenant's goods at sheriff's sale. *Schuyler v. Philadelphia Coach Co.*, 29 W. N. C. 343.

(h) Taxes.

542. A judicial sale divests the lien of a collateral inheritance tax, though made before its appraisal and assessment. *Mellon's Appeal*, 114 P. S. 564; reversing *Beatty's Estate*, 33 P. L. J. 283.

543. School taxes are not payable out of the proceeds of the sale of real estate under the local act of 11 April 1866. *Barclay v. Leas*, 9 C. C. 314.

544. Where a tax collector makes a levy before execution and notifies the sheriff of the tax claim, and permits him to sell, the claim should be paid out of the fund. *Griffs v. Griffs*, 12 C. C. 390.

545. Where real estate was attached on Oct. 20th, 1891, in the possession of the tenant as garnishee; it was held, that as to rent due by the garnishee, the attachment had priority over a subsequent levy by a delinquent tax collector

for city taxes for the year 1891 under the act 19 April 1883, sec. 3 (Brightly's Purdon 1472); in such a case, where the real estate was sold under a mortgage after the tax levy and was purchased by the mortgagee, who, on the refusal of the sheriff to deliver to him the deed, unless he paid said taxes, paid the same, it was held, that such payment was voluntary and did not entitle him to be subrogated to the city's lien or to preserve the lien of the levy for his benefit. *Fletcher v. Evans*, 12 C. C. 440.

546. An orphans' court sale is a judicial sale and divests a lien for taxes in the city of Pittsburgh. *Pittsburgh v. Hughes*, 13 C. C. 535.

547. The act 27 March 1877, sec. 11, P. L. 18, providing that all taxes in cities of the second class shall remain liens until fully paid and satisfied and shall not be divested by any judicial sale except to the extent to which distribution shall be made out of the proceeds, is unconstitutional. *Pittsburgh v. Hughes*, 13 C. C. 535.

548. Under the act 2 June 1881 (Brightly's Purdon 1988), county taxes are a lien prior to all other liens, and a sheriff's sale upon a judgment which is prior in date to the tax lien, but junior to it by reason of the priority given by that act, discharges the tax lien. *Ancona v. Becker*, 14 C. C. 73.

549. Upon the sale of unseated land by an orphans' court sale, taxes which have been assessed against the lands are not payable out of the proceeds. *Brotherlin's Estate*, 15 C. C. 251.

550. Upon the distribution of hand money paid to the sheriff on the sale of real estate, a claim for taxes of which the sheriff had notice has priority; and this, though the purchaser made default in payment and before a final sale the lien of the taxes had expired. *Fidelity Ins. Trust & Safe Deposit Co. v. Byrnes*, 6 Del. 146.

551. Taxes assessed on land for state, county, school and road purposes are not a preferred lien, and are not payable from the proceeds of a sheriff's sale. *Shaeffer v. Shaeffer*, 7 Lanc. 307.

552. Where a sheriff's sale is made of land before the time for returning county and bridge taxes they cannot come upon the fund, for the liability of the land has not then been determined. *Smith v. Meadowbrook Brewing Co.*, 3 Lack. Jur. 145. See *Lancaster County v. Stormfeltz*, 8 Lanc. 194.

553. Under the act 23 May 1889 (Brightly's Purdon 1567), city taxes in cities of the third class are liens on the real estate against which they are assessed, and have priority over all other liens upon the distribution of a fund produced by a sheriff's sale. *Smith v. Meadowbrook Brewing Co.*, 3 Lack. Jur. 145.

554. In school districts in cities of the third class which have not accepted the act 23 May 1889, school taxes after the time fixed for their registry are not liens until registered, and are not payable out of a fund produced by a sheriff's sale. *Smith v. Meadowbrook Brewing Co.*, 3 Lack. Jur. 145.

555. Poor taxes are not a lien upon real estate; the act 2 June 1881 (Brightly's Purdon 1988), by which they are made such, does not apply to cities of the first, second, and fourth classes, and is unconstitutional. *Smith v. Meadowbrook Brewing Co.*, 3 Lack. Jur. 145.

556. Under the act 2 June 1881 (Brightly's Purdon 1988), it was held that a claim for taxes should state what taxes were claimed and when levied, and should conform strictly to the act; otherwise it would not be entitled to priority of payment. *Weaver v. Steacy*, 4 York 205.

(4) Ground-rents.

557. Ground-rents, though made to secure future advances, are not affected by the act of 8 June 1881 (Brightly's Purdon 1322). *Hinchman v. Mishoe*, 47 L. I. 414; *Cunningham v. Gibson*, Ibid. 414.

(k) Mortgages.

558. An assignment of \$10,000, out of the first moneys due and payable on a mortgage for a larger amount, will give priority of payment of that amount over the residue of the sum secured. *Thayer's Appeal*, 9 Atl. 498.

559. If a mechanic's lien for the erection of a building on one of two adjoining lots be filed against both, a sheriff's sale thereunder discharges a subsequent mortgage. The mortgagee cannot allege that any portion of the ground was unnecessary for the use of the building; he should have had the curtilage judicially determined under sections 5-9 of the act of 16 June 1836. *Harbach v. Kurth*, 131 P. S. 177.

560. Upon the distribution of the proceeds of the sale of land under a mortgage, other judgment creditors of the mortgagor, in the absence of fraud and collusion, have no standing to set up the want of sufficient consideration for the bond and mortgage. *Holden v. Banes*, 140 P. S. 63.

561. Where a mortgage has been satisfied of record, and a judgment for the same debt still stands apparently in force, a purchaser may rely upon the record that the same will discharge a mortgage subsequent thereto; and this, though a rule to open the judgment is pending at the time of the sheriff's sale. *Meigs v. Bunting*, 141 P. S. 233.

562. A coal lease mortgage in Schuylkill is not discharged by a sheriff's sale under executions on judgments on claims for labor subsequently performed. *First National Bank of Mahanoy City v. Sheaffer*, 149 P. S. 236.

563. A purchase-money mortgage not recorded until more than sixty days after its execution, will not, upon the distribution of a fund, arising from a sheriff's sale, have preference over mechanics' liens which have attached in the meantime; and this, although the liens were filed against the equitable estate. *Allen v. Oenard*, 152 P. S. 621.

564. Where real estate is bound by a mortgage and subsequent judgments and is bid in by the mortgagee at a sale under the mortgage who fails to pay the purchase money and the land is resold, the amount of the mortgagee's default cannot be set off against his mortgage upon a distribution of the fund raised by the second sale. *Smith v. Wilson*, 152 P. S. 552.

565. Where a mortgage included a smaller tract of land already mortgaged to another party, and in proceedings on the first mortgage the small tract was sold to the plaintiff's predecessor in title, and after the sale the smaller lot was assessed as seated land, and subsequently sold for taxes and bought by the county, which held it for ten years and then sold it to the plaintiff; and the larger lot was assessed as seated land, and was sold for taxes during the time that the title to the smaller lot was in the county; it was held, that the sale upon the first mortgage divested the lien of the second mortgage upon the smaller lot and passed a good title to the purchaser; and further, that the sale of the larger lot for taxes did not pass title to the smaller lot although the title to the smaller lot was at the time in the county. *Brundred v. Egbert*, 158 P. S. 552.

566. A right to take natural gas from land and rights of way and appliances required in obtaining the gas and transporting it to consumers are not "land held in fee" within the exception of the act 7 April 1870 (Brightly's Purdon 431), and a special *feri facias* may issue for their sale under that act. Where a purchase-money mortgagee of such right secured control of two junior judgments and issued a special execution and sold subject to any mortgage existing upon the property, and such mortgagee purchased at sheriff's sale; it was held, that the mortgagee was not entitled to participate with other creditors in the fund realized by the sale. *Greensburg Fuel Co. v. Irwin Natural Gas Co.*, 162 P. S. 78.

567. Where a mortgage was given to

secure two sets of bonds and the first bonds were paid when they fell due and were delivered up to the mortgagor, and subsequently the mortgagor caused the same to be assigned to his brother as collateral security for money which he had borrowed from him; it was *held*, that the brother was not entitled to come in upon the fund raised by a sheriff's sale on the mortgage until the second set of bonds was paid. *Zimmerman v. Raup*, 162 P. S. 112.

568. Where a person takes title to land subject to two mortgages, he cannot at a subsequent sheriff's sale under the first mortgage buy in the property and hold it divested of the lien of the second mortgage; upon a bill by the second mortgagee to continue his lien, evidence is admissible that after the *scire facias* was issued and before the sale plaintiff was ignorant of the proceedings, that defendant was negotiating with him for the purchase of his debt, and that during such negotiation all mention of the proceedings was studiously avoided by the defendant. *Kennedy v. Borie*, 166 P. S. 360.

569. Where all the franchises and property of a corporation were sold under an execution subject to a certain mortgage given to secure an issue of bonds and the corporation was reorganized under the same name; it was *held*, that the sale extinguished the original corporation, and that a second sale under judgments subsequently obtained against the original corporation did not divest the lien of the mortgage. *Reynolds v. Cridge*, 11 C. C. 306.

570. Where land is conveyed by deed containing the words "grant, bargain and sell" and a covenant of general warranty, and the purchaser gives a mortgage for a portion of the purchase money, and the land is afterwards sold at sheriff's sale on a prior encumbrance for more than enough to pay all the liens except the purchase-money mortgage which is due, the holder of such mortgage is entitled to the proceeds of sale after prior liens are satisfied. *Comm'th v. Robinson*, 7 Kulp 253.

571. A mortgage, preceded only by a defective mechanic's lien, is not discharged by a sale under a subsequent encumbrance. *Cook v. Neal*, 6 Montg. 176. See s. c. *Ibid.* 147.

572. A sale upon a judgment accompanying a second mortgage, both entered on the same day with the first mortgage, does not discharge the latter. *Miller v. Fluck*, 26 W. N. C. 213; s. c. 8 C. C. 585.

(d) Judgments.

573. A judgment which has been actually paid has no right to participate in the distribution. *Moseley's Appeal*, 8 Atlan. 165.

574. Where the holder of a judgment against the defendant agreed to apply the same to a debt due by him to the defendant, on condition that the defendant should perform certain independent agreements which he failed to perform, the judgment will be considered as still alive and will have priority on distribution to a subsequent judgment against the same defendant. *McCormick's Appeal*, 14 Atlan. 257; s. c. 12 Cent. 471.

575. A judgment on a bond accompanying a recognizance in the orphans' court is preferred to a mortgage executed subsequent to the recognizance but before judgment thereon. *Heilman v. Leibert*, 1 Northam. 9; affirmed, *Leibert's Appeal*, 119 P. S. 517.

576. Upon the distribution of the proceeds of a sheriff's sale paid into court, a subsequent judgment creditor has no standing to contest the amount of attorney's commissions included in a prior judgment. *Zug v. Searight*, 150 P. S. 506.

577. Where a promissory note was drawn by B to A's order, who endorsed it, and it was then discounted at bank by B, who gave to A his judgment bond as collateral security for the said note and all renewals thereof, and afterwards A endorsed another note for B for a different amount which was not covered by the collateral, and subsequently both notes were combined on renewal into one; it was *held*, on A's issuing execution on his

judgment, that the collateral protected the combined note to the amount of the first note, and that A was entitled to be paid the same out of the proceeds of the execution before a subsequent judgment creditor; and this, although he had not yet actually paid the combined note. *Fulmer v. Boyer*, 11 Lanc. 209.

578. Where the first levy was on a judgment signed by three members of a firm but not in the firm's name, and the second levy was on a judgment against the firm, and it appeared that the property levied upon was firm property and that both judgments were for debts of the firm; it was *held*, that the first levy had priority. *McHose Fund*, 10 Montg. 47.

579. Upon the distribution of the proceeds of personal property where the judgments of the execution creditors were attacked for fraud but the commissioner found in their favor, the court refused to set the finding aside in the absence of gross error in such finding of fact. *Price v. Price*, 3 Northam. 61.

580. Where the lien of the plaintiff's judgment expired before the sheriff's sale of defendant's land thereunder; it was *held*, that the subsequent judgment creditors were entitled to receive the purchase money. *Carl v. Strine*, 1 York 141; affirmed in *Peeling's Appeal*, 2 York 75. See *Hockemeyer v. Hartman*, 2 York 173.

581. Where land was equitably converted by will and a plaintiff levied, condemned and sold a legatee's interest as land; it was *held*, upon a distribution of the proceeds, that the plaintiff was estopped from denying that it was land and the proceeds were awarded to a prior lien creditor. *Wolf v. Porter*, 7 York 194.

582. An auditor has no authority to allow as a set-off against a judgment, an indebtedness due by the creditor to the defendant in the execution, on a transaction between them, which did not relate to the judgment or involve an agreement for a credit upon it. *Baird v. Ford*, 152 P. S. 641.

583. An auditor appointed to report distribution of a fund arising from a

sheriff's sale has no right to disregard a regular judgment which is apparently a first lien; distribution should be made to the liens in their proper order or else should await the determination of the validity of the judgment in question as against the other creditors. *Harris's Estate*, 6 Kulp 409.

584. Where real estate is owned by a partnership as partnership property and it is sold under execution, the fund realized by the sale is distributable to the judgment creditors of the firm according to the priority of the entry of the judgment; such real estate is not converted into personalty as to creditors. *Moore v. Moore*, 153 P. S. 495.

585. Partnership property can be levied upon and sold under an execution against an individual member of the firm where the execution is for a firm debt, and upon the distribution of the money paid into court, it is competent for a creditor to show that an execution against individuals was for a partnership debt and that the debtors were members of the partnership. *McHose Fund*, 10 Montg. 47.

586. Where the land of a decedent was sold under a first mortgage; it was *held*, upon a contest as to the distribution of the balance of the proceeds between two judgment creditors where both judgments had been entered against the decedent's real estate before his death and the first had lost its priority as against the second in the defendant's lifetime, but neither judgment at the time of the sale had been revived within five years from the decedent's death, that the judgment first entered had priority. *McVaugh v. Heist*, 11 Montg. 97.

587. Where a life estate is sequestered under the act 13 October 1840 (Brightly's Purdon 849), the fund in the hands of the sequestrator is payable to the judgment creditors in the order of their priority at the time the fund is brought into court for distribution, and not at the time the sequestrator was appointed; a judgment which is not regularly revived during the term of the sequestration loses its prior-

ity and will be postponed until later judgment whose liens have been continuously maintained by revival. *Holiday v. Bruner*, 153 P. S. 262; reversing s. c. 30 W. N. C. 575.

588. If a judgment, upon revival, have added to it a waiver of exemption and a provision for attorneys' commissions, such additions do not break the continuity of its lien in favor of other liens existing at the date of such revival. *Earley v. Zeiders*, 137 P. S. 457; s. c. 26 W. N. C. 533; reversing s. c. 7 C. C. 569.

589. In the distribution of the proceeds of a sheriff's sale of real estate, where the defendant has waived the benefit of the exemption law in three judgments, he cannot claim it as against the judgment in whose favor there is no waiver. *Weaver v. Steacy*, 4 York 205.

See EXECUTION, VII.

(m) Legacies and charges on land.

590. Where the interest of a devisee in real estate was sold at sheriff's sale under his mortgage, subject to the prior lien of certain legacies, the interest of which was payable by a trustee to certain grandchildren; it was held, that the trustee was entitled to interest on the proceeds payable to him, from the date of confirmation of sale to the date of actual payment. *Hays's Estate*, 130 P. S. 454.

591. A sheriff who appropriates the proceeds of the sale, without applying them to legacies which are prior charges on the land and were discharged by the sale, is liable in assumpsit to the legatees. *Pryer v. Mark*, 129 P. S. 529.

592. Where land was devised in remainder subject to a valuation, and the devisees accepted the real estate, but the valuation money was never paid and the share of one of the devisees was sold by the sheriff and that of the other by an assignee in bankruptcy; it was held, that the lien of the valuation money was not discharged by the sales. *Weiler's Estate*, 12 Lanc. 123.

593. Where a husband and wife conveyed land, charged with the payment of

the legal interest of a certain sum of money, to the grantor and his wife during their joint lives, and to the wife during her life, if she survived her husband, and on the same day the land was reconveyed to the husband subject to the same charge; and subsequently the land was sold by the sheriff and some years afterwards the husband and wife were divorced; it was held, that the charge was not divested by the sheriff's sale; that the wife's interest was not divested by her divorce; and that the lien of the charge extended to every part of the land conveyed, and upon a division of the land the lien could not be apportioned without the consent of the parties for whose benefit it was created. *Blank v. Kline*, 155 P. S. 613; affirming s. c. 10 Lanc. 76.

594. Where a conveyance was made by a husband and wife to their son under and subject to the payment of an annual sum to the husband during his life, and of a less sum annually to the wife during widowhood, and the payment of the purchase money is provided for without interest one year after the death of the husband and the death or remarriage of the wife, such a conveyance creates a fixed lien or charge upon the land which will not be divested by a subsequent sheriff's sale. *Rohn v. Odenwelder*, 162 P. S. 346.

(n) Dower.

595. A widow's receipt for arrearages of her dower, specifying the years for which it was given, extinguishes her title to dower for the years specified, and she will not be allowed to participate in the distribution of a fund arising from a sheriff's sale of the land on which the dower is charged. *Fussett v. Frost*, 167 P. S. 448; s. c. 36 W. N. C. 272.

596. Where a widow's dower was charged on certain purparts which were accepted at a valuation by one of the heirs who gave a mortgage to secure the widow her annual interest and the other heirs their share of the principal at the widow's death, and the land was sold

under the mortgage after the widow's death; it was *held*, that arrearages due to the widow at her death were entitled to be paid to her executor *pro rata*, with the sums due the heirs, the sale having realized less than the valuation. *Hageman v. Esterly*, 11 C. C. 609.

597. Where two joint owners owned three-fourths and another co-owner owned the other fourth and the whole tract was charged with a dower charge of \$2475. payable to nine heirs, of which the last mentioned co-owner was one, and the first two owners paid \$2200 to the other heirs and received their release and subsequently their interest was sold at sheriff's sale; it was *held*, upon distribution, that the third co-owner was not entitled to recover any of the proceeds, as the other two joint owners had already paid more of said dower than they were bound to pay. *Bowman v. Bowman*, 1 York 215.

(o) **Owerty.**

598. Owerty in partition is a lien against the purpart upon which it is charged, and it is payable out of the proceeds of a sheriff's sale of the purpart. *Klinger v. Seiwel*, 6 Kulp 229.

(p) **Municipal and mechanics' liens.**

599. A sheriff's sale of the interest of a vendee of real estate will not divest the lien of a municipal claim against the vendor. *Chester v. Bullock*, 4 Del. 29.

600. Where the work was done and the right to file a lien existed before the sheriff's sale, but the claim was not filed until after the sale; it was *held*, that the claim was discharged by the sale and would be stricken from the record. *Philadelphia v. Cox*, 12 C. C. 240; s. c. 29 W. N. C. 519.

601. A sum assessed for the construction of a main sewer in a third class city against property devised to the testator's widow and assessed against the same as the property of the heirs, is a lien against said property and has priority to the lien of judgments entered

in decedent's lifetime. *Haus's Estate*, 12 C. C. 74.

602. In distributing a fund raised by sheriff's sale, interest should be allowed on mechanics' liens to the date of the sale only and not to the date of distribution. *Allen v. Oxnard*, 152 P. S. 621.

603. A purchase-money mortgage not recorded until more than sixty days after its execution will not, upon the distribution of a fund arising from a sheriff's sale, have preference over mechanics' liens which have attached in the meantime; and this, although the liens were filed against the equitable estate. *Allen v. Oxnard*, 152 P. S. 621.

604. If judgment be not obtained on a mechanic's or municipal lien within five years, it is not entitled to participate in a distribution of the proceeds of the property at sheriff's sale. *Norton v. Dietrich*, 1 Northam. 129.

(q) **Lien of agister.**

605. An inn-keeper agister has a specific lien upon an animal for boarding and keeping; where such an animal is sold under an execution and the proceeds of sale exceed the amount of the execution, the agister is entitled to be paid out of the fund. *Gross v. Emig*, 3 York 205.

(r) **Damages.**

606. Where damages were assessed to A for opening a street through his property, and after the time for appeal had elapsed without A having appealed, although appeals of other owners were pending, A's property was sold by the sheriff, and subsequently the court ordered the street to be opened on payment of the damages; it was *held*, that the portion assessed for A's property was payable to A and not to the vendee of the purchaser at the sheriff's sale. *Arnold v. Schaum*, 10 Lanc. 377.

(s) **Issue.**

607. Upon the affidavit of a subsequent lien creditor that prior judgments are without consideration, and for the pur-

pose of hindering, delaying and defrauding creditors, the court, under the acts of 16 June 1836 (Brightly's Purdon 854) and 20 April 1846 (Brightly's Purdon 854), have no discretion but to award an issue. *Schwartz's Appeal*, 21 W. N. C. 246; s. c. 13 Atlan. 302.

608. An issue need not be awarded if the record show that it will be unavailing; nor will the court grant an issue on a question of law. *Montgomery's Appeal*, 5 Cent. 200.

609. Upon the distribution of the proceeds of a sheriff's sale under a mortgage a petition for an issue will not be granted on the petition of the tenants alleging that they were not made parties to the *scire facias*, and that they could prove by other evidence than that offered on the trial that nothing was due on the mortgage. *Thompson's Appeal*, 126 P. S. 434.

610. If upon distribution of the proceeds of a sheriff's sale a judgment confessed for the arrears of a dower charge be attacked by other creditors as fraudulent and collusive, the fraud and collusion cannot be established by casual declarations of the plaintiff and defendant, not made in each other's presence, the same being denied by both parties under oath. *Kintzel v. Kintzel*, 133 P. S. 71.

611. A rule to open a judgment at the instance of a subsequent creditor will be discharged as a matter of course. The proper practice is to apply for a rule on the plaintiff and sheriff to show cause why the money produced by the sheriff's sale should not be paid into court, and dispute the validity of the judgment before an auditor, or apply for an issue to be tried in court. Under the act 16 June 1836 (Brightly's Purdon 854) the right to an issue is not a matter of right; an issue will be refused where the application is resisted and sustained by depositions which are sufficient. *Moore v. Dunn*, 147 P. S. 359; affirming s. c. 10 C. C. 79. As to the proper practice in such cases, see the opinion of Arnold, J., in this case.

612. Under the act 20 April 1846 (Brightly's Purdon 854) it is the duty of the common pleas to determine whether the facts in dispute are material, and if they are not so, to refuse the issue; where the affidavit shows fraud upon the part of the defendant, but fails to connect the plaintiff with the fraud, and the execution is not in excess of the debt due, an issue will not be awarded. *Loeffler v. Schmertz*, 152 P. S. 615.

613. An issue will not be awarded where the request for the issue embraces questions of law instead of fact, and where it is manifest that the matter to be tried cannot affect the decision. *Wolfe v. Oznard*, 152 P. S. 623.

614. Upon the distribution of the proceeds of a sheriff's sale an issue will not be awarded upon testimony merely tending to prove circumstances of suspicion; alleged fraud must be established either by direct proof or by clearly proved facts sufficient to warrant a presumption of its existence. *Hagy v. Poike*, 160 P. S. 522; affirming s. c. 4 Northam. 57.

615. Upon an issue to determine whether the judgment upon which the execution was issued was given for the purpose of defrauding creditors; it was held, that the jury would not be permitted to infer a fraudulent intent from the mere fact of preference, where it appeared that there was an actual debt due; a judgment cannot be impeached without evidence tending to show either some advantage or benefit to the debtor beyond the discharge of his obligation, or some other benefit to the creditor beyond mere payment of his debt, or some injury to the other creditors beyond mere postponement. *Werner v. Zierfuss*, 162 P. S. 360.

616. Upon distribution of the proceeds of a sheriff's sale a party plaintiff to any judgment may be called as for cross-examination by any other person interested in the distribution. *Harris v. Berry*, 7 C. C. 239.

617. Mere creditors of the defendant have no right to an issue, under the acts

of 16 June 1836 and 20 April 1846 (Brightly's Purdon 854), to try a question of fraudulent entry to delay creditors on the distribution of the proceeds of a sheriff's sale; and this, though they brought suit before the execution issued under which the sale was made. *Filbert v. Filbert*, 9 C. C. 149.

618. An issue will not be awarded upon the petition of a subsequent creditor averring that the previous judgment was confessed for more than was due, without alleging the insolvency of the defendant. The sheriff will not be required to swear to his answer to such petition. *O'Donnell v. Poike*, 12 C. C. 638.

619. Where a judgment is attacked on the ground of fraud, an issue will be granted where the affidavits allege that the judgment was confessed for more than was due; that the defendant was insolvent, that the intention was to defraud other lien creditors, and that the defendant had offered to confess such a judgment to another creditor, naming him. Upon an application for an issue the question will be decided by the court upon the affidavits alone and not upon depositions. *Lynch v. English*, 4 Del. 481.

See AUDITORS.

XVI. When a subsequent execution will be entitled to a preference.

620. A first execution creditor will not be postponed to a subsequent execution if he do not interfere with the sheriff in the performance of his duty, nor give any directions to him inconsistent with the exigencies of the writ. *Stroudsburg Bank's Appeal*, 126 P. S. 523.

621. If no levy be made on a first writ of *fieri facias* and the property be sold under a subsequent writ, the money made must be appropriated to the second writ, leaving the first execution creditor to an action against the sheriff for redress. *Ibid.*

622. That a constable who had made a

levy, on learning of a subsequent execution in the hands of the sheriff, handed his writ to the sheriff and permitted the latter to sell, does not constitute an abandonment of the first levy, and will not postpone it on distribution. *Miller v. Getz*, 135 P. S. 558.

623. The lien of a levy is not lost by reasonable indulgence to the defendant, given him in good faith for the purpose of allowing him to raise money to save his goods from sacrifice. *Connell v. O'Neil*, 154 P. S. 582.

624. When five successive *pluries fi. fas.* were issued during a period of nearly two years and not in good faith, but to protect the debtor's property from other creditors; it was *held*, that the last writ would lose its priority over earlier writs of other creditors. *Hall v. Vanderpool*, 156 P. S. 152.

625. Upon an agreement between an execution creditor by which the writ is returned levied, and the defendant is allowed eighteen months in which to make payments from time to time, the lien of the writ is postponed to the writs of other judgment creditors who subsequently issue execution. The mere fact, however, that an execution creditor issued a *pluries fieri facias* after having directed that a *fieri facias* and an alias should be returned unexecuted, is not sufficient to sustain a finding that the *pluries* was issued for the purpose of lien only and not to enforce the collection of the debt. *Sweet v. Williams*, 162 P. S. 94.

626. Where the owner of a senior judgment satisfied the judgment by mistake and the court subsequently struck off the satisfaction; it was *held*, that the judgment did not lose its priority of lien over junior judgments in existence at the time the satisfaction was entered, but as to a judgment entered pending the rule to strike off the satisfaction where the plaintiff advanced money upon the state of the record; it was *held*, that such judgment might be asserted in priority to the satisfied one but not as against the intermediate judgments; such latter judgment

would only be entitled to be paid upon distribution where the fund was large enough to pay the intermediate judgments and would have gone to the junior judgment if the senior judgment had been actually paid. *McCune v. McCune*, 164 P. S. 611.

627. Where a levy is not actually made and the sheriff never has the goods in his possession, the execution will not defeat the claim of a creditor or a subsequent purchaser; even after an actual levy, a failure to proceed for fifteen months would render the levy absolutely void as against a subsequent purchaser. *Glazier v. Sawyer*, 11 C. C. 34.

628. A first execution will not be postponed to a second, merely because the first plaintiff innocently requested the sheriff to allow the defendant to retain the possession of the property, where it appears that the sheriff was not influenced by the request but allowed the defendant to retain possession for other reasons. *Meyers v. Rasely*, 3 Northam. 178.

629. An execution will not lose its priority unless the evidence clearly shows that there was an intention to use it simply as a cover; mere leniency is not sufficient, nor is the sheriff's failure to close the defendant's place of business. *Wolf v. Tillinghast*, 3 Lack. Jur. 209.

630. Where the attorney of the first execution served a notice on the sheriff as the attorney of a third party, notifying the sheriff not to sell certain goods levied upon; it was held, that such notice must be regarded as a direction by the first execution creditor not to proceed against said property further on her writ, and to postpone her execution as against the proceeds of said property to the execution of a subsequent execution creditor who indemnified the sheriff in selling said property. *Taylor v. Taylor*, 6 York 111.

EXECUTORS AND ADMINISTRATORS.

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I. Letters of administration.

(a) Appointment of administrators.

1. A wife is entitled to letters of administration, though she was deserted by her husband and had obtained a divorce *a mensa et thoro*. *Fyock's Estate*, 135 P. S. 522; affirming s. c. 7 C. C. 425.

2. Upon an issue to determine the sanity of an intestate at the time of his marriage to a woman who claims administration as his widow, the inquiry is, as to the decedent's mental condition at the very time of the marriage ceremony, but evidence is admissible of his condition both before and afterwards as bearing upon his mental condition at the time of the marriage. *Nonnemacher v. Nonnemacher*, 159 P. S. 634.

3. A widow's right to letters of administration is not divested by a mere living apart from her husband without objection from him. *Ross's Estate*, 11 C. C. 601.

4. Where a widow was excluded by the register from administration on the

ground of business incompetency, the court reversed the register's action upon proof that she was a woman of intelligence and a person of good and sound judgment. *Scanlon's Estate*, 12 C. C. 339.

5. A widow will not be excluded from the administration of her husband's estate because of disagreement between her and her husband in his lifetime and differences after his death with other members of the family. *Scanlon's Estate*, 12 C. C. 339.

6. Where a widow refuses to take out letters of administration on the ground that the alleged assets are her own property and letters are subsequently granted to another person, she cannot, by abandoning her adverse claim, obtain a standing to have the letters revoked and administration granted to herself. *Lewis's Estate*, 15 C. C. 397.

7. Where a grand-daughter, an only lineal descendant of an intestate, refused to take out letters of administration during her lifetime, and upon her death she disposed of all her estate; it was held, that after her death, letters of administration would not be granted to collateral kindred of the grandfather. *Rapp's Estate*, 12 C. C. 609.

8. Where the personal estate of a decedent is insolvent, but he leaves real estate derived from his mother, letters of administration will be granted to a maternal cousin in preference to a paternal uncle. *Cantlin's Estate*, 13 C. C. 381.

9. Upon an application for letters of administration the court refused to set aside the only person having a legal right to the administration, because of the fact of his being affected with the disease of locomotor ataxia. *Robertson's Estate*, 1 Dist. Rep. 317.

10. Where a creditor applies for letters of administration, but fails to qualify by entering bonds, the court will not disturb the register's appointment three weeks thereafter of a deputy escheator as administrator. *Jakey's Estate*, 15 C. C. 377; s. c. 35 W. N. C. 476.

11. Where an alleged creditor demands the grant of letters of administration, he must establish such a *prima facie* claim against the estate as would entitle him to recover either upon a distribution or in an action before a jury. *Brann's Estate*, 7 Kulp 369.

12. If all the kindred refuse or are incompetent and no creditor applies, the register may grant letters of administration to any fit person. *Frick v. Baldwin*, 4 Cent. 676.

13. The register cannot disregard the clearly expressed wish of the heirs, whether residents or non-residents, and grant letters to a stranger. *Schau-fuss's Estate*, 5 Kulp 275.

14. The register cannot pass over a competent claimant for letters of administration and appoint a stranger; and this, though the latter be the nominee of a majority of the parties in interest. *Comfort's Estate*, 12 C. C. 571.

15. Non-residents have no right to administration, though the register should appoint their nominee; so letters may be revoked on their application if granted without their consent. *Frick v. Baldwin*, 4 Cent. 676.

16. One who stands in the relation of a party litigant to an estate is legally incompetent to administer upon it; this principle applies only to controversies affecting the corpus of the estate and not to disputes as to its proper disposition. *Robertson's Estate*, 1 Dist. Rep. 317.

17. The commonwealth has a right to be heard on the question of the appointment of an administrator in respect to estates subject to the collateral inheritance tax; a claimant, otherwise entitled, will be refused letters where it is shown that he has authorized or permitted the removal of personal property of the estate from this state when the tendency of such a removal is to the hindrance or delay of the commonwealth in the collection of its collateral inheritance tax or the lessening of her security therefor. *Robertson's Estate*, 1 Dist. Rep. 317.

18. The issue of letters of administra-

tion cannot be regarded as an adjudication that the decedent died intestate, in a proceeding to prove a lost or destroyed will. *Buchle's Estate*, 14 C. C. 99; s. c. 33 W. N. C. 393.

19. Administration is not necessary to enable an heir to take title to personal property where there are no creditors and only one heir. *Hege's Estate*, 12 Lanc. 105.

(b) Revocation of letters.

20. The acts of 29 March 1832 (*Brightly's Purdon* 623) and 1 May 1861 (*Brightly's Purdon* 625) do not authorize the revocation of letters of administration, for the reason that the administratrix has given a stranger an irrevocable power of attorney to act for her in the settlement of the estate. *Johnston's Appeal*, 11 Atlan. 78.

21. Letters of administration improperly granted to a stranger should be revoked by the register, or the orphans' court will direct a revocation. *Schau-fuss's Estate*, 5 Kulp 275.

22. Where letters of administration are granted to a stranger and the heirs at law join in a petition for their revocation, they should be promptly revoked. *Comfort's Estate*, 12 C. C. 571.

23. Letters of administration will not be revoked merely because they were granted on the day of decedent's death and in the absence of imperative necessity. *Comfort's Estate*, 12 C. C. 571.

24. Where letters of administration are granted by the register to a fit person, the appointment will not be revoked because of the expressed wish of the decedent that a certain other person should be appointed. *Groves's Estate*, 4 York 191.

II. Letters testamentary.

25. The probate of a will and the grant of letters testamentary cannot be set aside by the register of another county on the ground that the decedent was a non-resident. *Shoenberger's Estate*, 139 P. S. 132; s. c. 27 W. N. C. 129.

26. The word "residence" in the act 15 March 1832 (Brightly's Purdon 574) has the same significance as the word "domicil" at common law; upon an application for letters testamentary, the question of domicil is one of intention and must be determined by the acts and declarations of the decedent himself. *Lewis's Estate*, 10 C. C. 331.

27. An appeal from the register of wills in the granting of letters testamentary must be accompanied by a bond with two sureties and approved by the register; such an appeal must be supported by testimony. *Winklefoose's Estate*, 5 York 151.

III. Administration bonds.

(a) When an executor must give security.

28. Executors, in view of the uncertainty of their lives, and the large encumbrances on their real estate, were required to give bonds. *Colton's Appeal*, 3 Cent. 580.

29. An order upon an executor to enter security under the act of 1 May 1861 (Brightly's Purdon 625) will not be reversed unless there has been a clear abuse of discretion by the court below. *Sharp's Appeal*, 9 Atl. 860.

30. An executor will be required to enter security under the act 1 May 1861 (Brightly's Purdon 625) where it appears that he is insolvent. *Fagan's Estate*, 34 W. N. C. 67.

31. Upon a devise of all the real and personal property to a wife during her natural life or so long as she remains a widow, to be applied by her for her own proper use and for the maintenance and education of the minor children, with power in the executors to sell, if necessary for that purpose, and a further provision, that after death or remarriage all the remaining part be sold or disposed of, and the proceeds divided among the children; where the widow was one of the executors; it was held, that she took the right of possession and use of the personal estate as widow and legatee and not as

executrix, that she was not confined to the income, nor could she have been required to give security, and on her death, the surviving executor was chargeable only with such personal estate as was then remaining. *Heppenstall's Estate*, 144 P. S. 259.

32. Where an insolvent executor has been ordered to give security and the bond cannot be found in the office, and there is nothing upon the record to show who the surety was, it is proper to order the executor to enter new security or be dismissed. *Longenberger's Estate*, 148 P. S. 564.

33. An executor will not be required to enter security pending an issue to determine the validity of a will, merely because such issue has been awarded. *Smith's Estate*, 14 C. C. 161.

(b) Liability of surety.

34. The surety on an administration bond cannot relieve himself from responsibility by notice under the act of 14 May 1874 (Brightly's Purdon 972) to a creditor to proceed to collect. *Kauffman v. Comm'th*, 8 Atl. 600.

35. Where the attorney of an administrator made a deposit of estate money with a private banker and received a certificate of deposit therefor payable in one year with interest, the transaction was held to be a loan, unauthorized by law, for which the administrator was responsible on the insolvency of the banker; and where the administrator became insolvent and the attorney, who was also surety on the administration bond, paid the amount lost; it was held, that the deposit having been the act of the attorney and done without the knowledge of his co-surety, the latter was not liable to make contribution. *Eshleman v. Bolenius*, 144 P. S. 269; reversing s. c. 8 Lanc. 9.

36. Where a person is both attorney and surety of an administrator, he is amenable to the jurisdiction of the orphans' court, and if he has possession of the property of the intestate, a decree

may be entered against him personally for the amount in his possession. *Watts's Estate*, 158 P. S. 1.

37. In an action upon an administrator's bond, it is no defence that the surety had not been informed for two years that the money had not been paid over by the administrator, and that the administrator was solvent and able to have paid the amount for nearly two years after the order to pay, but that no steps had been taken to compel payment. *Comm'th v. Degitz*, 167 P. S. 400.

38. A delay of nineteen years in calling upon the sureties of an administrator to answer the latter's default is such unwarrantable laches as will bar the proceeding. *Niewind's Estate*, 40 P. L. J. 385.

IV. Dismissal of executors and administrators.

39. An executrix may be removed from office where she has removed from the jurisdiction of the court and resided for over a year in another state. *James's Estate*, 10 C. C. 220.

40. An executrix will be removed where it appears that she agreed, in an action against an insurance company, that judgment might be entered for the defendant; and this, although she defends her action on the ground that the policy had already been paid to her son, who had applied the proceeds to the testator's debts. *James's Estate*, 10 C. C. 220.

41. Where an executor, as a result of a spirit of resentment and hostility towards his co-executors, refused to join in a mortgage for the support of the widow; it was held, that he might be removed, but where he subsequently agreed to sign the mortgage, the order for his removal was suspended subject to his good conduct. *Bicking's Estate*, 14 C. C. 661; s. c. 15 C. C. 284.

42. The dismissal of executors was refused, upon an allegation that they had undertaken the management and control of the real estate without authority, where the answer set forth that the devisees

withheld personalty from the executors and hindered and embarrassed them in the performance of their duties, and also denied misconduct or fraud on the part of the executors. *Young's Estate*, 16 C. C. 54.

43. Where lands descend under the intestate law, the deeds belong to the heir, and a refusal by an executor to permit their inspection is good ground for removal. *Tompkin's Estate*, 6 Kulp 99.

44. The removal of an executor who has moved out of the state is discretionary with the court. *Grotz's Estate*, 1 Northam. 96.

45. An executor and trustee will not be removed on the petition of his co-executor and trustee, upon the ground that his continuance in office will jeopardize the interests of the estate unless that fact clearly appears; it will not be done on the ground of a mere disagreement between them, nor to gratify the malice or bad feeling of one against the other. *Morgan's Estate*, 26 W. N. C. 236; s. c. 47 L. I. 155.

V. Inventory and appraisement.

46. An executor who includes a judgment in his inventory is not thereby estopped from setting up a claim to its ownership. *Stewart's Estate*, 137 P. S. 175; s. c. 26 W. N. C. 553; affirming s. c. 1 Lack. Jur. 225.

47. An executor who has put in his inventory a bank account standing in decedent's name, is not estopped from proving that the money was his own. *Eichhorn's Estate*, 7 C. C. 433; s. c. 24 W. N. C. 364.

48. The value fixed by the appraisers is not to be overcome except by strong convincing proof to the contrary. *Fox's Estate*, 5 Kulp 218.

49. Where a will provided for the appraisement of real estate, and appraisers were appointed under the act 17 April 1869 (Brightly's Purdon 602), the court set aside the appraisement, where it appeared that the appraisers were led to

understand that the farm contained ninety-two acres more or less, when in fact it contained one hundred acres. *Meyer's Estate*, 5 York 160.

VI. Co-executors and administrators.

50. An executor who has received no part of the assets may maintain an action at law, for a debt due him by the decedent, against a co-executor who has received all the assets. *Pringle v. Pringle*, 130 P. S. 565.

51. One of three executors may satisfy a mortgage held by them as executors upon payment to him and such a satisfaction will discharge the mortgage, where such executors were not technically trustees under the will, and their right to collect the mortgage as between them and mortgagor was a function of their power as executors. *Fesmire v. Shannon*, 143 P. S. 201.

52. Where judgment on a mortgage due an estate was confessed to the two executors; it was *held*, that the surviving executor had a right to receive payment of the mortgage and satisfy the record and that the grant of letters of administration *de bonis non, cum testamento annexo* did not divest the surviving executor of his powers or vacate his appointment. *Packer v. Owens*, 164 P. S. 185.

53. Co-executors were ordered to invest a fund to pay certain legacies as they fell due; the executor in whose hands the money remained became insolvent; a transcript of the decree was entered in the common pleas; the other executor paid the legacies, and, claiming to be subrogated to the judgment in the common pleas, received a dividend thereon out of the assigned estate of his co-executor; *held*, that the dividend belonged to him and was not assets of the estate. *Miller's Appeal*, 127 P. S. 95.

54. An executor who acts with good faith and reasonable diligence is not responsible for the embezzlement of a co-executor; otherwise, if he be guilty of

negligence. *Fesmire's Estate*, 134 P. S. 67; s. c. 25 W. N. C. 544; reversing s. c. 5 Montg. 97.

55. Where a mortgage has been paid to one of two executors, and his co-executor wantonly and obstinately refuses to join in an entry of satisfaction on the record, he is liable to the penalties provided by the act 28 May 1715 (Brightly's Purdon 655). *Crawford v. Simon*, 159 P. S. 585.

56. Where a testator directs that his executors shall invest his estate in good real estate security and the executors fail to reduce certain bonds to judgment until after the obligor has become insolvent, one executor cannot relieve himself from liability on the ground that his co-executor had the custody of the bonds, collected the interest and had the entire charge of the business. *Stong's Estate*, 160 P. S. 13; affirming s. c. 9 Montg. 185.

57. Where one of the executors was a banker and the other a mining engineer, and a deposit was made in the bank of one, and joint checks were drawn upon the deposit and mailed to the widow and heirs, all of whom resided at a distance, and such checks might have been collected before the failure of the bank; it was *held*, that the other executor was not responsible for the loss, especially as the method of distribution had been frequently made and approved by the distributees. *Maffet's Estate*, 7 Kulp 153.

58. One of three executors may recover from the others in assumpsit his share of the commissions awarded by the orphans' court for settling up the estate of the decedent. *Shaw v. Betts*, 4 Atlan. 731.

59. Upon disputes at the adjudication between co-executors about matters which concern them individually, counsel for each will be allowed but part of their compensation out of the estate, without prejudice to their right to recover the balance from their clients individually. *Fox's Appeal*, 125 P. S. 518.

60. Where co-executors claim in a joint account a certain per cent as commissions, the orphans' court has no jurisdiction to

examine into the relative value of their services and to apportion the commissions. *Markle's Estate*, 11 C. C. 13; s. c. 29 W. N. C. 479.

61. If one of two executors has forfeited his right to commissions, the orphans' court may apportion their compensation and reward the other. *Smith's Estate*, 37 P. L. J. 33.

62. The remedy against a co-executor for a share of the commissions allowed is in the court of common pleas. *Woodward's Estate*, 27 W. N. C. 407; s. c. 6 Kulp 7.

63. The execution of joint powers by one of the executors of a will is considered in a note to *Bailey's Case*, 1 Atlan. 135.

64. As to the effect of joint executors filing a joint account, see note to *English v. Newell*, 6 Atlan. 513.

VII. Administrators pendente lite.

65. Where, pending a contest over a will, an administrator *pendente lite* has been appointed, the court will not, before the litigation is determined, order the filing of an account or payment of the funds held by the administrator, to the executors. *Fow's Estate*, 9 C. C. 558; s. c. 28 W. N. C. 134.

VIII. Administrators de bonis non.

66. If a trust be annexed to the office of an executor, on his death, it can only be exercised by an administrator *de bonis non*. *Sanders's Estate*, 5 Kulp 521.

67. An administrator *de bonis non* is entitled to all the assets in the hands of the first administrator; he may recover them in an action at law against the latter's personal representatives. *Miller v. Comm'th*, 2 Cent. 830.

68. It is the duty as well as the right of an administrator *de bonis non* to receive from the estate of the predecessor the assets of the estate, and such right exists notwithstanding the settlement of an ac-

count by the predecessor and a decree of distribution among the heirs of the balance thereon. *Beeler's Estate*, 6 York 125.

69. A bill lies by an administrator *de bonis non, cum testamento annexo*, to set aside a power of attorney given by the testator to the executor and to compel the executor to account for moneys alleged to have been fraudulently appropriated to his own use while acting as attorney in fact for the decedent in his lifetime; and this, though the account of the executor has been confirmed by the orphans' court. *Fidelity Ins. Trust & Safe Deposit Co. v. Gazzam*, 161 P. S. 536; reversing s. c. 2 Dist. Rep. 569.

70. An administrator *de bonis non* is not entitled to recover from a bank the amount of a deposit which originally stood in the name of the intestate, but which the deceased administrator reduced to his possession by a transfer to his own credit and which his administrator has since drawn out. *Sibbs v. Philadelphia Saving Fund Society*, 153 P. S. 345.

71. The register of wills has no power to vacate letters testamentary as to a surviving executor by the appointment of an administrator *de bonis non, cum testamento annexo*, and such a decree could be attacked in a collateral proceeding. *Packer v. Owens*, 164 P. S. 185.

72. Where a trust for a widow is annexed to the office of executor, such trust on the death of the executor can only be exercised by an administrator *de bonis non, cum testamento annexo*. *Sanders's Estate*, 4 York 1.

73. An administrator *de bonis non* is entitled to recover from the representatives of a former administrator, the balance of the account for the purpose of distribution; and this, although the account was filed and absolutely confirmed in the lifetime of the first administrator. *Pierce's Estate*, 11 Montg. 110.

IX. Administrators cum testamento annexo.

74. Where the register admits a will to probate and the executrix refuses to act, the register should grant letters *cum testamento annexo* to her appointee, and such an appointment will not be vacated on the ground that an appeal is pending from the admission of the will to probate. *Coleman's Estate*, 15 C. C. 252.

75. Under the last proviso of sec. 22 of the act 15 March 1832 (Brightly's Purdon 579), that in all cases of an administration with the will annexed, where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue; it was held, that the only limitation upon the discretion of the register is, that he must select from those asking administration, if competent, in the particular class from which the administrator must be selected. *Elliott's Estate*, 12 C. C. 410.

76. Letters of administration *cum testamento annexo* will not be issued where they are based upon the will of a resident of France which is invalid under the laws of that country. *Coleman's Estate*, 13 C. C. 81.

77. Under the act 24 February 1834, sec. 67 (Brightly's Purdon 588), an administrator with the will annexed has power to carry out a direction of the will to sell real estate for the purposes of distribution. *Still's Estate*, 12 C. C. 379; s. c. 31 W. N. C. 252.

See EXECUTORS AND ADMINISTRATORS, VIII.

X. Foreign executors and administrators and ancillary administration.

78. An assignment by a New York executrix, of a claim of her testator against a party domiciled in New York will be recognized in this state to enable the assignee to maintain a suit here. *Elmer v. Hall*, 148 P. S. 345.

79. A Pennsylvania debtor may make payment to a foreign administrator so

long as there are no Pennsylvania creditors; and this, though the debt be secured by mortgage on lands in this state. *Colburn v. Wells*, 1 Lack. Jur. 106.

80. A foreign executor or administrator may make a good assignment of a chose in action in this state, where such assignment is made in the state where the letters were granted and the debtor at the time resides in the same state. *Harris v. Hall*, 11 C. C. 53.

81. Where there are domestic creditors, the executors of a mortgagee, who was domiciled in another state at the time of his death, may be required to account in this state for the proceeds of a mortgage foreclosed by process in this state; such a foreign executor cannot escape liability to so account by proceeding in the name of a merely nominal assignee. *Myrick v. Hutchinson*, 6 Kulp 293.

82. The court will not remit the share of a distributee to the executor of the domicil for the purpose of subjecting it to the claims of foreign creditors, where there are claimants in the jurisdiction of the ancillary. *Del Valle's Appeal*, 3 Cent. 163; affirming *Del Valle's Estate*, 17 W. N. C. 30.

83. An ancillary administrator having the same foreign domicil as the decedent is not entitled to the payment of his individual debt out of the proceeds of the ancillary administration. *Gray's Appeal*, 8 Cent. 414; s. c. 116 P. S. 263.

84. Where an executor took out ancillary letters here, where he sold real and personal property for which he accounted in the court of the domicil, and a legatee who had demanded his legacy from the executor of the domicil and had brought suit for it filed a petition here after a lapse of ten years to compel the filing of an ancillary account; it was held, that the executor was warranted in presuming that the legatee had, by acquiescence, dispensed with the filing of an ancillary account, and that it, therefore, would be inequitable to order the filing of such an account. *Harlan's Estate*, 16 C. C. 51.

85. As to the powers of foreign execu-

tors and administrators, see note to *Gove v. Gove*, 15 Atlan. 122.

XI. Rights and duties of executors and administrators.

(a) Rights generally.

86. The right of a decedent, under a contract of purchase, to have his money refunded if dissatisfied with the property, descends to his legal representatives on his death. *Fuller v. Dempster*, 11 Atlan. 670.

87. Upon the death of the vendee of land and a taking possession by the vendor after a tender of a deed by the vendor in the name of the heirs of the vendee, and the refusal of the same by his administrator, the latter cannot recover the purchase-money already paid; the heirs not being a party, and their interest not being shown to have been divested. *Wise v. Walker*, 10 Atlan. 28.

88. If real estate of a decedent be sold under execution, the proceeds, over and above the execution and costs, should be paid to the executor or administrator upon his entering security; the money will not be ordered into court. *Phillips v. Phillips*, 4 Del. 348.

89. Where a fund is raised by the sheriff's sale of decedent's real estate, the balance, after the payment of liens, must be paid to the executor or administrator of the decedent, and cannot be distributed by an auditor appointed by the common pleas; the jurisdiction of the orphans' court is exclusive; but it seems that when the case gets into the orphans' court, the issue before the auditor, although it fell with the proceedings in the common pleas, may be used to inform the conscience of the court. *Weimer v. Karch*, 153 P. S. 385.

90. Upon the death of a partner, profits made from the continuance of the manufacture of coke was held to follow the ownership of the land, and not to pass to the administrator of the deceased partner. *Rafferty's Estate*, 40 P. L. J. 188.

See DECEDENTS' ESTATES.

(b) Individual claims of executors and administrators against the estate.

91. An order of subrogation being obtained by an administrator, in favor of himself, to the rights of a judgment against the estate, such order was held to be fraudulent against the creditors of the estate and not binding upon them. *Allegheny Valley Railroad Co. v. Jones*, 131 P. S. 86.

92. An administrator may retain an honest debt against the estate, which would otherwise be barred by the statute of limitations, but no interest will be allowed after the grant of letters. *Lazarus's Estate*, 6 Kulp 53; affirmed in 142 P. S. 104; and reversed in 145 P. S. 1.

93. Where an executor is the payee of a note of his decedent, which was overdue at the time of his decedent's death, he must show clearly that he held the note by a title hostile to that of the decedent; he may do so by showing that the note was in his wife's custody immediately after the decedent's death. *Hoffer's Estate*, 156 P. S. 473.

94. Where an executor purchases a claim against his testator's estate for less than its face value, he can recover from the estate only the amount he pays for the claim. *Woods v. Irwin*, 163 P. S. 413; affirming s. c. 13 C. C. 276.

95. Where an executor has advanced money in payment of his testator's debts, he cannot be denied interest thereon because of negligence which did not result in loss to the estate. *Hobson's Estate*, 42 P. L. J. 456.

See DECEDENTS' ESTATES.

(c) Payment of debts.

96. Upon an award on distribution to two persons, co-payees of a note, an administrator, who pays the whole award to one, is liable for such mispayment to the other. *Van Voorhis's Appeal*, 10 Cent. 412.

97. An executor of an insolvent estate, who, in good faith, and in the belief that the estate is solvent, pays a judgment against the decedent and marks such

payment of record, is entitled to subrogation out of the personal estate but not out of the real estate, against junior liens of record at the date of the sale. *Searight's Estate*, 163 P. S. 222.

See DECEDENTS' ESTATES.

(d) Advancements upon distribution.

98. Where an executor is requested by written agreement to advance moneys in advance of distribution for the benefit of one of the heirs, he is entitled to reimbursement out of her share as provided by the terms of the agreement. *Good's Estate*, 150 P. S. 301.

99. Where an executor had power to make advances to a legatee on account of a vested interest, subject to be divested upon a contingency which never happened; it was held, that such executor was entitled to credit in his accounts for advancements made by him under such power. *Barker's Estate*, 159 P. S. 518; affirming s. c. 13 C. C. 419.

100. Where an executor makes a voluntary payment to a legatee, without taking security approved by the court, he does so at his own risk, and a subsequent confirmation of his account, in which he has taken credit for such payment, will not protect him against the subsequent claims of creditors; such legatee may be compelled to contribute to the payment of creditors notwithstanding five years have elapsed since the confirmation of the executors' account. *Robins's Estate*, 4 Dist. Rep. 277.

See DECEDENTS' ESTATES.

(e) Sale of property.

101. Administrators will not be charged with a failure to obtain a better price for real estate sold to pay debts, there having been no objection to the confirmation of the sale. *Merkel's Estate*, 131 P. S. 584.

102. An executor is not responsible for loss on a sale of securities if he acted in good faith; integrity and ordinary prudence are all that is required. *Woodward's Estate*, 27 W. N. C. 407; s. c. 6 Kulp 7.

103. Administrators who sell at public sale personalty within the year are chargeable simply with the proceeds. If, however, the value depreciates, and the sale is delayed until after the year, the loss must fall upon them. *Merkel's Estate*, 131 P. S. 484.

104. Where an administrator, upon a sale of property of the estate, takes notes in payment, he does so at his own risk. *Henninger v. Boyer*, 10 C. C. 506.

(g) Retention of securities.

105. Where an executor owed to his testator unpaid purchase money on a farm, under articles of purchase, the legal title remaining in the testator; it was held to be no breach of duty for him to allow the debt to stand and treat it as a security for the interest to be paid to the widow during her life. *Good's Estate*, 150 P. S. 301.

106. An executor retains securities of fluctuating value at his peril, but where they cannot be sold presently without prejudice to the estate, the court will not order an immediate distribution. *Christian's Estate*, 13 C. C. 283.

(h) Investments.

107. An executor is authorized to invest in bank stock when he does so under instructions from the testatrix herself. In such case, if he makes the investment as executor, and not in his own name, he is not liable. *Pensyl's Appeal*, 15 Atlan. 719.

108. Where the intention of the testatrix as to the discretionary powers of her executor is apparent, the executor will not be held liable for losses incurred by the failure of an investment not authorized by statute. *Barker's Estate*, 159 P. S. 518; affirming s. c. 13 C. C. 419.

109. Where an executor knows that a legatee has not been heard from for years and that payment is likely to be postponed indefinitely, it is his duty to invest the fund, and upon his failure to do so, he will be charged with interest thereon from the end of one year after the date

of the award to him. *Miles's Estate*, 12 C. C. 383.

110. A life tenant has the right to insist upon the sale of unproductive securities and the investment of the proceeds for the purpose of producing income. *Christian's Estate*, 13 C. C. 283.

111. Where a testator gave to his widow for life or widowhood all the rents, issues and income of his estate; it was *held*, that such a clear gift was not cut down by a subsequent power to his executors to change investments, and that under such power they had no authority to collect the rents given to the wife. *Lare's Estate*, 15 C. C. 355; s. c. 35 W. N. C. 447.

(d) Collection of assets.

112. That there is but one fund due to an estate, when letters of administration are taken out, does not limit the authority of the administrator to the collection and disbursement of that fund. *Sweed's Estate*, 10 C. C. 463.

113. Where it was sought to surcharge an administrator with a debt alleged to be due by the decedent's son to his father which the accountant had failed to collect, and it appeared that the only evidence of the debt was contained in a ledger of the decedent which was not a book of original entry and the son disputed the debt, and was silent while the question of his indebtedness to the estate was discussed; it was *held* to be error to surcharge the accountant with the amount of the alleged debt, and it was further *held*, that the presence and silence of the son at the audit did not justify the court in setting off the alleged debt against his share of his father's estate. *Huston's Estate*, 167 P. S. 217.

114. Where an accountant claimed credit for a bond charged in the inventory as uncollectible, and the evidence showed that the bond could have been collected, the accountant was surcharged with the amount of the bond; and this, though she claimed that she had been advised by her counsel, now deceased, that it was uncollectible. *Will's Estate*, 5 York 40.

115. An executor will be allowed a reasonable time to collect and pay over rents before the court will compel an accounting. *Cox's Estate*, 8 Montg. 161.

116. Where executors employed for the collection of a judgment the same attorney whom the testator employed to obtain the judgment, and the latter after collecting the debt became insolvent and failed to account for it; it was *held*, that the executors were not liable for the loss. *Webb's Estate*, 165 P. S. 330.

(k) Management of the estate.

117. Where an administrator without consultation with creditors and with no cautionary order from the court expends the money of the estate upon a leasehold of an iron ore property of a highly speculative and hazardous nature, and the business proves a failure and a large sum is lost to the estate, he will be surcharged with the loss. *Shinn's Estate*, 166 P. S. 121.

118. An ordinary contract of lease of a farm is not such a personal contract as dies with the lessee. An administrator has a discretion whether to give up the contract and let the estate respond in damages or to complete the contract. If the lease be valuable he should realize from it, and he is entitled to credit for his expenses in conducting it. *Walker's Estate*, 6 C. C. 515.

119. Where a decedent left a large estate consisting of coal mines, stocks and real estate; it was *held* to be proper for the executors to employ a superintendent and to furnish him with an office. *Maffet's Estate*, 7 Kulp 153.

XII. Powers of executors and administrators.

(a) Generally.

120. An executor cannot bind the estate by endorsing and discounting promissory notes; where the money obtained on such notes was used by the executor for the estate; it was *held*, that while he might have a legal claim therefor against

the estate and the holder of the notes might be entitled to be subrogated to his rights and remedies, this could only be determined on the distribution of the estate. *Farmers' Nat. Bank v. Griel*, 12 Lanc. 28.

121. It is not a fraud in law for an executor to confess a judgment for a *bona fide* debt, barred by the statute. *Woods v. Irwin*, 141 P. S. 278.

122. Where creditors of a decedent do not allege fraud or collusion, they have no standing to ask that a judgment confessed by the executor be opened, on the ground that the debt was barred by the statute of limitations; and this, though the estate be insolvent. *Woods v. Irwin*, 141 P. S. 278.

123. An executor cannot vote the stock of his testator in a joint stock company. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

124. On the trial of an action by an administrator, an instruction that a release by a former administrator duly proved, entitled the defendant to a verdict, was not error, where there was no attempt to impeach the release and no exception taken to the ruling. *Stoever v. Walmer*, 140 P. S. 590.

125. The administrator of a guardian who has entered up a judgment bond given to the guardian as guardian, has no authority to release the lien of the judgment in derogation of the interests of the wards. *Brown v. Thompson*, 156 P. S. 297.

126. Administrators have no power over the land except upon an order of sale for the payment of debts. The rents and profits belong to the heir. *Merkel's Estate*, 131 P. S. 584.

127. Where an executor has authority to collect the rents of real estate but no power of sale, he will not be permitted to open mines or quarries upon the property as against the owner in fee of the remainder. *Cox's Estate*, 8 Montg. 161.

128. Where a lease has been made by the heirs of a decedent, the executor cannot distrain for the rent, and this, although

he has made a subsequent agreement with an assignee of the lessee reducing the rent. *Grier v. McAlarney*, 148 P. S. 587.

(b) Sale of real estate under a power.

129. Where executors were by the will empowered to sell, as the testatrix's husband should direct, it was *held*, that a codicil, made after the husband's death, authorized them to sell unqualifiedly. *Brewer v. Taylor*, 9 Atlan. 515.

130. An order of the orphans' court approving a sale to an executor at his own sale under a previous authority to bid, is addressed to its sound discretion and will not be disturbed by the supreme court. *Dundas's Appeal*, 12 Atlan. 485; affirming *Dundas's Estate*, 43 L. I. 16, 194.

131. If at an executor's sale the executor assures a purchaser that he will take clear of all liens, a purchaser who buys subject to such assurance takes a clear title. *Reiner's Appeal*, 12 Atlan. 850.

132. One who buys at an executor's sale upon the assurance of the executor that he will take a clear title, and relying upon such assurance, expends a considerable sum in improvements, has so far executed the contract that it would be against equity to adjudge a rescission thereof. *Ibid.*

133. An executor selling real estate under a power, and taking a mortgage for the purchase money which is subsequently found to be void, has full power to demand and receive payment from the vendees of such purchase money. *McElroy v. Nucleus Association*, 131 P. S. 393.

134. Under a power to sell "any interest that I may have in the Green Tree Farm remaining unsold at my death"; it was *held*, that the executors had power to sell an interest in the said farm which had been set apart in severalty to the testator after the execution of the will. *Swan v. Covert*, 138 P. S. 306.

135. Equity will not interpose to set aside a sale by executors under a power; even under the allegation that it was made to deprive the legatees from getting the full value of the land sold. *Applica-*

tions for relief should be made in the orphans' court. *Cascaden v. Cascaden*, 140 P. S. 140; affirming s. c. 7 Montg. 9.

136. Where executors have a power of sale within a fixed time, during that time they have some discretion; after its expiration they have none. *Fahnestock v. Fahnestock*, 152 P. S. 56.

137. Where a testatrix gave the whole of her estate to three of her daughters for life, and upon the death of each of them, to the survivors, and upon the death of the last survivor, she directed any surplus to be divided among her other children, and she directed her executor by, and with the advice, consent and approval of "my said named daughters and legatees" to sell her real estate; it was *held*, that the words "said named daughters and legatees" referred to the three daughters alone, and was not intended to include other legatees, and that a deed by the executor and two surviving daughters passed a good title. *Hackett v. Milnor*, 156 P. S. 1.

138. Where a testator authorized his three children to sell the real estate, and appointed them executors, and two of the children, by will, gave their interests to the surviving brother; it was *held*, that the surviving brother could, as surviving executor, take a good title to the land. *O'Rourke v. Sherwin*, 156 P. S. 285.

139. Where an executor sold certain of the decedent's property and agreed that the purchaser should pay for it by giving credit upon an account which he claimed against the estate, and the price of the property was fully accounted for and distributed among the creditors of the decedent and the purchaser's personal account was excluded from the distribution; it was *held*, that the contract was valid and the executor could not subsequently recover the price of the property from the purchaser. *Neely v. Bair*, 157 P. S. 417; affirming s. c. 5 York 179. See s. c. 144 P. S. 250.

140. Where a testator gave all his real and personal estate to his wife, so long as she remained his widow, and after her

death to his children, and made his wife sole executrix, giving her the power to sell a portion of the real estate, if necessary, to pay debts; it was *held*, that a deed executed by the widow under the power passed a good title to her grantee. *Doran v. Piper*, 164 P. S. 430.

141. Where a testator directed the whole of his residuary estate, real and personal, to be converted into money as soon as practicable and paid over to certain legatees mentioned, and in the following clause authorized his executors to sell and dispose of his real estate in Pennsylvania and other states, and he further directed that as soon as may be, for the best interests of his estate, his executors convert into money all his unproductive real estate excepting *inter alia* a certain eight-acre lot in the city of Pittsburgh; it was *held*, that the power of sale as to all of the real estate remained in the executors, and that they could pass a good title to a portion of such eight-acre lot. *Pennsylvania Company for Ins. on Lives & Granting Annuities v. Leggate*, 166 P. S. 147.

142. An executor will not be surcharged with an alleged loss on the public sale of real estate, upon the testimony of experts as to its value. *Hazzard's Estate*, 6 C. C. 637; s. c. 46 L. I. 180.

143. An executor who, under a power in the will, sold the decedent's house nine days after the latter's death, was disallowed a claim for auctioneers' commissions under a contract made at a still earlier period. *Sayer's Estate*, 8 C. C. 32.

144. Upon a devise of all the rest, residue and remainder of the testator's estate, real, personal or mixed, to executors in trust, "that they receive, collect, secure, and obtain and reduce into possession all the capital, principal money or interest by me invested or held"; it was *held*, that the testator's real estate was included in the trust and that the executors had power to sell it. *Arrott's Estate*, 9 C. C. 536; s. c. 28 W. N. C. 199.

145. Where a legacy and an annuity

charged upon certain real estate are the only claims against the estate, and the property is sold by the executor under a power and purchased by the legatee and annuitant, the executor will be directed to accept their receipts together with the legal costs properly to be deducted from the purchase money and to make them a deed. *Parker's Estate*, 13 C. C. 453.

146. Where a will devises and bequeaths the real and personal property to daughters and gives the executors a naked power of sale, this does not authorize the executors to collect the rents or to lease, manage and control the real estate and apply the income to the payment of debts. *Young's Estate*, 16 C. C. 54.

147. Where a testatrix uses the words "estate" and "effects" as identical and orders the executor to convert her effects into money, the language will be held to include real estate and to confer upon the executor a power to sell the same. *Schropp v. Shaeffer*, 2 Dist. Rep. 362.

148. Where a testator who was the owner of certain real estate provided in his will for its sale specifically by the executor, and subsequently after acquiring other real estate and adding a codicil to his will which contained no express provision relative to the same, he died; it was held, that the executor had no power to sell the after-acquired real estate without an order of the orphans' court. *Miller v. Kissler*, 3 Lack. Jur. 309.

149. An executor directed to sell real estate at "public vendue" cannot of his own motion sell the same at private sale. *Ross v. Coolbach*, 6 Lanc. 290.

150. A sale made by an executor under a power and a deed to the purchaser will not be set aside by the orphans' court merely because the land brought less than others would afterwards give for it; and this, though the land brought less than the fair market value, unless abuse or improvidence on the part of the executor be shown. *Cascaden's Estate*, 7 Montg. 55.

151. Where an executor is directed to sell real estate, it is his duty to keep it in repair and make it productive. *Corby's Estate*, 1 Northam. 219.

152. The orphans' court can set aside a sale made by an executrix under a power in the will, where it was made at a grossly inadequate price, and the property was in five days re-conveyed to her. *Hanck's Estate*, 37 P. L. J. 8.

153. A purchaser of real estate from an executor under a power will not be compelled to accept a title, where the land is burdened with restrictions of which he had no notice. *Morgan's Estate*, 47 L. I. 466.

154. A power given to an executor to sell the real estate during the lifetime of the testatrix's husband and a direction to sell immediately after his death, does not empower the executor to enter into an agreement giving the privilege to buy at any time within three years and a half; such an agreement is not a use of the power but a surrender of it for a fixed time and will not be enforced by a decree for specific performance. *Hickok v. Still*, 168 P. S. 155; s. c. 36 W. N. C. 329.

155. Upon a conveyance by an executor or a trustee under a power conferred by will, the orphans' court has no jurisdiction to ratify or confirm the same unless the aid of the court is required to supply some omission in the terms of the instrument creating the power. *Schwartz's Estate*, 36 W. N. C. 337

(c) Exercise of discretion.

156. Where executors were authorized to purchase and sell real estate at public or private sale, and for the best interests of testator's children, and to hold in trust for them or give it to them as they might regard their best interests; it was held, that the power of sale was discretionary and without limitation as to time of sale; it was further held, that the discretion was absolute and did not need the aid of the orphans' court to support it; and this, even against the objection of an assignee for creditors of a beneficiary. *Marshall's*

Estate, 138 P. S. 260; *Marshall's Estate*, 147 P. S. 77.

157. An executor will be restrained from exercising a discretionary power of sale where such sale would be prejudicial to the interests of a devisee for life, and not necessary to protect the estate of the testator. *Espenship's Estate*, 13 C. C. 294.

158. Equity will not control the proper exercise of a discretion conferred upon executors; where a testator directed his executors "as soon as, in their judgment, the best interests of my estate" to set aside sufficient money to secure an annuity which was to have precedence over all other legacies, and the executors did not set aside the money, the court refused to compel them to do so, or to pay other legacies which were made payable after the setting aside of the annuity fund. *Young's Estate*, 4 Dist. Rep. 293.

159. Upon the bequest of a fund in trust, with the discretion in the executors to pay over such amounts of the principal as they may deem necessary in case of want, the court refused to order the executors to pay over the principal, on evidence of the poverty of the legatee, the matter being in the discretion of the executors. *Hubley's Estate*, 8 Lanc. 129.

(d) Purchase at own sale.

160. A residuary legatee who is the wife of the executor, may purchase the share of another residuary legatee through the medium of her husband. *Dundas's Estate*, 136 P. S. 318; s. c. 26 W. N. C. 481; affirming s. c. 44 L. I. 284; 45 Ibid. 226.

161. An executrix who obtains leave to bid at her own sale does not lessen her duty to obtain the highest obtainable price; the court charged her with an excess of 28 per cent which she obtained on a resale from one with whom she had been in communication before she obtained leave to bid. *Hacker's Estate*, 7 C. C. 202; s. c. 24 W. N. C. 318.

162. Where an executor by leave of court purchases at his own sale, under circumstances affording ground for sus-

picion of fraud, the orphans' court may vacate the sale even after the confirmation and delivery of the deed and the payment of the purchase money, where the rights of third parties will not be affected. *Myer's Estate*, 9 C. C. 439.

163. An executrix will not be compelled to join with her co-executrices in a deed for land, where it appears that the latter had sold the land to their husbands at public sale for an inadequate price and without an order of court and against the defendant's protest. *Schaefer's Estate*, 10 C. C. 100.

164. An administrator who purchases himself, at his own sale, through a third party, cannot hold the title against the distributees; in making sale he occupies a trust relation towards the heirs or devisees in the same degree as towards creditors. *Henninger v. Boyer*, 10 C. C. 506.

165. Where executors were authorized by a decree of the orphans' court to sell property at private sale in part to themselves and to charge their proportion of the purchase money against their shares and such decree was assented to by all the parties in interest; it was held, that such decree could not be questioned at the auditing of their accounts upon the ground that the will did not authorize such a method of payment. *Markle's Estate*, 11 C. C. 13; s. c. 29 W. N. C. 479.

166. Where real estate of a decedent is sold by the sheriff for arrears of ground rent, his administrator may become a purchaser in his own right and will not be required to account to the estate for a profit made by the sale of his bid. *McManus's Estate*, 14 C. C. 379; s. c. 34 W. N. C. 222.

XIII. Liabilities of executors and administrators.

(a) Generally.

167. Where a purchaser of real estate from a decedent surrenders his contract of purchase to the executor, on the latter's agreement to pay a claim against the former for the erection of a building,

such promise is not within the act of 26 April 1855 (Brightly's Purdon 943) and the promisor is liable personally to the third party for his claim. *Fehlinger v. Wood*, 134 P. S. 517.

168. A suit for abuse of legal process will not lie against an administrator for issuing an execution upon a judgment of the decedent; and this, though previously notified that the judgment was paid in the decedent's lifetime. *Mell v. Barner*, 135 P. S. 151.

169. Where a debtor in his lifetime gives money to a third person to pay the debt but such payment is not made until after the death of the debtor, such payment will relate back to the time when the money was received by such third person, and the debtor's administrator will not be held responsible therefor. *Carr's Estate*, 15 C. C. 354; s. c. 35 W. N. C. 448.

170. Where an executor promises to pay to the distributees certain moneys outside of the balances determined by the accounts, a release by the distributees of the balance does not apply to the executor's promise. *Reilly v. Daly*, 159 P. S. 605.

171. Where an executor has power to invest on bond and mortgage and he buys in land upon which he has taken a mortgage, if he deals with it in his representative capacity he renders the estate liable for a breach on his part of a contract made by him to sell the same. *Yerkes v. Richards*, 37 W. N. C. 69; reversing s. c. 11 Lanc. 308. See s. c. 153 P. S. 646.

172. An executor taking land under an unconditional devise, is not liable for the payment of pecuniary legacies when no assets have come into his hands applicable to the payment of such legacies. *Duvall's Estate*, 146 P. S. 176.

173. Where executors were directed to permit the sister of the testatrix to occupy a certain dwelling, and during her occupancy she erected a fence having a door therein which extended, when wide open, ten inches beyond the limit within which obstructions were permitted; it was held, that such executors were not

responsible for an injury to a passer-by, caused by the sudden opening of the door against him. *Eisenbrey v. Pennsylvania Co.*, 141 P. S. 566.

174. Where an executrix has delayed selling the real estate for the payment of debts, and has lived on the land for a number of years, she must pay all the taxes, interest, repairs and improvements, and will not be allowed credit for the same in her account. *Villee's Estate*, 9 Lanc. 353.

175. Where executors made certain payments for repairs, it was held, that the contractors with whom the testator was alleged to have contracted for the repairs were not competent witnesses to prove that the testator entered into the contract, and the executors were not allowed credit for such payments against the objections of the parties interested. *Burton's Estate*, 15 C. C. 367.

176. Where certain repairs were made by an administrator to the testator's real estate under a contract made by the decedent in his lifetime, the permission of the court having first been had and obtained; it was held, that the administrator was entitled in his account to a credit for the sum expended in said repairs. *Burton's Estate*, 4 Dist. Rep. 107.

177. Where an executor or administrator assumes charge and control of the real estate, he is liable to account to the devisees or heirs as a trustee or agent; not in the orphans' court, but in another forum. *Young's Estate*, 16 C. C. 54.

178. Executors directed to rent until they can sell will be charged with no more rent than they could have secured by reasonable diligence; they will be allowed credit for repairs and fertilizers. *Smith's Estate*, 6 Kulp 76.

179. Rents collected by an administratrix have no place in an administration account; an administratrix is personally liable to the heirs for such rent although she has applied the same to the payment of the decedent's debts. *Graham's Estate*, 6 Kulp 269.

180. Where the son of a lunatic ren-

dered services for the lunatic's wife, and repaired his real estate under an express contract with the committee to pay, and the personal estate was insufficient to pay the claim, but after the lunatic's death his administrator sold the real estate and paid the claim; it was *held*, that credit taken for its payment would be allowed. *Glassick's Estate*, 5 York 205.

181. When an executor receipted for ground rent, and there was no ground rent due the estate, it will be presumed, after eleven years, that he paid it over to the life tenant. *Erdman's Estate*, 7 C. C. 306; s. c. 46 L. I. 444.

(b) When chargeable with interest.

182. An administratrix is not chargeable with interest on her collections deposited in bank, it not being shown that she profited by the deposit. *Johnston's Appeal*, 11 Atlan. 78.

183. Upon an appeal by an executor from a surcharge, he is chargeable with interest on the sum actually found against him during the pendency of the appeal; and this, though on the appeal he succeeded in reducing the surcharge. *Wilson's Appeal*, 11 Atlan. 678.

184. An administrator, who uses the proceeds of testator's stocks for his own purposes, is liable either for the profits realized by the use of the money or six per cent interest. If, however, he pledge such stock to secure a personal loan, and the same is lost to the estate, he is liable for the subsequent accrued dividends if they exceed six per cent. *McGeary's Appeal*, 5 Cent. 852; affirming *McGeary's Estate*, 33 P. L. J. 404.

185. An executor ordered to invest to pay legacies and complying with the order, is not chargeable with the interest thereon for the benefit of the residuary estate; the order was made for the benefit of the legatees. *Miller's Appeal*, 127 P. S. 95.

186. An administrator is not chargeable with interest during the time that an auditor is engaged in settling the account. *Merkel's Estate*, 131 P. S. 584.

187. Where an executrix retained rentals for nine years which should have been distributed, she was charged interest on the same. *Fow's Estate*, 14 C. C. 648.

188. Where an administrator intermingles money of the estate with his own and uses it in his business he is liable for interest thereon, no matter how honest his intentions may be. *Kline's Estate*, 8 Lanc. 356.

189. Where there is a judgment against the administrator in favor of the decedent and he has not had the money therefor actually in his hands as administrator but has personally retained the same, he is chargeable with interest thereon; such interest should be charged against him up to the day the auditor's report was presented and confirmed *nisi*. *Kline's Estate*, 8 Lanc. 356.

190. Executors who act in good faith in not sooner selling land should not be charged with interest on the legacies. *Price's Estate*, 7 Montg. 35.

191. As to the liability of an executor for interest, see *Stewart's Estate*, 1 Lack. Jur. 225.

(c) Costs.

192. An executor who fails to make distribution as directed by the court, is personally chargeable with the costs of a second proceeding to enforce it. *Warner's Estate*, 130 P. S. 359.

193. Although an administrator was surcharged, it is not error to refuse to charge him with the costs of an audit, which would have been necessary in any event. *Merkel's Estate*, 131 P. S. 584.

194. The allowance of costs in the orphans' court is in the discretion of the court, the costs of witnesses of an unsuccessful claimant were placed upon the claimant and the costs of the accountant's witnesses were allowed out of the fund. *Toomey's Estate*, 150 P. S. 535.

195. Where exceptions to an executor's account are referred to an auditor and are sustained, it is proper to place part

of the costs on the estate. *Hoffer's Estate*, 156 P. S. 473.

196. Where an unsuccessful attempt is made to surcharge an administrator with royalties which, it is alleged, should have been collected by him, the costs are properly payable out of the estate. *Hodgson's Estate*, 158 P. S. 151.

197. Where a resident of Maryland owned a farm in Pennsylvania which she directed her executor to sell, and the latter, who was her son, sold the farm and subsequently one of his brothers sued him individually in Maryland to recover a share of the proceeds, and the Maryland court decided that the suit could not be maintained in Maryland; it was held, that upon an audit of the executor's account in this state, he could not be allowed a credit for the costs and expenses to which he had been subjected by the suit in Maryland. *Roberts's Estate*, 163 P. S. 408.

198. Delay in filing an account is ground for putting the costs of the citation on the accountant, but not for forfeiture of compensation. *Fox's Estate*, 5 Kulp 218.

199. Though an administratrix show that the estate is insolvent by reason of her own claim, the estate is still liable for the costs of audit. The costs should not be put upon an attaching creditor of an heir. *Reed's Estate*, 4 Montg. 173.

200. An executor who files his account after the expiration of a year, in obedience to a citation, must pay the costs in the first instance. *Luckenbach's Estate*, 1 Northam. 162.

201. Where the appointment of an auditor to settle exceptions to the account of an executrix was rendered necessary by her failure to employ counsel at the proper time; it was held, that the costs of the audit were properly imposed upon her. *Lau's Estate*, 8 York 173.

202. Where the accounts for a term were confirmed *nisi* and came up for final confirmation and it appeared to the court that illegal fees were allowed therein to the register of wills, clerk

of the orphans' court and prothonotary, the court refused to confirm the accounts and appointed a committee of the bar to file exceptions thereto. *In re Accounts*, 10 Lanc. 139. See *Mumma's Estate*, 10 Lanc. 193; *Reeser's Petition*, 12 Lanc. 33.

(d) Counsel fees and expenses.

203. Upon disputes at the adjudication between co-executors about matters which concern them individually, counsel for each will be allowed but part of their compensation out of the estate, without prejudice to their right to recover the balance from their clients individually. *Fox's Appeal*, 125 P. S. 518.

204. Creditors cannot object to an allowance by an administrator to his counsel of one-half of the amount collected as a contingent fee, except such an allowance be unreasonable and in fraud of their rights. *Mumma's Appeal*, 127 P. S. 474.

205. Allowances were made out of the estate for separate counsel for individual executors on serious questions of title arising between them. *Daisz's Estate*, 6 Lanc. 177; affirmed in *Daisz's Appeal*, 128 P. S. 572.

206. Though great loss has resulted through irregularities but the administrators have acted in good faith, they should be allowed the fees of counsel employed after the irregularities occurred, whose services were necessary and who did not misadvise them. *Merkel's Estate*, 131 P. S. 584.

207. There being no dispute before the auditor, a fee will not be allowed the counsel for the executor. *Bracken's Estate*, 138 P. S. 104; s. c. 38 P. L. J. 132.

208. Where an account was restated under the direction of the auditing judge, at the instance of a legatee, the excepting legatee was allowed counsel fees out of the estate. *Kennedy's Estate*, 141 P. S. 479; affirming s. c. 8 C. C. 376.

209. An executor was disallowed counsel fees for advice as to an improper

claim against the estate. *Good's Estate*, 150 P. S. 307.

210. Counsel fees for the trial of issues *devisavit vel non* cannot be charged to the estate unless it be benefited thereby. *Reimer's Estate*, 159 P. S. 212; reversing s. c. 40 P. L. J. 452.

211. Where an executor agrees in writing to pay out of his commissions whatever fees should be allowed to his counsel, it is no defence in an action to recover the fee that the writing was signed by him in the haste and excitement of the court room and did not contain the agreement as he made it. *Reilly v. Daly*, 159 P. S. 605.

212. Where the executor of a will was a beneficiary to an amount largely in excess of what he would have received under the intestate laws, and the will was contested and the verdict rendered against it and a second trial resulted in a disagreement, and the parties then entered into a compromise agreement by which the executor's share was reduced, and a verdict was rendered sustaining the will, and it appeared from the whole record that the question of testamentary capacity was doubtful; it was *held*, that the taxable costs should be paid out of the estate, but that the executor should not be allowed his claim for counsel fees, stenographer's bill and personal services. *Titlow's Estate*, 163 P. S. 35; affirming s. c. 11 C. C. 625.

213. An attorney for the creditor of a decedent's estate who, without being requested by the administrator, assists the counsel for the administrator in the trial of a cause, is not entitled to be paid out of the estate. *Moore's Estate*, 8 C. C. 447.

214. One of the paramount duties of an executor is to collect the assets of the estate, and if in so doing he acts in good faith, the estate, and not he, must pay his counsel fees; and this, though the effort be unsuccessful. *Smith's Estate*, 11 C. C. 448; s. c. 30 W. N. C. 204.

215. Where a will provided that the expenses of proceedings to contest the same should be deducted from the shares

of the heirs, legatees or devisees who should institute such proceedings; it was *held*, that counsel fees expended in sustaining the will might, upon distribution, be deducted from the contestants' shares. *Fow's Estate*, 12 C. C. 133; s. c. 30 W. N. C. 418.

216. Where a testator named an attorney for the executors; it was *held*, that in case of litigation, they might employ an assistant. *Maffet's Estate*, 7 Kulp 153.

217. Where it becomes the duty of an executor to resist demands made against the fund, he will be allowed counsel fees out of the estate. *Plank's Estate*, 9 Lanc. 249.

218. Where an audit is rendered necessary by reason of a claim which it is the executor's duty to resist, he will be allowed a reasonable sum for attending the audit and for his counsel fees. *Good's Estate*, 11 Lanc. 17.

219. The auditor of an executor's account should not fix the amount of counsel fees to be paid for future services. *Price's Estate*, 7 Montg. 35.

220. Where an executor has made a successful defence to a claim against his testator's estate, he will be allowed his counsel fees out of the estate; and this, though not requested by any one to make the defence, and although his secret motive in doing so was animosity to the plaintiff. *Schweitzer's Estate*, 3 Northam. 40.

221. An executrix was allowed a scrivener's charges for writing deeds conveying the decedent's land, but she was surcharged with an amount paid for the scrivener's services personally to her. *Lau's Estate*, 8 York 173.

XIV. Of a devastavit.

222. An administrator will not be convicted of a *devastavit* from the mere fact that he expended money in a reasonable effort to save the property of his intestate situated in another state. *Shinn's Estate*, 166 P. S. 121.

223. Where a devisee who is also

executor has wasted the personal estate to an amount exceeding the value of his interest under the will, and has become insolvent, he may, in an action of partition, be treated as having thereby received his whole share of the estate. Where a final account has been settled in the orphans' court, and the executor is insolvent or refuses compliance with its decree, a court of common pleas has jurisdiction to award partition in such a case. *Armstrong v. Walker*, 150 P. S. 585.

XV. Accounts.

(a) Citation to account.

224. The accounts of an administrator can only be settled in the orphans' court. *Miller v. Comm'th*, 2 Cent. 830.

225. Upon a sale in partition a portion of the purchase money remaining charged to secure the widow's interest was, at her death, without right paid to the administrator of one of the heirs; *held*, that the orphans' court might compel such administrator to account. *Emerick's Estate*, 6 C. C. 641.

226. One whose interest in the estate depends on a successful termination of his contest to set aside the will, is entitled to demand an account from the executor. *Stewart's Estate*, 7 C. C. 603.

227. A citation to file an account will be revoked if the petition fails to state that the petitioner is a creditor. *Fry's Estate*, 7 Lanc. 107.

228. An executrix having filed an account in 1881, was, on petition of a creditor, in 1885 ordered to file a further account. *Irwin's Appeal*, 9 Atlan. 298.

229. After the lapse of thirty-three years the payment of a legacy is presumed, and a rule by the legatee upon the executors to file an account will be dismissed. *Phillips's Appeal*, 13 Atlan. 906.

230. Pending an issue in the common pleas as to whether certain funds are assets of a decedent's estate or belong to the executrix, the orphans' court will not

interfere and order her to file her account of the same. *Keily's Estate*, 9 C. C. 175; s. c. 47 L. I. 514.

231. Where one who claims to be a creditor, but in fact is not such, obtains a citation upon an executor to settle an account, the proper practice is to file an answer denying his claim, and if he then fail to make out a *prima facie* claim, the citation and petition should be dismissed. *Lightner's Estate*, 144 P. S. 273.

232. A petition for a citation against executors to account for profits earned by them in their business by the use of the moneys of the estate, should not be dismissed on demurrer on the ground of the petitioner's laches, where it is averred in the petition, that at the audit of the executors account, twenty-two years before, the petitioner was represented by her trustee, one of the executors and that he fraudulently concealed the facts relating to the settlement of the estate, and that she was thereby prevented from properly protecting her interests and from attending the audit, and that she had no knowledge of the fraudulent acts until within a short time of the filing of the petition. *Ellison's Estate*, 163 P. S. 315; reversing s. c. 13 C. C. 410.

233. An executor will not be relieved from filing an account for the information of those in remainder though he be given by the will absolute discretion as to the management, conversion and investment of the estate. *Harrison's Estate*, 12 C. C. 388.

234. Upon a petition for a citation to an executor to file an account; it was *held*, that the presumption of distribution and due settlement of an account which might have arisen by reason of lapse of time, was overcome by an admission in the answer that the estate, after the death of the tenant for life, had been retained by the executor. *Palethorp's Estate*, 14 C. C. 287. See s. c. 160 P. S. 316; and see *Palethorp's Estate*, 14 C. C. 288.

235. Where everything connected with the management of an estate shows un-

doubted honesty and integrity and a desire to carry out the wishes of the testatrix to settle everything among themselves, numerous family settlements and distributions will not be disturbed after the lapse of years. *Palethorp's Estate*, 3 Dist. Rep. 760.

236. Upon a petition for a citation for an account, it is sufficient that the petitioner has a *prima facie* right at the time of filing the petition. *McNeal's Estate*, 6 Kulp 271.

237. Upon a petition to compel an executor to account where the pleadings leave the question as to the petitioner's standing in doubt, the petitioner will be given the benefit of the doubt and the executor will be ordered to account. *Kern's Estate*, 11 Lanc. 15.

238. An administrator of an administrator will not be compelled to file an account of the first administration twenty-seven years after the death of the first administrator; after such a lapse of time a presumption arises that the estate was settled and the full distributive share of the petitioner paid to her. *Finley's Estate*, 7 York 201.

239. No appeal lies to the supreme court from a decree of the orphans' court citing an executor to file an account. *Palethorp's Estate*, 160 P. S. 316. See s. c. 14 C. C. 287.

240. Where a widow who was executrix and sole devisee *durante viduitate* collected rents as executrix even after her subsequent marriage; it was held, that she was not liable for the same as executrix, and that the question of her liability could not be determined in the orphans' court, and a petition for an account was dismissed. *Miller's Estate*, 4 Dist. Rep. 408.

(b) Advertising accounts.

241. The orphans' court may, by rule, compel the publication of accounts by the register of wills in a paper designated for the publication of legal notices, and provide for the payment of such publication out of each estate. *McGreevy v.*

Kulp, 126 P. S. 97; affirming *Kulp v. McGreevy*, 5 Kulp 134.

242. The orphans' court in the absence of legislation has no authority to prescribe the amount to be paid for advertising the accounts of executors; the authority of the court is confined to the enforcement of the act of 13 April 1840, sec. 8 (Brightly's Purdon 880). *Register of Wills*, 15 C. C. 479.

(c) Statement of account.

243. The executor of a deceased executor is competent to state the latter's account from his declarations and the declaration of the original testatrix; and this, though the wife of the executor stating the account is the administratrix *de bonis non* of the original testatrix and interested in her estate. In filing the account he is acting in an official capacity and not as a witness. *Law's Estate*, 140 P. S. 444; affirming s. c. 47 L. I. 212.

244. It is in the discretion of the orphans' court to approve an executor's account though it is blended with the distribution account, which fails to state the time for which the rents received were paid. *St. Clair's Appeal*, 15 Atlan. 914.

245. An executor must charge himself with all property of the decedent which came into his hands either before or after the decease; otherwise, he will be surcharged. *Osterhout's Estate*, 8 Lanc. 18.

246. An executor's account should not blend principal with income, nor personality with realty nor administration with distribution. *Parker's Estate*, 12 C. C. 436.

247. Where a husband, as administrator of his wife, charges himself in his account by mistake with money which is really his own, the court may permit him to withdraw it from the account. *Qualter's Estate*, 147 P. S. 124.

248. Where an executor has improvidently included in his account a trust fund, standing in the name of the decedent, such fund may be withdrawn. *Osmond's Estate*, 161 P. S. 543.

(d) Debits.

249. Where an executor owed his decedent money which was secured by notes, and upon the surrender of the notes the executor agreed to maintain his decedent for life, which agreement he fulfilled; it was *held*, after the death of the testator, that the executor was not bound to charge himself with the amount of the notes. *Smith v. Hay*, 152 P. S. 377; *Wagner's Estate*, 152 P. S. 384.

250. Executors are chargeable with the entire income of the estate, as well as the amount they were bound to collect for the protection of the legatees. *Ziegler's Estate*, 4 Montg. 17.

251. Where a testatrix leased certain city stalls in a market and sub-let the same at a profit and her executrix continued the same arrangement; it was *held*, that she was liable to account to the estate for the profit so received. *Fow's Estate*, 14 C. C. 648.

(e) Surcharges.

252. In an effort to surcharge an executor with a sum of money received from decedent, the evidence was *held* sufficient to establish a gift. *Ames's Appeal*, 10 Cent. 301.

253. The court refused to surcharge an administrator with royalties under a coal lease which he never received. *Hodgson's Estate*, 158 P. S. 151.

254. In a feigned issue against an executor to determine whether he is indebted to the estate or not if the evidence be insufficient to sustain the verdict, it will also be *held* insufficient to justify the orphans' court in surcharging him with the alleged debt. *Wagner's Estate*, 152 P. S. 384. See *Smith v. Hay*, 152 P. S. 377.

255. An executor will be surcharged with the penalty he was compelled to pay for neglect in paying the collateral inheritance tax on a legacy, as awarded in a previous account. *Allen's Estate*, 9 C. C. 328; s. c. 48 L. I. 16.

256. Upon the settlement of an execu-

tor's account where it appeared that the decedent, who was in an enfeebled condition of mind, had satisfied a mortgage against the executor for a grossly inadequate consideration, the orphans' court surcharged the executor with the amount of the mortgage. *Pittock's Estate*, 9 C. C. 457.

257. Where an executor has been surcharged and dies, a petition for a peremptory order upon his administrator to sell his real estate to enforce such surcharge does not lie, the prayer should be for a citation to the administrator to show cause why he should not present his petition for authority to sell his decedent's realty for the payment of debts. Such a petition should be entitled in the estate of the executor and not in the estate of the testator, and will not be entertained pending an appeal to the supreme court to test the validity of the surcharge. *Titlow's Estate*, 13 C. C. 445; s. c. 32 W. N. C. 348.

258. Where executors charged themselves in the inventory with an indebtedness of one of their number to the testator, but they failed to show that they used due diligence to secure its payment or that it was uncollectable, they will be surcharged. *Souder's Estate*, 169 P. S. 239; affirming s. c. 15 C. C. 285.

259. A bond given to a decedent passes to her personal representatives, and where such bond was given by the executor of the daughter of the decedent it was *held*, that he could not be surcharged with it as it did not belong to the daughter's estate. *Pennell's Estate*, 6 Del. 75.

260. An executor must account for all property of the deceased which comes into his possession, either before or after the death, and if he fails to charge himself with any item, he will be surcharged with it. *Osterhout's Estate*, 2 Lack. Jur. 95. See s. c. 148 P. S. 223.

261. The orphans' court has no jurisdiction to pass upon the claim of heirs that a widow and administratrix should be surcharged with the rent of property occupied by her. *Brandt's Estate*, 11 Lanc. 321. *Hege's Estate*, 12 Lanc. 105.

262. Where the decedent while sick had money in hand and deposited it in his wife's name for safety and demanded a check from her, so that in case of her death he would have no trouble to get it; it was *held*, on a distribution of his estate, that the widow as executrix would be surcharged with the amount so deposited. *Young's Estate*, 10 Montg. 93.

263. Where an executrix, believing that her husband's will gave all the property to her, farmed the real estate and kept the proceeds, and the property was afterwards sold upon the demand of creditors and the estate proved insolvent; it was *held*, that she was properly surcharged with the value of one year's crop. *Law's Estate*, 8 York 173.

(g) Credits.

264. An administratrix is not entitled to credit for taxes paid by her which were not liens at the time of the sale of the land for the payment of debts. *Smith's Estate*, 8 C. C. 159.

265. A widow who is executrix will not be allowed interest on money advanced to pay debts, where the bequest to her is subject to the payment of debts. *Corby's Estate*, 1 Northum. 219.

266. An administratrix living upon the decedent's property is not entitled to credit for interest paid by her upon a lien thereon, before she took out letters, as against the lien creditor's claim upon the proceeds of the property. *Smith's Estate*, 8 C. C. 159.

267. An accountant who sues out a note due the estate, and is compelled to buy in real estate, is entitled to a credit for his expenses. *Bowler's Estate*, 8 C. C. 522; s. c. 47 L. I. 298.

268. If minor children have a guardian, administrators will not be allowed credit in their account for their maintenance. *Keenan's Estate*, 6 Kulp 73.

269. It is the duty of a life tenant to pay interest on encumbrances, the executor cannot be allowed credit if he

do so. *Geiger's Appeal*, 1 Mona. 547; s. c. 24 W. N. C. 264.

270. Where an executor elected to insure his property as additional security for estate moneys in his hands; it was *held*, that he could not claim credit against the estate for the premiums. *Good's Estate*, 150 P. S. 307.

271. Where a decedent's estate held a mortgage upon a property; it was *held*, that the executor was entitled to a credit for premiums paid by him for the insurance of the property from fire. *Bean's Estate*, 3 York 78.

272. An executrix will not be allowed credit for incidental expenses covering nine years, which expenses are not itemized or supported by vouchers. *Fow's Estate*, 14 C. C. 648.

273. A non-resident executor will not be allowed credit in his account for the cost of procuring a surety on his bond. *Miller's Estate*, 13 C. C. 137; s. c. 32 W. N. C. 232.

274. Whenever it becomes necessary for an executor or administrator to enter security for the proceeds of real estate, he must individually bear the cost of obtaining such security and will not be allowed a credit therefor in his account. *Pickering's Estate*, 4 Dist. Rep. 263.

275. An administrator is not entitled to credit for money paid to a corporation for becoming his surety as administrator, or for becoming his surety as trustee to sell real estate in proceedings in partition. *Eby's Estate*, 164 P. S. 249; affirming s. c. 12 C. C. 601.

(h) Funeral expenses.

276. An executor is liable on an express contract to pay funeral expenses, and in such case it is no defence that they were unreasonable. In the absence of an express contract, however, the plaintiff can recover only their reasonable worth, in ascertaining which the jury may consider the estate of the decedent and his station in life. *Smith v. Teacle*, 8 C. C. 150.

277. Expenses of administration which include funeral expenses, paid by an

administrator out of his individual funds, are not within the statute of limitations. *Duff's Estate*, 37 P. L. J. 493.

278. An executor is entitled to credit for the expense of a suitable tombstone over the decedent's grave; and this, though there be no provision on the subject in the testator's will. *Webb's Estate*, 165 P. S. 330.

279. An administrator will not be allowed credit for a gravestone of such cost as to provoke comment on the contrast between the same and his habits of life; and this, although he may have left a large estate. *Taylor's Estate*, 3 Dist. Rep. 691.

280. Where an estate is insolvent, an executrix will not be allowed a credit for a tombstone. *Villee's Estate*, 9 Lanc. 353.

(4) Exceptions.

281. Exceptions which fail to point out specifically the errors alleged to have been committed will be dismissed. *Teaf's Estate*, 7 C. C. 463; s. c. 26 W. N. C. 310; *Stewart's Estate*, 1 Lack. Jur. 225.

282. Exceptions to an account involving questions of fact must be supported by testimony. *Thomas's Estate*, 5 Kulp 213.

283. After fourteen years the court will refuse to consider exceptions to an account or to listen to evidence in support of them. *Woodward's Estate*, 27 W. N. C. 407; s. c. 6 Kulp 7.

284. An exception to a claim which has never been ruled upon by the auditing judge will not be allowed. The proper practice is to apply for a rehearing. *Young's Estate*, 7 C. C. 287; s. c. 46 L. I. 232.

285. Exceptions not filed in time will be stricken off unless it appear that the neglect was that of the attorney and not of his client. *Zech's Estate*, 7 Lanc. 348.

286. One who is awarded a share under an agreement with legatees has standing to file an exception. *Bracken's Estate*, 138 P. S. 104; s. c. 38 P. L. J. 132.

287. Upon exceptions to an executor's account, a party cannot assert title to a

chose in action in the possession of and claimed by the estate. *Corson's Estate*, 137 P. S. 160; s. c. 27 W. N. C. 84.

288. A rule of court that accounts shall be confirmed *nisi* on the first day of each term, and if no exceptions are filed within four days thereafter, they shall be confirmed absolutely, does not preclude the consideration of exceptions filed after the expiration of the four days with an auditor appointed by the court to consider exceptions which were filed within that time. *Koch's Estate*, 148 P. S. 159.

(k) Adjudication and decree.

(1) Of the adjudication.

289. Where all the parties in interest adjust the account of an executor, an auditing judge has nothing further to do with it. *Barber's Estate*, 46 L. I. 516.

290. The minority of one who has a reversionary or contingent right in the property will not prevent an executor from adjusting the estate of his testator by the consent of all present parties in interest. *Barber's Estate*, 46 L. I. 516.

291. Upon the settlement of the account of a deceased executor as stated by his executor, the individual creditors of the deceased executor have no status to be heard; their claims cannot be adjudicated. *Law's Estate*, 140 P. S. 444; affirming s. c. 47 L. I. 212.

292. Where an account shows no balance for distribution, it is error to hear and determine the claims of creditors, legatees and distributees; the proper practice is to merely audit and settle the account and ascertain its correctness. *Snyder's Estate*, 15 C. C. 253; s. c. 35 W. N. C. 204.

293. The adjudication of an account will not be set aside because of the action of the auditing judge in refusing a continuance for the purpose of obtaining further testimony; that is a matter entirely within his discretion. *Becker's Estate*, 15 C. C. 290; s. c. 34 W. N. C. 576.

294. Upon the adjudication of an executor's account an auditing judge cannot

make an order as to property which cannot, in its existing shape, be brought into the account before him. *McClelland's Estate*, 15 C. C. 375.

295. The adjudication of an executor's account involves no duty on the auditing judge to value real estate not embraced in it. *Potter's Estate*, 4 Dist. Rep. 329.

296. Upon the audit of an administrator's account he may be called and examined by an adverse party as to his disposition of the balance shown in his account. *Kline's Estate*, 8 Lanc. 356.

297. Where an auditor was appointed to pass upon exceptions to an account last filed; it was *held*, that such order could not be so narrowly construed as to prevent the auditor from inquiring into nothing but that which was contained in the last account. *Huber's Estate*, 9 Lanc. 337.

(2) Effect of adjudication.

298. An adjudication upon the account of an executor and trustee ordering the investment of a definite sum for the benefit of a legatee, is conclusive against the claim on a second adjudication, of the legatee for interest on the sum from the death of the testator. *Moyer's Estate*, 141 P. S. 125.

299. Where the auditing of an account was waived in 1868 in the interest of the beneficiaries; it was *held*, that the account so settled and confirmed by the parties was conclusive upon the adjudication of an account filed in 1879 but not called for a hearing until 1881. *Barber's Estate*, 142 P. S. 476.

300. The finding of an auditing judge is equivalent to the verdict of a jury, and where it is approved by the court below, it will not be reversed in the supreme court. *Mayhew's Estate*, 155 P. S. 94.

301. The decree of distribution is a judicial ascertainment of the shares of the parties interested, but an execution will not issue without a previous rule to show cause when, if it appears that the amount has been paid, the accountant has the right to have the record satisfied. *McIntosh's Estate*, 158 P. S. 525.

302. Where a guardian collects the assets of the decedent's estate, pays the debts and retains the surplusage as guardian, the fact that the administratrix charges herself in her account with such surplus, which she had never received, is not conclusive of her liability; there is no reason why the surplus should be paid over to the administratrix only to be returned to the guardian, and the sureties on the guardian's bond are liable. *McIntosh's Estate*, 158 P. S. 525.

303. The findings of an auditing judge on questions of fact, except for clear error, will not be disturbed. *Boyer's Estate*, 7 C. C. 285; s. c. 46 L. I. 232.

304. A decree of the orphans' court upon the adjudication of an executor's account is a final decree, but it is only conclusive as to what is in the account, and is no bar to a petition for an account of moneys not contained therein. *Young's Estate*, 14 C. C. 547; s. c. 34 W. N. C. 165.

305. Where an account was filed with the register who certified it into the orphans' court, and on exceptions filed, it was referred back to the register to be by him restated; it was *held*, that such restatement must be treated as an auditor's report, at least as *prima facie* evidence of the correctness of the account. *Moyles's Estate*, 7 Kulp 215.

306. The confirmation of a first account is conclusive only as to questions which arise in the statement of the account and decree of confirmation. *Reiff's Estate*, 5 Montg. 171.

(3) Order to pay.

307. Where a final adjudication of an executor's account showed a sum due a guardian and it appeared that the executor had made no effort to pay the same for a period of five months, the court made a mandatory order on the executor to pay at once. *Brown's Estate*, 13 C. C. 413.

308. Where a distributee permits the fund to remain in the executor's hands under an agreement that he shall honor her drafts and pay her interest on the

balance, the relation becomes one of debtor and creditor, and the orphans' court will dismiss a petition for an order to pay. *Krogman's Estate*, 14 C. C. 567; s. c. 34 W. N. C. 104.

(4) When an adjudication will be opened.

309. Where an account was filed six months after decedent's death and immediately distributed, the distributees concealing from the auditing judge the fact that the petitioner claimed to be a creditor, the court will open the adjudication and order restitution. *Gallen's Estate*, 8 C. C. 37; s. c. 26 W. N. C. 308.

310. Where an account was filed within the year, the adjudication was opened upon the petition of the husband of the testatrix claiming his distributive share; and this, although the testatrix in her will alleged that he had deserted her. *Wright's Estate*, 12 C. C. 589.

311. Where fraud and concealment are alleged against executors in obtaining a decree confirming their account under which distribution was made, the proper remedy is not by petition to cite the executors to account and to pay over the amount claimed by the petitioner, but an application should be made to set aside the decree upon the ground that it was obtained by fraud. *White's Estate*, 1 Dist. Rep. 508; s. c. 12 C. C. 93. See s. c. 163 P. S. 388; affirming s. c. 2 Dist. Rep. 207.

312. Where the balance for distribution in an account was based upon the inventory and appraisal and not upon an actual conversion into cash, and the distribution is awarded in fixed amounts, the court in a proper case may order the audit to be opened and the award set aside and a supplemental account may be filed and a supplemental audit had. *Page's Estate*, 3 Dist. Rep. 212.

313. An executor's account which has been absolutely confirmed may be reopened upon newly discovered evidence which could not have been procured by due diligence before. *Miller's Estate*, 11 Lanc. 201. See *Bare's Estate*, 11 Lanc. 202.

314. Where an account has been filed, advertised and confirmed without exceptions, a petition to reopen will not be allowed except for error of law apparent on the record or for new matter that has arisen since the decree. *Shaw's Estate*, 7 Montg. 124.

315. An administrator's account can only be reviewed for error of law apparent on the face of the record or for new matter which has arisen since the decree; a review of grace may be granted for new proof discovered after the decree which could not possibly have been used at the time the decree was made. Where omissions from the account are shown to be fraudulent or so large as to indicate fraud, the court will not, however, permit the error to remain uncorrected. *Heany's Estate*, 8 Montg. 108.

316. Upon a petition to open an executor's account a responsive answer must be treated as conclusive until overcome by evidence. *Long's Estate*, 168 P. S. 341; s. c. 36 W. N. C. 331.

317. A petition to open an account and distribution will not be allowed where it does not allege fraud or that the money has not been distributed. *Miller's Estate*, 4 Dist. Rep. 407.

318. No appeal lies from an order of the orphans' court opening a decree of confirmation of an executor's account upon the application of one who was a minor and unrepresented when the account was filed. *Long's Estate*, 168 P. S. 341; s. c. 36 W. N. C. 331.

XVI. Discharge of executors.

319. Where a widow and co-executrix elects to take against the will, and remarries, and her co-executors are discharged, the court will appoint a trustee to take charge of the estate, other than the widow. *Meyer's Estate*, 8 C. C. 374.

XVII. Suits by and against executors and administrators.

320. An administrator whose account has been filed and confirmed, but who

has not been discharged, has a right to sue for a debt due the decedent. *Williams v. Short*, 155 P. S. 480.

321. An action for an alleged tortious conversion of property, while under the dominion of executors and trustees, is rightly brought in the name of the administrator and the trustee *de bonis non, cum testamento annexo*, after the removal of the original trustee. *Pennsylvania Company for Insurance on Lives & Granting Annuities v. Philadelphia, Germantown & Norristown R. R. Co.*, 153 P. S. 160; affirming s. c. 11 C. C. 482.

322. An action will not lie by an executrix to recover damages for the flooding of lands, in violation of an agreement between the testator and the defendants, where it appears that the testator had devised the land to his grandchildren, and that the damages had all accrued after the testator's death. *Webb v. Bennett's Branch Improvement Co.*, 161 P. S. 623.

323. In an action by the administrator of a solvent estate, the defendant may set off against the claim a debt due by the decedent when suit was brought; but in the case of an insolvent estate the decedent's debts maturing after his death are not admissible as a set-off. *Hicks v. National Bank of Northern Liberties*, 36 W. N. C. 424.

324. In an action against executors to establish a personal liability, the naming of the defendants as "executors" will be treated as surplusage. *Smith v. Teacle*, 8 C. C. 150.

325. In an action of trespass *vi et armis* against several defendants, where one of them dies, his executor cannot be brought upon the record by *scire facias* and substituted in place of the defendant, but the plaintiff may pursue the executor in an independent action. *Cowell v. Pitcher*, 13 C. C. 583.

326. Where a testator in his lifetime enters into an article of agreement to sell a house and lot, such agreement works an equitable conversion, and the vendor's interest becomes a chose in action, which

goes to his executors, who are the only persons who have the right to use the legal title to the land to enforce the collection of the purchase money. Where such a suit was brought by other devisees, it was *held*, that the executor was entitled to be substituted as a plaintiff in the suit. *Bender v. Luckenbach*, 162 P. S. 18.

327. A *scire facias sur mechanic's lien* is not within the act 24 February 1834, sec. 34 (Brightly's Purdon 596), which requires widows and heirs to be made parties, in order to charge a decedent's real estate with the payment of decedent's debts. *Reece v. Haymaker*, 164 P. S. 575; affirming s. c. 42 P. L. J. 74.

328. Where executors acting under a power of sale given to them by the will, received the proceeds of certain notes given to them as executors, and the plaintiff claimed as heir at law of the decedent and sued the executors as such; it was *held*, that the orphans' court had exclusive jurisdiction of the controversy. *Barber v. Ross*, 13 C. C. 613.

329. Under the act 19 May 1874, sec. 7 (Brightly's Purdon 1628), the orphans' court will enjoin an executor or testamentary trustee, upon satisfactory proof of such actual misconduct or threatened misconduct as will render the property in his charge likely to suffer loss or be jeopardized by its further continuance under his control; and where the proof is not sufficient to support an injunction, the same will be dissolved without prejudice to a pending proceeding to remove the executor. *Lafferty's Estate*, 15 C. C. 300; s. c. 35 W. N. C. 132.

330. A rule of court requiring a bill of particulars of a set-off will not be enforced against the representative of a decedent's estate in a suit upon the decedent's contract. *Lewis v. Keck*, 2 Northam. 345.

331. An executor or administrator, under the act of 25 May 1887 (Brightly's Purdon 1728), is not required to file an affidavit of defence in a suit on a contract made by his decedent where the cause of action arose before the death. *Kennedy*

v. *Kennedy*, 7 C. C. 311; *Cowden v. Kennedy*, Ibid. 312. See *Malone v. Philadelphia*, Ibid. 613; s. c. 46 L. I. 380; *Wood v. Chamberlain*, 7 C. C. 612.

332. An administrator is not required to file an affidavit of defence where the cause of action arose in the lifetime of the decedent. *Hyde v. Chism*, 9 Montg. 46.

333. When a judgment is entered against the personal representatives of a decedent in default of a sufficient affidavit of defence, within less than a year after his death, the plaintiff should show an unimpeachable record to sustain it; as to the power of the court to adopt a rule subjecting executors and administrators to judgments by default. *Johnson v. Smith*, 158 P. S. 568.

334. Where suit was brought against an executor by a devisee of a farm, to recover the proceeds of corn, which had been planted shortly after the decedent's death and sold by the defendant; it was held to be a sufficient affidavit of defence that the defendant had kept the said proceeds to reimburse himself, in providing for the tenant part of the seed according to an agreement between the tenant and the decedent, the whereabouts of the plaintiff not having been then known and he not having notified the defendant of the acceptance of the devise until after the corn had been cut. *Evans v. Eberly*, 9 Lanc. 227.

335. In a proceeding to charge the estate of a deceased administrator, neither a surviving administrator nor an heir or the latter's husband are competent to testify to any matter occurring in the lifetime of the deceased administrator. *Finley's Estate*, 7 York 201.

336. An executor may, under the act of 2 March 1868 (*Brightly's Purdon* 1142) or under the act of 20 April 1876 (*Brightly's Purdon* 2074), in a suit for manual labor, appeal from a justice without payment of costs. *Beach v. Evans*, 7 C. C. 241.

337. In a suit for wages an administrator may appeal without paying any

costs except the costs of the transcript. *Kauffman v. Newcomer*, 7 Lanc. 255.

XVIII. What actions survive.

338. If a widow dies, who has brought an action for the death of her husband by negligence, her personal representatives may be substituted as parties plaintiff. *Brown v. Philadelphia & Reading Railroad Co.*, 46 L. I. 380.

339. After the death of the plaintiff in ejectment his administrator may proceed and give notice of a claim for mesne profits. *Hart v. McGrew*, 11 Atlan. 617.

340. Death does not revoke the rule of reference in compulsory arbitration, but the arbitrators on the death of the plaintiff cannot make a valid award in his favor until the proper parties are substituted. *Meehan v. Karolin*, 1 Lack. Jur. 305.

See ABATEMENT.

XIX. Executors de son tort.

341. An executor is not called upon to accept or renounce until he is cited to do so; mere inaction or delay unaccompanied by intermeddling cannot amount to an acceptance. The payment by sons named as executors, of their father's funeral expenses, will not charge them as executors, where the payment was not made with funds of the estate and they renounced when cited to qualify. *Ralston's Estate*, 158 P. S. 645.

XX. Compensation.

342. A surviving partner, as executor of his deceased partner, is entitled to compensation for the distribution of any moneys realized from the partnership. *Smith's Estate*, 37 P. L. J. 33.

343. A surviving partner who is also executor of his deceased partner, directed to carry on the business, is entitled to the compensation fixed by the will, in addition to his interest in the profits. *Allen's Appeal*, 125 P. S. 544; affirming *Allen's Estate*, 45 L. I. 227; s. c. 7 C. C. 14.

344. If an executor acts in good faith he is entitled to compensation, though by reason of a wrong construction of the will he has compelled proceedings by interested persons against him to obtain their rights. *Miller's Appeal*, 8 Atlan. 864.

345. Administrators should not be disallowed commissions, if the course of management which resulted in insolvency was recommended by competent advisers and approved by creditors. *Merkel's Estate*, 131 P. S. 584.

346. An executor who uses the money of the estate as his own, keeps no bank account, produces no vouchers, and files an account which causes an expensive audit, is not entitled to commissions. *Geiger's Appeal*, 1 Mona. 547; s. c. 24 W. N. C. 264.

347. An executor who invests the funds in his own name, or uses them in his business, or conceals such fact, is not entitled to commissions. *Ziegler's Estate*, 4 Montg. 17.

348. A surviving partner and executor of his deceased partner, who denies the title of the estate to a portion of the firm assets, which is recovered in adverse proceedings, forfeits his right to commissions. *Smith's Estate*, 37 P. L. J. 33.

349. An executor should not be allowed extra compensation for attending the audit, when he has received legal commissions. *Shirk's Estate*, 4 Del. 214.

350. Where an executor with power to sell does not make the sale himself, but joins in the employment of a real estate agent to do so, the fund being paid to a trustee, the executor is not entitled to commissions on the same. *Sloan's Estate*, 7 C. C. 377.

351. An executor is not entitled to commissions on an amount charged for the widow's benefit upon land devised to him; it is his individual debt to the estate. *Muth's Estate*, 6 C. C. 597.

352. Though an executor will not be allowed compensation for collecting a debt due from himself, yet if he has paid it into the distinct funds of the estate he

will be allowed half commissions for disbursing it. *Stewart's Estate*, 1 Lack. Jur. 225.

353. If one of two executors be indebted to the estate, and the same is paid and distributed, they are entitled to compensation for its safe keeping and distribution. *Smith's Estate*, 37 P. L. J. 33.

354. An executor will not be allowed commissions on uncollected assets. *Vanderford's Appeal*, 12 Atlan. 491.

355. Executors are not entitled to commissions on securities taken by the heirs *in specie*. *Ziegler's Appeal*, 4 Atlan. 837.

356. The court refused to disturb an allowance of commissions, though the estate was large and a considerable part thereof was accepted by the legatees in securities as money. *Harster's Appeal*, 125 P. S. 1.

357. An administrator who takes possession of the inventory as his own, and ten years afterwards accounts for it at the inventory price, is not entitled to commissions, but will be charged with interest from the date of the inventory. *Keenan's Estate*, 6 Kulp 73.

358. If an executor operates a farm under the lease of the decedent, he is entitled to commissions on the gross proceeds. *Walker's Estate*, 6 C. C. 515.

359. Where executors purchase at their own sale under a decree of the orphans' court, they are entitled to commissions on such sale. *Markle's Estate*, 11 C. C. 13; s. c. 29 W. N. C. 479.

360. An executor will be allowed a reasonable commission upon a debt, which was due the testator, but which was cancelled by a bequest to the debtor. *Miller's Estate*, 13 C. C. 137; s. c. 32 W. N. C. 232.

361. An executor may waive his commissions and such waiver will be binding on his representatives. *Frishmuth's Estate*, 14 C. C. 49; s. c. 34 W. N. C. 427.

362. Upon a petition for review, the orphans' court will open and amend its adjudication of the account of an executor, so as to allow him commissions to which he is entitled, but for which he

failed to ask, owing to a justifiable misunderstanding of the character of the assets. *Levy's Estate*, 14 C. C. 169.

363. Where real estate was sold by executors and trustees, as executors and not as trustees; it was held, that they were entitled to commissions on the proceeds of the sale, without waiting until the termination of the trust. *Hoxie's Estate*, 14 C. C. 633; s. c. 34 W. N. C. 406.

364. Upon the dissolution of a partnership by death, the administrator of the deceased partner, under exceptional conditions, was allowed commissions from the joint estate. *McCullough v. Barr*, 145 P. S. 459.

365. One who makes an agreement with the heirs of a decedent, to settle up the estate for a fixed sum, will be held to his agreement. *Koch's Estate*, 148 P. S. 159.

366. An executor will not be deprived of his commissions by a mere mistake in claiming a credit, where there was no fraudulent intent. *Hoffer's Estate*, 156 P. S. 473.

367. The commissions of an executor cannot be calculated upon his own debt to the estate. *Hoffer's Estate*, 156 P. S. 473.

368. Where an executor renounces his right to commissions, his assignee for creditors cannot claim them, and it seems that such a right is not assignable for creditors as against public policy. *Mulligan's Estate*, 157 P. S. 98. See s. c. 12 C. C. 166.

369. An administrator who manages the rest of the estate with such skill as to largely increase the value of the assets, will not be deprived of his commissions because of a loss sustained by him in the management of a speculative business in relation to an iron lease, which proved a failure. *Shinn's Estate*, 166 P. S. 121.

370. In determining the amount of an administrator's compensation, the court will not consider his services in contesting an alleged will, or in settlements of claims made before the letters were granted, or in contests over granting and

retaining letters. *Taylor's Estate*, 3 Dist. Rep. 691.

371. An executor will not be allowed commissions on amounts to be retained by devisees out of the valuation of real estate devised to them, or on money borrowed on mortgage by order of the court to pay the debts of the testator, where portions of the valuation of real estate to be paid over by the devisees is due the estate, or on the amount of dower charged on the real estate under proceedings in the orphans' court. *Collins's Estate*, 8 Lanc. 297.

372. An executor is not entitled to commissions on assets until they are converted; and this, though the will fixes his commissions at five per cent on the corpus of the estate. *Price's Estate*, 7 Montg. 35.

373. Where the same person under a will performs the duties of both executor and trustee, he will be allowed but one commission upon the principal of the estate. *Reed's Estate*, 8 Montg. 98.

374. Four per cent is not an extravagant allowance to an administratrix who files her account in one year; and this, though she divided her commissions with an agent. *Johnston's Appeal*, 11 Atlan. 78.

375. Five per cent on income is not excessive compensation. *Woodward's Estate*, 27 W. N. C. 407; s. c. 6 Kulp 7.

376. Commissions of about six per cent on \$74,010.71 allowed by the auditor were reduced by the court to three per cent. *Ziegler's Appeal*, 4 Atlan. 837.

377. The allowance to an executor of eleven hundred and fifty dollars in an estate of ninety-five thousand was held not to be excessive. *St. Clair's Appeal*, 15 Atlan. 914.

378. An auditor's finding as to the compensation of an executor or administrator will not be disturbed except for glaring error. *Hemingway's Estate*, 1 Northam. 139.

379. Where real estate has been sold by executors in another state and administration raised there, the decree of the

foreign court as to compensation due the executors in connection with the sale, is conclusive here. *Stockham's Estate*, 7 C. C. 321; s. c. 46 L. I. 281.

380. If an estate be large and involved in extraordinary difficulties, the executor is entitled to compensation; he is not limited by the five per cent rule. *Gilpin's Estate*, 138 P. S. 327; s. c. 38 P. L. J. 127.

381. A commission of three per cent in an estate of seventy-two hundred dollars was held to be a liberal allowance to the administrator. *Zeiger's Estate*, 11 C. C. 517.

382. Where an executor was directed to sell real estate and made repeated but unsuccessful attempts to do so, and he then died; it was held, that the representatives of his estate were entitled to a commission of one per cent for such service. *Donat's Estate*, 15 C. C. 379.

383. An administrator will not be allowed five per cent upon a large estate except under special circumstances. *Taylor's Estate*, 3 Dist. Rep. 691.

384. Where an executor sells real estate in the usual way and there is no evidence of unusual trouble, he will be allowed three and one-half per cent commission. *Pickering's Estate*, 4 Dist. Rep. 263.

385. Where the inventory was made up almost entirely of a judgment, which the administrator had made no effort to collect and had taken credit for it in the account; it was held, that the administrator would not be allowed five per cent on the whole amount of the inventory, but only on the amount that actually passed through his hands. *Zimmers's Estate*, 10 Lanc. 355.

386. Where, by reason of the purchaser of real estate refusing to take title, without releases being filed from the heirs entitled to a dower charged thereon, the administrator was compelled to make distribution of the dower charge and obtain the releases; it was held, that he would be allowed two and one-half per cent on the whole of the purchase money,

including the amount of the dower. *Zimmers's Estate*, 10 Lanc. 355.

387. A commission of two and one-half per cent will be allowed an executor on the sum realized by the sale of real estate, in the absence of any special trouble in making the sale. *Schweitzer's Estate*, 3 Northam. 40.

388. In an estate of seven thousand two hundred dollars, it was held, that a commission of three per cent was a very liberal allowance. *Yeiger's Estate*, 3 Northam. 207.

389. Where the entire fund passing through an executor's hands amounted to \$76,000, and the settlement of the estate had been troublesome and it had been successfully managed; it was held, that an allowance of \$3485.53 to the executor as commissions was not excessive. *Bean's Estate*, 3 York 78.

390. A claim of four per cent on the proceeds of the sale of real estate was reduced to three per cent. *Lau's Estate*, 8 York 173.

EXECUTORY DEVISES.

See DEVISE, VI.

EXEMPTION.

See ASSIGNMENT: ATTACHMENT, IV.: EXECUTION, VII.: DECEDENTS' ESTATES, IV.: TAXES, VI.: WAIVER.

EXPERTS.

See EVIDENCE, XLIX., L.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, XII.

EXPRESS COMPANIES.

See CARRIERS.

EXTENT.

See EXECUTION, IX.

FACTORIES.

1. A company which employs five or more women and children in any one or all of its establishments, is subject to inspection under the act 3 June 1893 (Brightly's Purdon 865); and this, though it operates its business in several different buildings but under one management. *In re Factory Inspection*, 4 Dist. Rep. 228; s. c. 16 C. C. 313.

2. There is nothing in the act 3 June 1893, sec. 12 (Brightly's Purdon 866), authorizing the inspector to condemn unsafe buildings; it is wise for him, however, to call the attention of those in charge to any defects in the construction of a building. *In re Factory Inspection*, 4 Dist. Rep. 229; s. c. 16 C. C. 312.

FACTORS.

See AGENCY: BAILMENT.

1. A surety on a bond, given by a factor for faithful performance, is not entitled to notice of acceptance of the services of the factor nor of the consignment of goods. *Buehler v. Coe*, 1 Cent. 222.

2. A commission merchant who sells a consignment on credit and takes a note therefor in his own name, including sales for other parties, is liable to his consignor for the amount due on the consignment. *Brown v. Delk*, 132 P. S. 152.

3. A commission merchant who sells out the goods of his principal for less than he has guaranteed they would bring, has no claim for the deficiency in the price realized. *Holt's Estate*, 4 Del. 363.

4. A factor may have a lien for past advances on goods shipped to him with directions to deliver to a third party on payment of the price to the factor; there is nothing in such a circumstance indicating an intention to limit the lien to the price. *Harrison v. Mora*, 150 P. S. 481.

5. Where the holder of a bill of lading has a lien for advances, his title is not affected by a foreign attachment issued at the suit of the shipper's creditors. *Harrison v. Mora*, 150 P. S. 481.

6. Where a factor is instructed to sell at his best judgment, and he subsequently makes advances on the goods, he is not bound by subsequent instructions limiting the price at which to sell. *Gill v. Beattie*, 29 W. N. C. 459.

7. Upon a bailment of personal property there is always a right or duty to return the property delivered which distinguishes it from a conditional sale, where there is an absolute liability to retain and pay for it; a bailment will not be changed into a conditional sale by a provision for the giving of notes for the value of the bailor's accommodation, nor by a provision allowing a factor, upon a sale of the property delivered, to retain for himself all in excess of an invoice price. *Bridgeport Organ Co. v. Guldin*, 3 Dist. Rep. 649.

8. The delivery of a bill of lading to the order of a factor vests the title of the goods in the factor as between the vendor and third persons. *Harrison v. Mora*, 150 P. S. 481.

9. Horses are merchandise within the act 31 March 1860, sec. 25 (Brightly's Purdon 499), against embezzlement of proceeds of merchandise by consignees and factors. *Comm'th v. Keller*, 9 C. C. 253; s. c. 5 York, 61; 4 Del. 514; 9 Lanc. 51; *Comm'th v. Kelly*, 8 York 9.

10. The subject of liability of factors to principal is considered in note to *Pinkham v. Crocker*, 1 Atlan. 828.

FALSE IMPRISONMENT.

1. If the defendant made complaint before a magistrate with general criminal jurisdiction, who thereupon issued his warrant, he, the defendant, in the absence of bad faith or malice, is not liable to an action for false imprisonment, though the facts stated in the complaint do not constitute a criminal offence. *McElhattan v. Kane*, 7 C. C. 313.

2. If the cause of action is in reality a trespass against the person by false arrest, it is barred after two years; and this, though the form of action be case, with

allegations of conspiracy and malice. *Reed v. Wilson*, 13 C. C. 227.

3. One who orders an intruder from his store (who came there to get satisfaction and refused to go when ordered out) is not liable for false imprisonment if he sends for an officer and has him arrested. *Sloan v. Schomacker*, 136 P. S. 382; s. c. 27 W. N. C. 10.

4. In an action for false imprisonment as for trespass, in improperly ejecting a passenger by the employees of a railroad company, the damages include, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation and injury to feelings. *Duggan v. Baltimore & Ohio R. R. Co.*, 159 P. S. 248.

5. A justice of the peace who illegally orders or causes a person to be arrested, or refuses to accept bail where the offence is bailable, is liable in damages for false imprisonment. *Grohmann v. Kirschman*, 168 P. S. 189.

FALSE PRETENCES.

See CRIMINAL LAW, XLIII.

FEEES.

See EXCISE: EXECUTORS AND ADMINISTRATORS, XV.: JUSTICES OF THE PEACE: OFFICE, X.: PROTHONOTARY, SHERIFF.

FEIGNED ISSUES.

See COSTS, I.: EQUITY, L.: EXECUTION, VIII., XV.: HUSBAND AND WIFE, XI.: JUDGMENT: ORPHANS' COURT: PRACTICE, XLI.

FEME SOLE TRADERS.

See HUSBAND AND WIFE.

FENCES.

See DEED, VIII.

1. Since the passage of the act 4 April 1889 (P. L. 27), repealing the fence law of 1700, the owner of cattle who is sued

for damages for the trespass of his cattle, must show, to prevent recovery, that he kept his cattle in, or tried to, by a sufficient fence. The act of 4 April 1889 did not repeal the act 11 March 1842 (Brightly's Purdon 904) relating to fence-viewers. *Barber v. Mensch*, 157 P. S. 390; *Leibey v. Old*, 4 Northam. 85; s. c. 5 Del. 367.

2. Since the repeal of the fence law by the act of 4 April 1889 (P. L. 27), a landowner is not required to fence cattle out, but their owner must fence them in so as to avoid trespassing. *Arthurs v. Chatfield*, 38 P. L. J. 53.

3. Since the repeal of the fence law of 1700 by the act of 4 April 1889 (P. L. 27), every one must keep his cattle within his own close. It is not necessary that the plaintiff's field be enclosed to maintain an action for trespassing cattle. *Thompson v. Kyler*, 9 C. C. 205; s. c. 8 Lanc. 245.

4. The repeal of the act 1700, containing an express requirement to erect fences, was held not to raise an implied obligation to fence from the language of laws subsequent to that act and *in pari materia* with it. *Greenlee v. Eisenbroun*, 10 C. C. 483.

5. Where land has been appropriated by a railroad company according to law, the boundary cannot be defined by disconnected portions of a fence, erected to prevent cattle from trespassing. *Fisher v. Pennsylvania Co.*, 2 Atlan. 878.

6. In an action of ejectment, the plaintiff must recover on the strength of his own title, and the burden is upon him to show that a division fence erected by him and the defendant is not on the true line. *Wiggins v. Hunt*, 6 Kulp 375.

7. Where a private lane runs between two farms, and from one public road to another, and it is closed by the owner of the land upon which the lane is situated, the other owner may build a division fence along his side of the lane and compel his neighbor to contribute to the cost of the fence. *Odenwelder v. Frank-enfield*, 153 P. S. 526.

8. The act 11 March 1842, sec. 3 (Brightly's Purdon 904), providing for the payment of the cost of division fences, is substantially a re-enactment of the second section of the act of 1700 and is not repealed by the act of 4 April 1889 (P. L. 27), repealing the act of 1700. Where fence-viewers set forth the number of panels requiring resetting and repairing, the report will be sustained; and this, although they do not state in their certificate the sum which the defendant ought to pay. *Roberts v. Sarchet*, 14 C. C. 372.

FEROCIOUS ANIMALS.

See ANIMALS.

FERRIES.

See INJUNCTION, III.: RIVERS.

FIERI FACIAS.

See EXECUTION, V.

FIRE COMPANIES.

See CHARITY.

FIRE ESCAPES.

1. A person indicted for violating the act of 3 June 1885 (Brightly's Purdon 915) cannot escape punishment, because after the prosecution he complied with the law, and the bureau of fire escapes gave him a certificate of approval. *Comm'th v. Kitchenman*, 46 L. I. 270.

2. The act 3 June 1885 (Brightly's Purdon 915) does not raise an absolute liability for all injuries on the happening of a fire, whether the absence of a fire escape had any connection with such injuries or not; where the owner of the building had provided a proper fire escape but the plaintiff was unable to reach it because the door leading to it had been closed by one of the tenants, whose act the defendant could not control; it was held, that the defendant

was not liable. *Sewell v. Moore*, 166 P. S. 570.

3. Under the act 3 June 1885 (Brightly's Purdon 915, pl. 14) a person is at liberty to erect a fire escape different from that described in the act, but such erection is at his own risk that it shall prove permanent, safe and external and that it shall be subject to the inspection and approval of the proper authorities; the absence of a certificate of approval creates no liability that would not otherwise arise from the fact, but simply puts the burden of proof on the owner to show that he has complied with the act by building a fire escape in accordance with its directions. *Sewell v. Moore*, 166 P. S. 570.

4. In an action for personal injuries alleged to have been caused by the failure of defendant to provide a proper fire escape, a certificate issued by the board of fire escapes after the fire is not admissible in evidence. *Sewell v. Moore*, 166 P. S. 570.

5. Under the act 3 June 1885 (see amendment 9 May 1889, Brightly's Purdon 914), it was held to be the duty of the factory inspector to proceed against the owner in fee or for life of buildings not properly supplied with fire escapes, and not against the tenant. *In re Fire Escapes*, 12 C. C. 525.

6. Where the third or higher stories of a building are used for storage and stock rooms and employees are constantly going to and from said rooms and remain there for stated intervals arranging the stock, it is the duty of the owners to provide fire escapes. *In re Fire Escapes*, 13 C. C. 495.

FIRE INSURANCE.

See INSURANCE.

FISH.

1. The act of 10 June 1881, supplementary to the acts relating to game and fish, is in violation of article III., sec.

3, of the constitution in regard to fish, they not being enumerated in the title. *Comm'th v. Bender*, 7 C. C. 620.

2. The three weeks' notice provided by the act of 10 June 1881 is from the date of planting the trout. The names of the fish commissioners need not be appended to the notice. *Ibid*.

3. Laws regulating the time and appliances for catching fish are within the police powers of the state. They may prohibit a land-owner from fishing in a small stream running through his own property. *Ibid*.

4. The ownership of land along the shore of a pond owned by another, gives no right to take fish in the pond. *Baylor v. Decker*, 133 P. S. 168.

5. Under the act 3 June 1878 (Brightly's Purdon 928), prescribing a penalty for fishing in private ponds, a pond does not become a private pond where a person whose lands are covered only by a part of the water places fish therein for the purpose of propagation. The mere placing of fish in a pond without any improvement for the propagation of fish is insufficient to place the pond within the protection of that act. A notice that all persons are notified not to trespass on the lands or fish in the ponds, under penalty of the law, is not a sufficient notice under that act. *Benscoter v. Long*, 157 P. S. 208.

6. Under the act 3 June 1878, sec. 34 (Brightly's Purdon 947), the quarter sessions has no jurisdiction over a complaint under sec. 26 of that act for the recovery of a penalty for catching or killing fish with explosive substances, unless the defendant has entered into a recognizance to answer said complaint on the charge of a misdemeanor before the said court. *Comm'th v. Owens*, 7 Montg. 144. Said section 26 is unconstitutional. *Comm'th v. Nihil*, 4 Dist. Rep. 582. See act 25 June 1895 (Brightly's Purdon 2579).

7. For a list of general and local laws relating to fish, fisheries, and fishing, prepared by Judge Hemphill, see note to *Comm'th v. Bender*, 7 C. C. 624.

FISHERIES.

See RIVERS.

FIXTURES.

- I. What are fixtures.
- II. Between landlord and tenant.

I. What are fixtures.

1. Whether a frame house erected on blocks of wood is a fixture, see note to *Deane v. Hutchinson*, 2 Atlan. 298.

2. If the testimony as to the actual character of a saw-mill, erected on land sold at sheriff's sale, whether movable or permanent, be conflicting, the question of fixture is one for the jury. Proof of the *ante litem motam* declarations of the owner and builder may be considered in determining the question. *Benedict v. Marsh*, 127 P. S. 309.

3. The engine, machinery, and appliances of an electric-light plant do not pass to the purchaser of the real estate at sheriff's sale, under a mortgage, unless it was the intention to make the plant a part of the realty when it was erected. *Vail v. Weaver*, 132 P. S. 363.

4. Where a person erects a culm separator plant consisting of buildings and machinery under a contract to clean and prepare the merchantable coal in a culm bank for market, and there is an express agreement that he may remove them at any time within six months after the termination of the agreement, such machinery and other appliances are personal chattels and may be the subject of a sheriff's interpleader. *Advance Coal Co. v. Miller*, 7 Kulp 541.

5. An inclined plane, built by the plaintiff for the use of defendant, and partly on defendant's land, the same to be redelivered at a certain time to plaintiff, was held not to be a fixture. *Charlotte Furnace Co. v. Stouffer*, 127 P. S. 336.

6. Where the defendant was the owner of a quarry and had thereon certain cars, iron rails on a tramway, and scales, and

these articles were placed thereon by him for use in mining, removing, and marketing limestone from his lands and were necessary for that purpose; it was *held*, that they were part and parcel of freehold, and not subject to execution as against a judgment creditor who had a lien upon the real estate prior to the issue of the execution. *Ritchie v. McAllister*, 14 C. C. 267.

7. Where a cemetery company enclosed a burial lot by stone curbing and erected a stone monument surmounted by a statue; it was *held*, that the curbing and monument were fixed to the realty as a part thereof and passed to the purchaser of the cemetery at a sheriff's sale under a mortgage. *Oakland Cemetery Co. v. Bancroft*, 161 P. S. 197.

8. As against the mortgagee of the realty, an oil engine used for pumping purposes and not attached to the freehold was *held* not to be a part of the realty, where the manifest intention of the owner to make it such did not appear. *Lea v. Shakespeare*, 10 Montg. 171.

9. Upon the subject of fixtures as between mortgagor and mortgagee, see note to *Schmitz v. Scheifele*, 1 Atlan. 699.

10. Radiators and valves connecting with steam heating apparatus are not fixtures attached to the realty; they are analogous to gas fixtures and are severable from the real estate. *National Bank of Catasaunqua v. North*, 160 P. S. 303.

11. Ordinary mirrors in a parlor, although nailed to the wall, movable china closets and movable screens and chandeliers, are no part of the realty and are not covered by a mortgage, although the owner has agreed with the mortgagee that they shall be covered by a mortgage of the house. *Lea v. Shakespeare*, 10 Montg. 171.

12. Where the property of a corporation was sold under a mortgage, and the purchasers organized a new company and took possession of all the assets of the old company, and agreed to pay a certain amount for the personal property and to account for the book debts which they

could collect; it was *held*, that the new company was not liable for the book accounts which they were unable to collect, and that they were entitled to have the value of certain fixtures to be deducted from the appraisement of the personal property, which they had agreed to pay. *Huston v. Clark*, 162 P. S. 435; affirming s. c. 3 Dist. Rep. 2.

II. Between landlord and tenant.

13. A range erected by a tenant for business purposes, and not affixed to the freehold except by being built against a wall, may be removed at any time before the end of the term. *Townsend v. Underhill*, 6 C. C. 544.

14. A wood floor put in a skating rink by the tenants, became a part of the freehold, under a clause in the lease that all improvements were to remain. *Harris v. Kelly*, 13 Atlan. 523.

15. Opera chairs placed in an opera house and fastened to the floor are not fixtures in a contest between a purchaser of the premises, under a mortgage, and the judgment creditors of the tenant. *Pratt v. Keith*, 4 Del. 69.

16. Buildings erected upon a farm by the tenant with the expectation that he would be permitted to purchase the property, which expectations were not realized by reason of the death of the landlord, cannot be removed by the tenant; and it made no difference that he had insured his improvements in his own name, with the knowledge and approval of his landlord. *Carver v. Gough*, 153 P. S. 225.

17. Where a tenant was authorized to make all necessary improvements, and having put in a steam heater, the tenant's personal property was sold by the sheriff upon a note given for the heater, and an auditor appointed to distribute the funds found that the heater was necessary and authorized by the landlord, the price of the heater was awarded to the plaintiff in the execution and not to the landlord. *Wilkinson v. Kugler*, 153 P. S. 238.

FORCIBLE ENTRY.

See CRIMINAL LAW, XLVI.

FORECLOSURE.

See MORTGAGE, XIII.

FOREIGN ATTACHMENT.

See ATTACHMENT, I.

FOREIGN CORPORATIONS.

See CORPORATION: PRACTICE, I.

FOREIGN EXECUTORS.

See EXECUTORS AND ADMINISTRATORS.

FOREIGN JUDGMENTS.

See JUDGMENT, VI.

FORFEITURE.

See AGENCY, II.: EXECUTORS AND ADMINISTRATORS, XX.: HUSBAND AND WIFE, X.: RECOGNIZANCE, IV.: WAIVER, III.

1. An attorney who compels his client to bring an action for moneys due him, forfeits all fees which may have been agreed upon for his services. *Large v. Coyle*, 12 Atlan. 343.

2. If one of two executors has forfeited his commissions, the orphans' court may apportion their compensation and award the other. *Smith's Estate*, 37 P. L. J. 33.

3. A fire policy will not be forfeited by acts in violation thereof, where it appears that the acts complained of would rather diminish than increase the danger of fire. *Allemania Insurance Co. v. White*, 11 Atlan. 96.

4. The court cannot relieve an insolvent from the forfeiture of his bond, caused by his failure to appear and present his petition for a discharge. *Koehler's Insolvency*, 5 Kulp 525.

5. Where a testator left to each of his children an undivided interest for life to be forfeited on withdrawal from the family a child by so withdrawing was held to forfeit her life estate only. The fee, being undisposed of, passes under the intestate laws. *Bell v. Fulton*, 1 Atlan. 579.

6. Whether the delay of ten days of a mutual aid society in refunding an assessment paid to an agent, amounted to a waiver of a previous forfeiture, was properly left to the jury. *United Brethren Mut. Aid Society v. Schwartz*, 13 Atlan. 769.

7. A widow's claim of her exemption is not forfeited by her marriage subsequent to the making of her claim. *Drygalski's Estate*, 6 Kulp 50.

8. Where the articles of association of an unincorporated land association provided for the publication of assessments in the newspapers of two cities, and also provided that stock might be forfeited upon failure to pay an instalment after the expiration of thirty days; it was held, that a failure to advertise the notice in one of the cities rendered a subsequent forfeiture invalid; in order to sustain a forfeiture of property, every condition precedent must be strictly and literally complied with. *Morris v. Metalline Land Co.*, 164 P. S. 326. See *Morris v. Metalline Land Co.*, 166 P. S. 351.

9. No charter of a corporation for public purposes can be forfeited except by the commonwealth in a direct proceeding for that purpose. *Hinchman v. Philadelphia & West Chester Turnpike Road*, 160 P. S. 150; affirming s. c. 5 Del. 414.

10. The charter of a corporation will not be forfeited upon *quo warranto* on account of an isolated case of misuser of its franchise, which produced no injurious consequences to any one and was not persisted in; surveying several lines of railroad by a coal and railroad company, without having any lands with which to connect them, was held not to be such a misuser as to warrant a forfeiture of the charter. *Comm'th v. New York, L. E. & W. Coal & R. R. Co.*, 10 C. C. 129.

11. One railroad company has no power to raise a question as to the abandonment or forfeiture of another railroad company's location; such a question is for the commonwealth alone. *Pittsburgh, Virginia & Charleston Ry. Co. v. Pittsburgh, Cannonsburgh & State Line Ry. Co.*, 159 P. S. 331.

12. Where an electric railway company was authorized to construct its railroad in a borough, with a proviso that upon failure to complete its railroad within eighteen months such authority should be revoked and annulled, and the company failed to complete the road within the limitation; it was *held*, that the borough had a right to attach such a condition to its consent, that such a condition would be strictly construed, that the company's failure to complete in time did not *ipso facto* forfeit their rights, but that some affirmative action was necessary to be taken by the borough; that the forfeiture could only be declared by the borough council, but if so legally declared, the burgess had authority to institute legal proceedings to enforce it. *Burke v. Carbondale Traction Co.*, 15 C. C. 159.

13. Where one water company seeks to condemn the property of another company on the ground that the charter of the other corporation is forfeited by nonuser, the proceedings must be conducted under the act 16 June 1883, sec. 5 (Brightly's Purdon 411), by the attorney-general; such a question cannot be raised upon a petition for leave to file a bond, but the court will hold under advisement the application to file a bond, until the proceedings at the instance of the attorney-general are finally disposed of. *Lebanon Water Co.*, 9 C. C. 589.

14. Where the plaintiff held a contract for the purchase of land and sold it to the defendant by an executory agreement for a specified price, and the defendant refused to take and pay for it, and it became forfeited by the non-payment to plaintiff's vendor, of money falling due after such refusal; it was *held*, that such non-payment being the default of the defendant, the plaintiff could recover from the de-

fendant the price the defendant agreed to pay the plaintiff for the contract; and this, notwithstanding the forfeiture. *McClintock v. South Penn Oil Co.*, 146 P. S. 144. See *Enterprise Land Co. v. Betz*, 15 C. C. 193.

15. Where three persons entered into a joint agreement to purchase a quarry, and one of them was to advance the money and the other two were to repay him by monthly instalments, and it was further agreed that on the neglect or refusal to pay for three months the said monthly instalments, the agreement should become void and all the amounts paid should be forfeited; it was *held*, that time was of the essence of the contract, and that a failure to pay any one of the monthly instalments worked a forfeiture not only of the agreement, but of the previous payments. *Axford v. Thomas*, 160 P. S. 8; affirming s. c. 9 Montg. 117.

16. Where a successful bidder on public work deposited a check with the city for two thousand dollars, to be returned to him if not declared forfeited by the department of sewers; it was *held*, in an action to recover it back, where the case stated failed to state that the check had been declared forfeited, the plaintiff was entitled to recover. *Mutchler v. Easton*, 148 P. S. 441; reversing s. c. 9 C. C. 613.

17. Where money is deposited by one of two contracting parties as a guaranty of good faith, it is forfeited by a failure of the party making the deposit to fulfil his part of the contract; and this, though there is no clause of forfeiture in the contract. Where such a forfeiture inures to a city the councils may not refund the money forfeited in the absence of mitigating circumstances. *Easton v. Mutchler*, 2 Northam. 377.

18. A *scire facias* to collect a mortgage on failure of payment of interest, is not a process to enforce a forfeiture. The mortgagee may refuse to accept the interest after a default. *Holland v. Sampson*, 5 Cent. 533.

19. Where a mortgage provides that upon default in payment of interest, the

whole debt secured by the mortgage shall become immediately payable, a court of equity will not avoid the forfeiture where the defendant offers no excuse except his own neglect. *Warwick Iron Co. v. Morton*, 148 P. S. 72; affirming s. c. 7 Montg. 87.

20. Where default is made in the payment of interest on a mortgage, a writ of *feri facias* on the bond will not be set aside upon the allegation that the debtor was prevented from making the payment of the interest in time by the action of the plaintiff's clerk in promising to inform the debtor of the amount of interest due. *Busch v. Groszwith*, 159 P. S. 623.

21. Where a mortgage contains a clause making principal and interest immediately demandable on default of payment of interest, no previous notice of forfeiture is required before issuing the *scire facias*, and mere delay of suit or neglect to vigorously exact his money on the day it was due is no evidence of waiver on the part of the mortgagee; and the fact that the debtor could not find the creditor is no ground for relief in the absence of an averment that the creditor had left the country when the interest became due or concealed himself to avoid payment. *Atkinson v. Walton*, 162 P. S. 219.

22. A right of re-entry for breach of a condition in a deed may be enforced if claimed at once or within a reasonable time, but where the condition is a condition subsequent and the breach was acquiesced in by the grantor and valuable improvements were made; it was held, that a forfeiture would not be permitted after a long delay. *Lehigh Coal & Navigation Co. v. Early*, 162 P. S. 338.

23. The legal effect of a forfeiture clause in a contract cannot be varied by an alleged oral understanding between the lessee and one only of the several lessors. *Springer v. Citizens' Natural Gas Co.*, 145 P. S. 430.

24. Where a lease contains a provision that the lessee shall pay gas bills and

water rent and also contains a clause of forfeiture in case the lessee shall not keep and perform all the terms, provisions and stipulations of the lease, a failure to pay such bills constitutes a forfeiture and justifies the assignee of the lessor in entering judgment of ejectment against the lessee under the terms of the lease. *Hand v. Suravitz*, 148 P. S. 202; reversing s. c. 10 C. C. 302.

25. A lease may be avoided by the lessor at his option where he was induced to make the lease by the false representations of the lessee. *Harvey v. Gunzberg*, 148 P. S. 294.

26. Where a lessor is in possession and he gives notice to the lessee that the lease is forfeited, it is substantially a declaration that he will refuse to give the lessee possession, and if the lessee assents to this action and accepts a new lease, he thereby rescinds the former lease and terminates all his rights thereunder. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

27. Where a lease provides for forfeiture in certain cases, an assignee of the lease is bound on his peril to ascertain whether or not the lease has been forfeited. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

28. Where a landlord, after knowledge of the facts upon which a forfeiture of the lease is claimed, accepts rent; query, whether such acceptance is not a waiver of his right to insist upon the forfeiture. *Hughes v. Moody*, 10 C. C. 305.

29. Upon a lease of personal property with an agreement for a bill of sale on payment of a sum named and with a provision for retaking on default in payment of any instalment, where the property is retaken for such default, the contract is at an end and a mortgage which has been given as part of the price, being part of the contract, falls with it; in such a case there can be no recovery on the mortgage although the amount named in the lease is independent of the amount named in the mortgage, and although suit is brought by an assignee

for value without notice before default. *Scott v. Hough*, 151 P. S. 630.

30. The forfeiture of an oil lease for failure of the lessee to put down a seventh well in a stipulated time, is waived by acquiescence in the failure to put down in time the two preceding wells. *Duffield v. Hue*, 129 P. S. 94.

31. A provision in an oil lease that a failure by a lessee to perform his covenant shall work a forfeiture is for the benefit of the lessor, and if he bring a suit upon the lease, the lessee cannot defend on the ground of forfeiture. *Wills v. Manufacturers' Natural Gas Co.*, 130 P. S. 222. See *Westmoreland Natural Gas Co. v. De Witt*, *Ibid.* 235; *Sanders v. Sharp*, 153 P. S. 555.

32. If an oil and gas lease provide for a forfeiture if any of the payments are not made, and a part payment be accepted before it is due, no forfeiture is incurred by a failure to pay the remainder at the time specified. *Westmoreland Natural Gas Co. v. De Witt*, 130 P. S. 235.

33. A clause of forfeiture, inconsistent with the terms of the instrument, will not be inserted in an oil lease, upon the evidence of the lessor and his family (contradicted by the lessee) of an alleged cotemporaneous agreement to that effect. *Thompson v. Christie*, 138 P. S. 230; s. c. 27 W. N. C. 87; 38 P. L. J. 136.

34. A clause of forfeiture in an oil or natural gas lease being intended for the benefit of the lessor, and he not choosing to avail himself of it, the lessee cannot set it up in an action by the lessor in affirmance of the lease. *Ray v. Natural Gas Co.*, 138 P. S. 576; *Springer v. Citizens' Natural Gas Co.*, 145 P. S. 430; *Ogden v. Hatry*, 145 P. S. 640; *Jones v. West P. N. G. Co.*, 146 P. S. 204; *Phillips v. Vandergrift*, 146 P. S. 357. See *Ramsey v. White*, 38 P. L. J. 425.

35. Where an oil lease provided that the lessee should complete the first well within six months, or thereafter within sixty days remove all machinery and buildings, and that the lease should be declared null and void unless further

prosecuted after the first well drilled; it was held, that where the first well was completed within six months and oil obtained, but nothing was done for four years towards drilling any other well, the lease had become void. *Heintz v. Shortt*, 149 P. S. 286.

36. Where an oil lease provided that a test well should be drilled within six months from the date of the lease; it was held, that to prevent forfeiture, it was necessary that such well should be drilled upon the land demised, and that a well drilled upon adjoining land was not sufficient. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

37. Where an oil lease contains a covenant to commence operations or forfeit the lease within sixty days and to complete a well in five months, the lessor may forfeit the lease after the expiration of five months if a well has not been completed within that time. Where the lessee testified that the lessor acquiesced in the delay and acknowledged the lease on the assurance that there would be a well put down; it was held, that this did not amount to a waiver of the right to have a well completed within five months. *Cleminger v. Baden Gas Co.*, 159 P. S. 16.

38. Where a brother of full age, acting for himself, and as next friend of his minor sister, asserts a forfeiture of an oil lease of land owned by them in common, he cannot afterwards recover for himself, his share of the monthly damages stipulated in the lease and accruing between the date of the assertion of forfeiture and the institution of the suit; it seems, that if the action of the brother was judicious and for the best interests of the minors, the forfeiture would be sustained against them. *Wilson v. Goldstein*, 152 P. S. 524; reversing s. c. 12 C. C. 337. See *Heinouer v. Jones*, 159 P. S. 228.

39. Where the lessee was to hold the premises during the term of two years and as much longer as oil and gas were found in paying quantities or the rental paid thereon, and the lessee covenanted to

commence a well within thirty days and to complete it within ninety days, or in default thereof, to pay to the lessor for further delay an annual rental of sixty dollars until such well should be completed; it was *held*, that the failure of the lessee to complete the well within the term of two years enabled the lessor to terminate the lease on its expiration, and that the lessee could not indefinitely continue the lease by the payment of sixty dollars per annum after the expiration of the two years. *Western Pennsylvania Gas Co. v. George*, 161 P. S. 47.

40. Where a lessee in an oil lease agreed to complete a well within six months or pay a certain sum per annum for delay within three months after the time for completing the well, and six days after the expiration of the nine months the lessor leased the premises to another person for a long term of years; it was *held*, that this was an election to enforce a forfeiture and that thereafter the lease was a nullity. *Wolf v. Guffey*, 161 P. S. 276.

41. Where a certain sum was to be paid by the owners of an oil lease before the drilling of each well; it was *held*, that the fact that the plaintiff failed to demand the money for each well when begun did not work a forfeiture of its rights; the time of payment being for the benefit of the plaintiff, might be waived. *Pittsburgh Consolidated Coal Co. v. Greenlee*, 164 P. S. 549.

42. Where an oil lease provided for rent payable for delay in putting down a well, which rent was due at the close of each year, and the lessee paid the rent for several years without drilling a well, but he then began operations and succeeded in obtaining oil, and the lessor lived on the land, and when the rent fell due, the lessee, by an oversight failed to pay it; it was *held*, that equity would relieve against the forfeiture, and that under the circumstances of the case, the lessor was bound to give notice before declaring a forfeiture. *Lynch v. Versailles Fuel Gas Co.*, 165 P. S. 518.

43. The forfeiture of an oil lease cannot be prevented by allegations that the lessee, owing to the extreme cold weather, could not obtain workmen to complete the well in time. *Cryan v. Ridelsperger*, 7 C. C. 473.

44. The lease of a slate quarry providing a forfeiture for "not working" the quarry for three consecutive months; *held*, that a forfeiture would not be incurred by failing to remove slate during a period when it was necessarily interrupted by the removal of water, snow and ice in the quarry, to make it possible to reach and remove the slate. *Miller v. Chester Slate Co.*, 129 P. S. 81.

45. The lease of an ochre mine providing that if the royalties be not paid for the term of three months then the lease to be null and void, a bill in equity will not lie against the lessees in possession to enforce a forfeiture, the lessors having an adequate remedy at law in assumpsit for the arrears. *Hoch v. Bass*, 133 P. S. 328.

46. Where the assignee of a mining lease has allowed it to become forfeited and disabled himself from performing his covenants contained in a bond given to his assignor, the assignor may either sue from time to time for royalties due or other damages, or he may treat the contract as rescinded and claim damages in one action for the entire breach. *Keck v. Bieber*, 148 P. S. 645.

47. After a lapse of twelve years, equity will not decree the forfeiture of a coal lease for non-payment of royalty. *Drake v. Lacoe*, 157 P. S. 17; reversing s. c. 2 Lack. Jur. 382.

48. A court of equity will not by injunction restrain a lessor from forfeiting a mining lease. It cannot be forfeited without cause, and for good cause the defendant has the right to insist upon it being at an end. *Grassy Island Coal Co. v. Hillside Coal & Iron Co.*, 1 Lack. Jur. 297.

49. Where the landlord, claiming a forfeiture of a coal lease, obtained possession by artifice and a show of force,

equity will at the suit of the tenant enjoin him from continuing such possession. *Frisbie Coal Co. v. Brennan*, 1 Lack. Jur. 417.

FORGERY.

See EVIDENCE, XVII., XXIX.: CRIMINAL LAW, L.

FORMER ACTION.

See ABATEMENT: COSTS, VIII.: EVIDENCE, XXX.: JUDGMENT, VIII.

FORMER RECOVERY.

See JUDGMENT, VIII.

FORTUNE TELLING.

1. An indictment for fortune telling need not set forth whose fortune the defendant is charged with telling. *Comm'th v. James*, Public Ledger, 30 January 1891.

FRAUD.

See ASSIGNMENT FOR CREDITORS: ATTACHMENT: CONTRACT, V.: CRIMINAL LAW, XLV.: EQUITY, V., XIII.: EVIDENCE, XXXII.: EXECUTION, XIII.: FRAUDS — STATUTE OF: FRAUDULENT CONVEYANCES: FRAUDULENT JUDGMENTS: HUSBAND AND WIFE, V., XI.: JURY, VII.: LIMITATION, II.: PROMISSORY NOTES, VII.: SALE, V.

- I. What is fraud.
- II. Proof of fraud.
- III. Pleading.
- IV. Relief against fraud.
- V. Undue influence.
- VI. Retention of possession.

I. What is fraud.

1. It is a fraud for one partner to use the name of his firm for his individual

transactions. *Real Estate Investment Co. v. Russel*, 148 P. S. 496.

2. A person who signs a release of liens, falsely representing that he has authority to do so from the owner of the lien, is liable in damages to a person purchasing the property on the faith of the release. *Lane v. Corr*, 156 P. S. 250.

3. One who is about to purchase an oil lease, is not bound to disclose to his vendor facts in regard to the production of oil upon a neighboring leasehold, which he owns, and the failure to disclose such facts is not fraud. *Neill v. Shamburg*, 158 P. S. 263.

4. For a short treatise on fraudulent representations, see note to *Taylor v. Saurman*, 1 Atlan. 44.

II. Proof of fraud.

5. An allegation of fraud offers a wide door to the admission of evidence. *De Wolf v. McNab*, 1 Atlan. 440; *Pfeil v. McCallin*, Ibid. 654.

6. Evidence tending to show fraud should always, in the event of a conflict, be submitted to the jury. *Landis v. Neff*, 9 Atlan. 926.

7. Upon an issue framed to test whether a note was given to defraud creditors, the proof of a "combination" between the parties establishes fraud. *Nusbaum v. Louchiem*, 1 Atlan. 391; *Nusbaum's Appeal*, Ibid. 392.

8. It is error for the court in discussing a question of fraud to the jury to treat the items of evidence one by one, without at any time directing them to their united force. *Montgomery Web Co. v. Dienelt*, 133 P. S. 585; s. c. 25 W. N. C. 549; reversing s. c. 5 Montg. 9.

9. In an action for breach of promise of marriage, what is sufficient evidence of fraud in the procurement of a release to justify its submission to the jury. *Ettinger v. Jones*, 139 P. S. 218; s. c. 27 W. N. C. 172. See *Newkirk v. Scott*, 4 Del. 449.

10. Fraud must be established either by direct proof, or by facts, sufficient to

warrant a presumption of its existence, clearly proved. *Jones v. Lewis*, 148 P. S. 234.

11. Upon the trial of questions of fraud, every circumstance in the condition and relation of the party and every act and declaration of the person charged with the fraud may be given in evidence, if, in the opinion of the judicial mind, it bear such a relation to the transaction as is calculated to persuade the jury that the allegation of fraud is or is not well founded. *Glessner v. Patterson*, 164 P. S. 224.

12. Where a will which a testator admittedly executed cannot be found at the time of his death, there is a presumption of revocation, but where fraud is charged, the latitude of proof is necessarily wide, and evidence is admissible, not only of the testator's character, condition, acts and declarations, but also of the conduct and interests of those who were around him from and after the date of the will. *Gardner's Estate*, 164 P. S. 420.

13. To justify a chancellor in setting aside or modifying a written instrument on the ground of fraud, the evidence must be clear and satisfactory, but if the judge sitting as a chancellor be not fully satisfied with the evidence, he may leave the question of fraud to the jury. *Newkirk v. Scott*, 4 Del. 449.

14. Where the testimony tended to show that the defendants after obtaining negotiable oil certificates issued by the United Pipe Lines from the plaintiff by means of a promise to give him in exchange other certificates issued by the Pennsylvania Transportation Company, to be endorsed by responsible parties, offered him certificates endorsed by an irresponsible party "without recourse" which he refused to accept; it was held, that the facts exhibited such evidence of fraud as to make out a *prima facie* case for the plaintiff in an action of trover for the certificates. *Purdue v. Taylor*, 146 P. S. 163.

III. Pleading.

15. It is not indispensable that a statement alleging fraud should aver fraud in express terms, it is sufficient if the facts would support an inference of fraud by the jury, as where it shows a clear breach of agreement, which may, without straining, bear the construction of a fraudulent trick. *Bradly v. Potts*, 155 P. S. 418. See *Bradly v. Potts*, 33 W. N. C. 570.

16. If fraud be alleged in an affidavit of defence, the facts constituting the fraud must be fully set forth. *Garis v. Hopkins*, 1 Northam. 358. A general allegation of fraud is also a nullity in an affidavit of claim. *Garis v. Fish*, 133 P. S. 555; affirming s. c. 7 Lanc. 5.

IV. Relief against fraud.

17. Though a member of a mutual insurance company has been induced to become such by the fraudulent representations of the officers, he cannot set up such fraud as a defence to an action by the receiver of the company for assessments, where other persons have subsequently joined the company as innocent third parties. *Dettra v. Kestner*, 147 P. S. 566.

V. Undue influence.

18. Undue influence in the procurement of a deed is not established by evidence of moderate solicitation though accompanied with tears. *Doran v. McConlogue*, 150 P. S. 98.

19. Where a fiduciary relation is established between the maker and payee of a note and an advantage is obtained at the expense of the maker, the law presumes that the benefit was the fruit of the continuing confidence; upon an allegation of actual undue influence the burden of proof rests upon him who would avoid the instrument, but where a confidential relation exists the burden shifts upon him who would retain the benefit. *Browning v. Patterson*, 11 Montg. 78. See *Clark v. Clark*, 42 P. L. J. 384.

20. The parol declarations of a person having the legal title to land, that it actually belongs to another, followed by a conveyance for the benefit of such other person, are competent evidence to rebut a presumption of fraud or undue influence which, in view of the relations of the parties and the age and infirmity of the grantor, might otherwise arise from the absence of a money consideration. *Kyte v. Kyte*, 8 Kulp 1.

21. The term "confidential relation" includes all persons who are associated by any relation of trust and confidence, and embraces partners and co-partners, principal and agent, master and servant, and physician and patient as well as trustees and *cestui que trusts*, guardian and ward, attorney and client, parent and child and husband and wife. Where a man eighty-three years of age went to reside with his nephew and gave him a letter of attorney authorizing him to manage his estate, which amounted to about nine thousand dollars, and subsequently the nephew presented to his uncle a note for seven thousand dollars which the uncle signed, the nephew stating that it was given for past services and for care during the remainder of his life; it was *held*, that the note must be held void in the absence of affirmative proof that the maker was informed of the effect, which would result from his signing the note, of the proportion of his estate which would be required to pay it, and of the fact that, if paid, but little of his estate would remain for payment of legacies provided for in his will. *Darlington's Estate*, 147 P. S. 624. See *Crothers v. Crothers*, 149 P. S. 201.

22. The mere relation of master and servant or boarder and landlord raises no implication of confidential relation, which the courts can consider in proceedings to set aside a conveyance. *Doran v. McConlogue*, 150 P. S. 98.

23. Where a tenant in common mortgaged his interest to his co-tenant to indemnify him against a contingent loss, by having to pay a guaranty to third per-

sons, and after the execution of the mortgage, the mortgagor sold and conveyed the mortgaged premises to the mortgagee; it was *held*, that there was no such confidential relations between the parties as required the mortgagee to disclose to the mortgagor the facts concerning the production of oil on a neighboring leasehold owned by the mortgagee. *Neill v. Shamburg*, 158 P. S. 263.

24. In an action of ejectment, where it appeared that the deed under which defendant claimed was executed by the grantor to his step-son for a nominal consideration, and was prepared by the latter's attorney and acknowledged in the presence of the grantee before a notary to whom the grantor was unknown; it was *held*, that the burden was upon the defendant to establish that the grantor understood the nature of the act and executed the deed of his own free will. *Miller v. Rivers*, 138 P. S. 270.

25. In ejectment by a brother claiming by descent from his deceased father against his sister, claiming under a deed from the father, evidence is admissible on the part of the plaintiff to show that when the deed was made the grantor was mentally incapacitated therefor. *King v. Humphreys*, 138 P. S. 310.

26. In an action on a bond given by the defendant to her father since deceased, where it was alleged that in release of payment he had voluntarily destroyed the bonds in his lifetime, and a close confidential relation between them was not denied, and there was strong evidence of extreme weakness bodily and mentally; it was *held*, that the burden was on the defendant to show that the transaction was righteous and conscientious, and that the obligee had acted intelligently, deliberately and freely; and this, though the disorder was merely temporary and not operative at the particular time; and it was competent for the plaintiff's executors to prove declarations of the obligee before his capacity was questioned, to the effect that he intended the bonds should be paid. *Smith v. Loafman*, 145 P. S. 628.

27. Where a son resides with his father at the time of the conveyance of real estate to him by his father, the presence of any fact or circumstance which casts the slightest suspicion upon the transaction will require the son to prove that there was no taint of fraud or undue influence in it, but the mere fact that the son held a general power of attorney executed very shortly before the conveyance and especially authorizing a lease of the farm, is not of itself sufficient to put the burden upon the son showing the integrity of the transaction. *Crothers v. Crothers*, 149 P. S. 201.

28. Undue influence in obtaining a receipt was held not to be established by evidence that the person who received it was the son-in-law of the other party, that she lived with him, that she derived income from the farm on which they lived, that she was illiterate, that she was unable to read or write, and that the son-in-law and daughter had great influence with her. *Rockey's Estate*, 155 P. S. 453.

See ORPHANS' COURT: WILLS.

VI. Retention of possession.

29. On the sale of personal property, if there be no delivery, the vendee takes no title as against subsequent purchasers and creditors of the vendor. Sufficiency of the delivery of a horse and wagon. *Stephens v. Gifford*, 137 P. S. 219; s. c. 27 W. N. C. 30.

30. Blooms purchased of a debtor and allowed to remain in the latter's possession for thirteen months, were held subject to an execution against the vendor; but not pig-iron so purchased, left to be made into blooms and not manufactured on account of the dulness of business. *Warwick Iron Co. v. First National Bank*, 13 Atlan. 79; s. c. 11 Cent. 696.

31. In an action of trover by a purchaser at a constable's sale under a distress warrant, the defendant cannot establish title from the tenant by the mere production of a bill of sale without proof of actual delivery. *Betz v. Hummel*, 13 Atlan. 938; *Betz v. Franz*, Ibid. 940.

32. Where the plaintiff in a sheriff's interpleader became surety for the purchase money of two mules with a condition that he should own the mules until the note was paid; it was held, that unless he took possession there was no transfer of title as against the creditors of the purchaser. *Shaeffer v. Zech*, 14 Atlan. 405; s. c. 13 Cent. 99.

33. Upon a bill of sale, in New Jersey, of personal property without delivery of possession, and a subsequent lease to the vendor, the property on its removal to Pennsylvania cannot be seized in execution by the latter's creditors. *Cornish v. Grubb*, 2 Northam. 240.

34. The rule that an assignment to be good against creditors must be accompanied by delivery of possession refers to visible tangible property only. *Widdall v. Garsed*, 125 P. S. 358.

35. Where machinery was sold, and it was levied on by the creditors of the vendor during preparations for its removal; it was held, that the title passed without an actual change of possession. *Chase v. Garrett*, 1 Atlan. 912.

36. In a feigned issue where the plaintiff claims title by a sheriff's sale under judgment in his own favor, fraud cannot be established by a bill of sale unaccompanied by possession given by the debtor as security for the judgment prior to the sheriff's sale. *Tisch v. Utz*, 142 P. S. 186.

37. Retention of possession by a debtor of property sold as his at a sheriff's sale is not of itself a badge of fraud. *Stoddart v. Price*, 143 P. S. 537.

38. Sufficiency of the delivery of possession of a horse and coupé to a surety by his principal as against the creditors of the latter, who re-obtained possession as a borrower. *Rieker v. Hensel*, 7 Lanc. 326.

39. A sale of rolling stock, the title of which stands in the name of the vendor until some condition is performed, is invalid as against subsequent creditors or purchasers, unless in writing, acknowledged and recorded, each car marked with the vendee's name, and some actual pos-

session be taken by the latter. *Rafferty v. McKennan*, 1 Atl. 546.

40. To protect a sale of machinery against the creditors of the vendor, such change of possession only is required as its nature and character and the situation of the parties makes reasonable. *Chase v. Garrett*, 1 Cent. 331.

41. If the purchaser at sheriff's sale leaves the goods in the hands of the execution defendant in good faith, it is not a fraud in law or in fact as against other creditors of the defendant. *Rohland v. Rooke*, 127 P. S. 139.

42. Upon the sale of a lot of lumber where the portion sold was piled separately, with the vendee's name marked on each pile in such manner as to be visible to any one examining the lumber and to indicate its ownership by the vendee; it was held, that there was a sufficient delivery of possession as against an execution levied a week later. *Ayers v. McCandless*, 147 P. S. 49.

43. One who purchases the lease of a dairy farm with the cattle and farm implements belonging to it and retains the vendor in possession as a tenant under a written lease, assumes sufficient possession to entitle him to retain it against the vendor's creditors. *Bell v. McCloskey*, 155 P. S. 319.

44. Upon a sale of a crop of wheat in the ground, the same to be threshed by the vendor, the waiting by the vendee for six weeks after harvest before demanding delivery was not such an unreasonable delay by the purchaser as to render the sale fraudulent as to creditors. *Emery v. Scarlett*, 8 C. C. 123.

45. A sale of goods in the hands of a bailee is good against an execution creditor, without delivery of possession. *Welton v. Miller*, 4 Del. 174.

46. Where a son sold horses and farming implements to his father for a good consideration and they were removed to a hotel, but in a few days they were returned to the son to be used by him without pay until the father could sell or remove them; it was held, that it was a

fraud in law and that the goods were liable to seizure by the son's creditors. *Christman v. Frick*, 7 Montg. 184.

47. Where A was indebted to the plaintiffs and sold to them a powder car with the understanding that A was to have the use of it by paying switch charges and a certain sum per year, and the car was removed from the switch upon which it was standing to another, and was thereafter used by A under the agreement and was seized and sold under an execution against A; it was held, in an action of replevin, that the plaintiff could not recover; that the removal of the car from one switch to another was a sufficient change of possession to vest the property in the plaintiff, but that the agreement to allow A the use of it was such a qualification of the plaintiff's possession as to render the sale fraudulent in law. *Thomas v. Everhart*, 4 York 75.

48. Where an artesian well borer was transferred to the plaintiff by a judgment debtor and it appeared that the plaintiff paid no money for it, and that after the sale there was a joint operation of the machine by the vendor and vendee; it was held, in a sheriff's interpleader between the vendee and a purchaser at sheriff's sale under a judgment against the vendor, that the evidence tended to show a fraudulent transfer of ownership. *Gantz v. McCracken*, 4 York 184.

49. Where a son being in debt sold a stock of goods in his store to his mother, who retained him as general manager of the business, and after the sale charges for goods sold were made against her and cash payments on account of the same were credited to her on the books of the store; it was held, that such facts were material and pertinent upon the question of the *bona fides* of the sale, and especially upon the question of delivery or change of possession. *Clarke v. Miner*, 6 Kulp 397.

50. Where the vendor of a horse surrendered a lease of the barn in which it was kept and the vendee arranged to keep it in the same barn, the question of

sufficient change of possession was properly left to the jury. *McAlevy v. McElroy*, 14 Atlan. 242; s. c. 12 Cent. 538.

51. In an action against the sheriff for a wrongful levy, where the plaintiff claimed title by bill of sale one day previous to the execution and took possession at once, the defendant in the execution remaining as an employé, the question of intent to defraud creditors was for the jury. *Gray v. Trent*, 16 Atlan. 107.

52. Upon the trial of a sheriff's interpleader, where the claimant had purchased the farm of the execution defendant at sheriff's sale, and taken possession, and afterwards bought from the latter the property on the farm, subsequently leasing both the farm and personalty to the wife of the execution defendant, who was his sister, and employed the execution defendant as his hired man, it was for the jury to say whether the sale of personalty was in good faith, and whether the change in possession was all that could reasonably be expected. *Renninger v. Spatz*, 128 P. S. 524.

53. Where D. in payment of a debt transferred to P. a portable saw mill, then sawing timber on P.'s farm, where it afterwards remained operated by a son of D. to whom it was leased by P., and the engine of the mill was subsequently levied upon for a debt of D. contracted prior to the transfer; it was *held*, that the court was justified in submitting to the jury the question, whether in view of the nature of the transaction, the position of the parties and the character and intended use of the property, there was a sufficient change of possession. *Pressel v. Bice*, 142 P. S. 263.

54. Where the plaintiff proved that he bought the mare in dispute in good faith from his stepfather with whom he made his home, and that he paid for the mare and for her keep with his earnings, and had used her for six years when she was sold to defendant at a constable's sale on a judgment against his stepfather; it was *held*, that whether there was such a

change of ownership and possession as under the circumstances could reasonably be expected was a question of fact for the jury. *McGuire v. James*, 143 P. S. 521.

55. Where a debtor in part payment of his debt transferred to a creditor, in good faith, all the appliances of a lumbering camp and also his contract with the land owner, and the creditor did not remove the property from the place, but, retaining the former owner as his foreman, continued operations under the contract until the property was levied on by another creditor; it was *held*, that in view of the character and situation of the property and the use that was being made of it, no formal ceremony was necessary to a valid sale and delivery even as against other creditors, and the case should have been submitted to the jury. *Garretson v. Hackenberg*, 144 P. S. 107.

56. In a sheriff's interpleader for horses, wagons and harness, claimed under a bill of sale from the defendant in the execution, where it appeared that the vendor declared in the presence of witnesses that he delivered possession to the vendee and delivered the key of the stable and went away and stayed away, and the vendee went into possession but employed the vendor's drivers, that the lease for the stable continued in the vendor's name but the vendee paid the rent and the vendor's name remained on the stable and wagons; it was *held*, that it was not error to refuse to give binding instructions that there had not been a sufficient change of possession. *Janney v. Howard*, 150 P. S. 339.

57. Upon the trial of a sheriff's interpleader, where it appears that the claimants and the defendants in the execution, who were two firms, had negotiated for the combination of the firms, and that during said negotiations the claimant's goods were moved to the premises of the other firm, but the agreement was never consummated and the goods were never mingled with those of the defendant; it was *held*, that the case was properly sub-

mitted to the jury. *Heere v. Penn National Bank*, 160 P. S. 314.

58. Upon the trial of a sheriff's interpleader, where the testimony showed a symbolic delivery of the stock of goods and the assumption by the vendee of immediate and exclusive control, followed by a change of all indications of the former ownership; it was *held*, that the question of delivery was for the jury. *Goddard v. Weil*, 165 P. S. 419.

59. Upon the trial of a sheriff's interpleader where a transfer of the property is alleged to have been fraudulent, such an inference is not sustained by the mere proof of inadequacy in price, but that fact may be considered by the jury in connection with the other facts in the case. *Goddard v. Weil*, 165 P. S. 419.

60. Upon the trial of a sheriff's interpleader, it was *held*, that the question of change of possession was for the jury taking into consideration the character of the property, the position of the parties, the place where the property was kept before the sale, the absence of the vendor from the county for a considerable period after the sale, and the use made of the property by the other members of the family of the vendee. *Mandeville v. Dodge*, 7 Kulp 13.

FRAUDS — STATUTE OF.

I. Contracts affecting lands.

- (a) Contracts within the statute.
- (b) Contracts for the sale of lands.
- (c) Parol gift of land.
- (d) Parol leases.
- (e) When a parol contract will be enforced.
- (g) When the statute does not apply.

II. Promise to pay the debt of another.

- (a) When within the statute.
- (b) When not within the statute.

I. Contracts affecting lands.

(a) Contracts within the statute.

1. A contract to procure options for coal lands and to divide profits upon re-

selling them at a profit is not within the statute of frauds; under such a parol agreement of partnership, such profits realized in a single transaction can be recovered in assumpsit by one partner against the other. *Howell v. Kelly*, 149 P. S. 473.

2. A parol contract as to the thickness of a party wall is void under the statute of frauds. *May v. Prendergast*, 12 C. C. 220.

(b) Contracts for the sale of lands.

3. A married woman cannot bind herself to convey real estate except by an agreement in writing separately acknowledged. *Caldwell's Appeal*, 7 Atlan. 211.

4. If an intruder be in possession the statute continues to run unless there be some definite promise to the owner, or such acknowledgment of his title, as prevents him from taking steps to regain his possession. If the statute has run, even a definite parol agreement is within the statute of frauds. *Byers v. Shepler*, 7 Atlan. 182.

5. A will devising real estate in consideration of services to be rendered by the devisee may operate as a memorandum of a contract for the sale of the land sufficient to comply with the statute of frauds, and as such be evidence in the lifetime of the testator; especially is this so where the testatrix in accordance with her agreement has put the devisee in possession, and he has fully complied with his part of the agreement. *Smith v. Tuit*, 127 P. S. 341. See *Tuit v. Smith*, 137 P. S. 35; s. c. 26 W. N. C. 563.

6. In an action of replevin to recover timber cut on land where an equitable ownership in the land growing out of a parol contract is set up as a defence, the defendants occupied the same position as if they had filed a bill for specific performance, and their rights must be so clearly established as to justify a chancellor in enforcing the alleged parol contract. *Henrici v. Davidson*, 149 P. S. 323.

7. Where a contract to sell land is

insufficient under the statute of frauds, a notice by the vendor that he will not convey and that he will consider the plaintiff a trespasser will not prevent a recovery by the vendee of his expenses incurred after the notice, if it appear that the vendor withdrew the notice or encouraged the vendee to believe that the original contract would be carried out. *Holthouse v. Rynd*, 155 P. S. 43.

8. Where an agreement in writing for the sale of land cannot be established without the help of parol testimony, it is within the statute of frauds. *Rineer v. Collins*, 156 P. S. 342.

9. A sale of land to establish a conversion cannot be proven by a verbal agreement of the executors to sell the same. *Darlington v. Darlington*, 160 P. S. 65.

10. A contract for the sale of lands cannot be established by a paper which does not identify the land or indicate the price to be paid. *Wilson's Estate*, 7 C. C. 459.

11. Upon a bill for the specific performance of a contract to sell land, such contract being in writing and made by an agent of the owner but without authority in writing; it was held, that an averment in the bill that the defendant had executed a deed in pursuance of the agreement which she still retained in her possession was sufficient to entitle the plaintiff to go to his proofs. *Becker v. Patten*, 10 C. C. 643.

12. Upon a bill for the specific performance of an agreement for the conveyance of land, the court overruled a demurrer on the ground that there was no agreement in writing nor possession by the complainant, where the bill alleged that there was a parol agreement for a specific value to be given in work with the balance to be paid in cash, that the said work had been done and that a deed was executed by the defendant, but they refused to deliver it upon tender of the balance in cash. *Brophy v. Hagan*, 12 C. C. 365.

13. A receipt for purchase money

which did not refer to the land and was signed by a person as agent was held to be greatly defective as a contract for the sale of lands under the statute of frauds. *Tighe v. Doran*, 7 Kulp 124.

14. A railroad company cannot acquire title to a right of way by parol. The payment of the purchase money will not alone take the case out of the statute, neither will the continuance of a prior possession obtained by a trespass. *Scranton v. Delaware & Hudson Canal Co.*, 1 Lack. Jur. 149.

15. The court will not open a judgment to enforce a parol agreement to accept a conveyance of land in satisfaction. *Linen v. Sweeny*, 1 Lack. Jur. 196.

16. Upon a *scire facias* to revive a judgment, it was held, that the plaintiff could not be defeated by a verbal agreement that the defendant was to have satisfaction of the judgment, and the plaintiff was to hold certain lots in fee discharged of defendant's equitable interest therein, such parol agreement being void within the statute of frauds. *Alderfer v. Boyer*, 7 Montg. 53.

17. The sale of real estate through auctioneers is within the statute of frauds and the owner will not be restrained at the suit of a purchaser from selling the land to another where the contract with the auctioneer was not in writing; and this, though one hundred dollars was paid on account at the time of the sale. *Harvey v. Thacher*, 28 W. N. C. 134.

18. As to the sufficiency of a contract for the sale of lands, see note to *Phillips v. Swank*, 13 Atlan. 715.

(c) Parol gift of land.

19. In ejectment against a co-owner where the defendant claims title by adverse possession, a parol gift from the father to the defendant, though not good in itself, is evidence that he entered adversely. *Craig v. Craig*, 11 Atlan. 60.

20. A parol gift of land cannot be established by evidence that the donor staked off the lot, and told a third person to tell the donee that he had given him

the lot, and that he stood by and watched him build a house on it. *Dolan v. Kelly*, 11 Atl. 680; s. c. 10 Cent. 289.

21. A parol gift of land, to be followed by a deed, is invalid as against a subsequent grantee of the vendor; and this, though the gift be evidenced by the letters of the owner, and the one to whom the gift was made was in possession at the time of the second conveyance. *Giebner v. Patterson*, 5 Cent. 723.

22. A parol gift of land, or an unrecorded trust, is void as against a purchaser without notice. *Dolan v. Kelly*, 11 Atl. 680; s. c. 10 Cent. 289.

23. A parol gift of land from father to daughter cannot be taken out of the operation of the statute of frauds unless such parol gift be shown by full, complete, satisfactory and indubitable proof. *Dunning v. Reese*, 7 Kulp 201.

24. Upon a parol gift of land and continued possession by the donee until the donor's death, the commonwealth in proceedings to enforce collateral inheritance tax cannot take advantage of the statute of frauds. *Huey's Estate*, 41 P. L. J. 470.

(d) Parol leases.

25. Where a lease for five years was executed under seal by the lessee alone, who entered and remained in possession, and by a separate writing under seal attached to the lease, the defendant became surety for the lessee's covenants for the full term during which the latter might retain possession; it was held, that the defendant was liable as surety under his contract so long as the lessee remained in possession, and that the legal effect of the lessor's omission to sign the lease under the statute of frauds had no bearing on the defendant's responsibility. *Duffee v. Mansfield*, 141 P. S. 507.

26. Where a lease for five years provides for a further extension of five years at the option of the lessee by notice in writing three months before the expiration of the first term, the lessor may waive the provision for a written notice and accept an oral notice, and it is error

to take the case from the jury under the statute of frauds, because the notice was not in writing. *McClelland v. Rush*, 150 P. S. 57; reversing s. c. 11 C. C. 188.

27. Where the lessees under an oil and gas lease have an absolute right to rescind the lease at any time and such lessees never enter into possession, the rights and privileges under the lease may be rescinded by parol. *Hooks v. Forst*, 165 P. S. 238.

28. Under the act 21 March 1772 (Brightly's Purdon 941), a lease under seal for a term of ten years executed by an agent without written authority creates a tenancy at will, or at most a tenancy from year to year, terminable at the end of any year at the will of either party; and after the death of the tenant and notice by his executors of his intention to surrender, the liability of the tenant's estate cannot be changed by a ratification of the lease in writing by the principal. *Loran's Estate*, 10 C. C. 554; s. c. 29 W. N. C. 115.

29. Where a lease executed by the lessor's agent and acquiesced in by the principal provided that the buildings erected by the lessee should be paid for by the lessor at a price to be determined by arbitrators, it was not necessary that the agent's authority should be in writing. *Dietz v. Lamb*, 5 Kulp 264.

30. A lease, though for more than three years, may be rescinded by parol, where the rescission is accompanied by a surrender and acceptance. *West v. Connel*, 6 Montg. 196.

31. It is not necessary that the surrender of a lease of lands for oil and gas purposes and the acceptance of such surrender should be in writing; it may be done orally by the parties at any time. *Cochran v. Shenango Natural Gas Co.*, 40 P. L. J. 82.

(e) When a parol contract will be enforced.

32. If the vendee take possession under a parol agreement to give bond to pay the purchase money to the heirs of the

vendor, the agreement is not within the statute of frauds, and one of the heirs may maintain an action for his share of the purchase money. *Hillegass v. Hillegass*, 2 Cent. 832.

33. A parol contract to sell land will be enforced only where it is established by clear, complete, and unequivocal proof, and where it has been so far executed that it would be inequitable to rescind it. *Daisz's Appeal*, 128 P. S. 572; affirming *Daisz's Estate*, 6 Lanc. 177.

34. Equity will decree the specific performance of a parol contract for the sale of land where possession has been taken in pursuance thereof, and valuable improvements made, and the plaintiff has been in possession for upwards of fourteen years; and this, though the full purchase money has not been paid. Delivery of the deed will be decreed on payment of the balance due. *Schuey v. Schaffer*, 130 P. S. 16.

35. Equity will enforce a parol contract to sell lands where it appears that a deed was duly executed and delivered, and then handed back to the vendor for corrections, who wrongfully retained it, and further, that plaintiff was given and retains possession. *Graft v. Loucks*, 138 P. S. 453; s. c. 27 W. N. C. 184.

36. Where plaintiffs by a parol contract sold to defendant a lot of ground to have a frontage of fifty feet, and several weeks thereafter the plaintiffs' agent, in the presence of the defendant staked off the lot sold and marked the boundaries upon the ground; it was held, that such designation was a component part of the contract, which was therefore taken out of the operation of the statute of frauds; and it appearing that the agent by mistake included in the line one foot of land belonging to a stranger, the defendant in an action for the purchase money was entitled to recoup damages for the failure of title thereto; and this, although the plaintiffs tendered to him and put on file a deed for the fifty feet to which they had title. *Tyson v. Eyrick*, 141 P. S. 296.

37. Where the agent of a vendor of land without written authority signs for the vendor a contract for the sale of the land, such contract under the statute of frauds, when ratified in writing by the vendor, will have the same effect as though signed by the agent in pursuance of lawful authority by writing; provided the vendee has not repudiated the contract before such ratification. *McClintock v. South Penn Oil Co.*, 146 P. S. 144.

38. A parol sale of land may be established by proof that the vendor bought the land at a judicial sale at the request of the vendee, and agreed to sell to him as much as he could pay for, that a line was subsequently established fixing the portion of the vendee, who was to pay at the bid which the land was bid off at, with two hundred dollars extra, and that the vendee took possession and paid the whole of the purchase money. *Brownfield v. Brownfield*, 151 P. S. 565.

39. A parol agreement for the exchange of land established by clear, precise and indubitable evidence and consummated by actual possession is not within the statute of frauds. *Brown v. Bailey*, 159 P. S. 121.

40. Where tenants in common, intending to make partition, run and mark upon the ground a division line and then take possession of their respective parts, title will vest in each in severalty. The statute of frauds is not impinged by a parol partition of land. *Wolf v. Wolf*, 158 P. S. 621.

41. Payment of part of the purchase money upon a parol contract to sell land is not such a partial performance of the contract as will entitle the vendee to a decree for specific performance. *Becker v. Patten*, 10 C. C. 643.

42. Where a married woman through her husband agreed to sell certain land to a tenant in possession who paid a certain amount on account and then ceased to pay rent, and who made certain improvements and remained in possession; it was held, upon the vendor's death, upon a petition for specific performance, that the facts

set forth did not show such an equity on the part of the purchaser as to take the case out of the statute of frauds. *Donnelly's Estate*, 15 C. C. 11.

43. A parol sale of land will not be taken out of the statute of frauds unless the boundaries be defined and the quantity of land indicated, consideration fixed, and delivery of possession in pursuance of the contract are shown by clear and convincing proof. *Small v. Ehrgood*, 1 Lack. L. N. 167.

(g) When the statute does not apply.

44. A parol partition of land is not affected by the statute of frauds. What is sufficient evidence of. *McKnight v. Bell*, 135 P. S. 358; s. c. 26 W. N. C. 281.

45. Where the plaintiff was operating a coal mine on the north side of a road under a written lease from the defendant, and made a parol agreement with the defendant, that if he, the plaintiff, could find coal on the south side of the road, the defendant would lease to him eight or ten acres thereof for as long as it would last at a certain rental, and the plaintiff developed coal on the south side of the road and opened and prepared a pit, and the defendant then refused to execute the lease; it was *held*, that the parol contract was an independent agreement, upon the breach of which the plaintiff was entitled to recover damages to the value of his work done, and that the case was unaffected by the statute of frauds and no change of the written contract by parol was involved. *Heilman v. Weinman*, 139 P. S. 143.

46. Upon the assignment of a judgment, which is a lien on real estate, a collateral parol agreement that the assignors were to receive a credit upon account of their indebtedness to the assignee, is not within the statute of frauds. *Goldbeck v. Kensington Nat. Bank*, 147 P. S. 267; affirming s. c. 10 C. C. 97; 48 L. I. 76.

47. In an action for the drilling of an oil well under a parol contract to drill for an interest therein, evidence is ad-

missible on behalf of the defendant that the contract was that he should hold the oil and the property until the proceeds paid for the drilling, when plaintiff was to have a quarter interest. The statute of frauds has no bearing. *Haight v. Conners*, 149 P. S. 297.

48. Where the signature of a party to a contract for the sale of land is made by his direction and in his presence, it is his signature, and no question of agency under the statute of frauds arises. *Fitzpatrick v. Engard*, 4 Dist. Rep. 383. See *Fitzpatrick v. Engard*, 4 Dist. Rep. 87.

II. Promise to pay the debt of another.

(a) When within the statute.

49. Under the act of 10 May 1881 (*Brightly's Purdon* 221), the acceptance of a check or bill of exchange for over twenty dollars must be in writing. *Magginn v. Dollar Savings Bank*, 131 P. S. 362.

50. A parol promise by a third person, that if the promisee will forbear eviction and permit his tenant to occupy the premises for the remainder of the term the promisor will pay the rent, is within the statute of frauds and unenforceable. *Riegelman v. Focht*, 141 P. S. 380.

51. A promise by a senior judgment creditor to pay off a junior judgment after buying in the property at a sheriff's sale which was about to take place, was *held* to be an undertaking to pay the debt of another and void under the statute of frauds. *Branson v. Kitchenman*, 148 P. S. 541.

52. A promise to pay the debt of another, although in writing, is of no force unless founded upon a consideration either actual or by the existence of a seal, and where the promise is to pay an overdue debt, mere forbearance without an agreement to that effect is no consideration. *Hess's Estate*, 150 P. S. 346. See *Kanada v. Duckworth*, 8 Montg. 208.

53. Where a parol promise is to pay the debt of another composed of separate

accounts, some of which are liens on defendant's property, and some are not, the promise is valid only as to the account which was a lien when the promise was made. *Rees v. Jutte*, 153 P. S. 56.

54. Where plaintiff was employed by a contractor to cut timber, and he was told by an agent for the owner to "keep on to work just as you have been, we will see you paid"; it was *held*, that the agreement was a collateral undertaking within the statute of frauds, upon which there could be no recovery. *Lewis v. Lewis Lumber Mfg. Co.*, 156 P. S. 217.

55. Where the plaintiffs and defendant entered into a parol agreement, by which the plaintiffs were to continue to sell goods to certain customers, and obtain all the cash they could, and take their notes for the balance due upon each month's settlement, and the defendant agreed to discount said notes for plaintiffs without recourse, but there was nothing said about the original debt being extinguished by the notes; it was *held*, that the defendant's promise was the promise to pay the debt of another and was within the statute of frauds and could not be enforced. *Dougherty v. Bash*, 167 P. S. 429.

56. Where the plaintiff, a physician, was attending the defendant's step-son, who was of age, and it becoming necessary to call in a surgeon to perform an operation, the defendant said to the plaintiff, "If the boy dies I don't want any blame resting on me. You go and get the doctor and do all you can for the boy. I will see that you get your pay," and the operation being performed, the defendant paid the surgeon's bill but refused to pay the plaintiff, it was properly left to the jury whether the defendant made an original contract to pay the plaintiff, and the jury having found for the plaintiff for the services rendered subsequent to the making of the contract, the verdict was sustained. *Boston v. Farr*, 148 P. S. 220.

57. As to when a promise to pay the debt of another is within the statute of frauds, see note to *Nugent v. Wolfe*, 4 Atlan. 19.

(b) When not within the statute.

58. Upon a sale of stock and a verbal agreement by the purchaser to assume the liabilities and receive the dividends, the statute of frauds is no defence to an action by the vendor to recover an assessment paid by him upon the stock. *Bailey v. Shroyer*, 1 Atlan. 717.

59. Where a purchaser of real estate from a decedent surrenders his contract of purchase to the executor on the latter's agreement to pay a claim against the former for the erection of a building, such promise is not within the act of 26 April 1855 (Brightly's Purdon 943), and the promisor is liable personally to the third party for his claim. *Fehlinger v. Wood*, 134 P. S. 517.

60. Where the leading purpose of a promise is to subserve some interest or object of the promisor himself, such promise is not within the statute of frauds; and this, though the effect of the promise is to pay or discharge the debt of another. *Elkin v. Timlin*, 151 P. S. 491.

61. Where one of two joint endorsers agrees to become such upon the promise of the other that he will be put to no loss, and the promising endorser afterwards pays the whole debt, he cannot hold the other for contribution; such a promise is not a promise to answer for the debt of a third person within the statute of frauds. *Mickley v. Stocksleger*, 10 C. C. 345.

62. A promise by the purchaser of real estate to apply a part of the consideration money to a debt due by the vendor is not within the statute of frauds. *Dunlevy's Estate*, 10 C. C. 454.

63. Forbearance is a good consideration to support a parol promise to pay a mechanic's lien against the promisor's land for which he was not personally liable. Such a promise is not within the statute of frauds. *Bell's Estate*, 4 Montg. 175.

64. A verbal promise by the owner of a building to pay a claim for work done for the contractor is not within the statute of frauds. *Kelly v. Wicks*, 26 W. N. C. 269.

65. Where A conveyed land to B and the latter agreed verbally to pay a debt owed by A to C, such agreement being a part of the consideration for the conveyance, and all three were present when the agreement was made; it was *held*, that suit upon the same was not barred by the act 26 April 1855 (Brightly's Purdon 943), requiring promises to pay the debt of another to be in writing. *Young v. Peeling*, 1 York 79.

FRAUDULENT CONVEYANCES.

- I. When a conveyance is fraudulent as to creditors.
 - (a) Voluntary conveyances.
 - (b) Fraudulent intent.
- II. Contracts between husband and wife.
- III. Between parent and child.
- IV. Conveyances by partners.
- V. By corporations.
- VI. Who may avoid a fraudulent conveyance.
- VII. Operation of a fraudulent conveyance.

I. When a conveyance is fraudulent as to creditors.

(a) Voluntary conveyances.

1. The assignment of a contract to construct a railroad, made to facilitate its completion, and to secure the entire sum for the benefit of the assignor's creditors, though without consideration, is not fraudulent and void. *Ahl's Appeal*, 129 P. S. 49. See *Walford v. Railroad Co.*, 5 York 186.

2. Equity will not enforce the provisions of a secret trust in a bill of sale made to hinder and delay creditors. *Guggenheimer's Appeal*, 2 Cent. 526.

3. Land being set aside to the debtor in bankruptcy proceedings, under the exemption laws, a subsequent transfer by him in trust for his children is not fraudulent as to creditors; and this, though his discharge was subsequently refused. *Boyd v. Martin*, 3 Del. 601.

4. Upon the subject of transfers of property in fraud of creditors, see notes to *Knight v. Kidder*, 1 Atlan. 143, *Miholland v. Tiffany*, 2 Ibid. 837, and *Foster v. Knowles*, 7 Ibid. 295.

(b) Fraudulent intent.

5. In ejectment by a purchaser at sheriff's sale against a previous vendee of the defendant, the question of fraud in the transfer was properly left to the jury. *Close v. Benjamin*, 9 Atlan. 51.

6. In an action against a constable for levying on and selling plaintiff's property under a judgment against his father, evidence of fraudulent transfers between the plaintiff's father and mother is inadmissible, unless there be an offer to show that the plaintiff's title had been obtained by such a transfer. *Bennethum v. Long*, 13 Atlan. 778.

7. In an issue to test the validity of an assignment, evidence is admissible of the knowledge and intent of the assignee, and of the insolvency and admissions of the assignor. *Kline v. First National Bank*, 15 Atlan. 433.

8. An intent to defraud creditors cannot be presumed from paying a debt before it becomes due and taking a rebate of interest. *Sayers v. Kent*, 3 Cent. 610.

9. A *bona fide* purchaser from one indebted, is not affected by a fraudulent intent on the part of his grantor of which he had no notice. *Reehling v. Byers*, 94 P. S. 316. See *Reehling v. Byers*, 2 York 56.

10. In an attachment execution where the garnishees claimed that the fund in their hands was the proceeds of lands belonging to the son of the defendant and deposited by the defendant under a power of attorney from his son, and there was evidence tending to show that the title to the property was put in the son under circumstances tending to indicate an intent to cover up the title; it was *held*, that the case was for the jury. *First National Bank of Brookville v. Cathers*, 164 P. S. 343.

11. Mere suspicion of a fraudulent purpose growing out of mere relationship

will not justify the court in submitting to the jury the question of fraud in the transfer of personal property; where the proof of title is clear and uncontradicted, the court should give binding instructions. *Newton v. Shaffer*, 6 Kulp 357.

12. A combination to defraud creditors between a debtor and transferee cannot be established by the declaration of one party in the absence of the other. *Hager v. Weiss*, 5 Montg. 121.

II. Contracts between husband and wife.

13. If a husband at the time of a voluntary settlement on his wife be indebted in any amount, the burden is on those claiming under the settlement to show that it was not covinous. *Seiple v. Seiple*, 1 Northam. 365; reversed as to another point in 133 P. S. 460; s. c. 25 W. N. C. 488.

14. A lot purchased by a wife on the credit of her separate estate may be held by her against her husband's creditors; so if a house be built on the lot with money raised on mortgage, the lot having advanced in value. *Perrine v. Dinan*, 133 P. S. 544.

15. In a suit against a sheriff for selling property of the wife under execution against her husband, she may show title by proving that the goods were purchased with the proceeds of the sale of a building paid for by her with the proceeds of a stock of notions bought by her on credit, and which building she had moved on to her own lot. *Rogers v. McDowell*, 134 P. S. 424.

16. The voluntary conveyance to a wife by an insolvent husband engaged in a hazardous business, made with intent to place the property beyond the reach of his creditors, is fraudulent and void as to a subsequent creditor, who became such without notice of the conveyance. *Marshall v. Roll*, 139 P. S. 399.

17. Where, upon the trial of a sheriff's interpleader, the goods were claimed by the wife of the execution defendant under

a trust deed from the purchasers at a sheriff's sale under judgments against the husband, one of which was in favor of the wife; it was *held*, that the trust being to pay the grantor's claims and apply the balance in support of her family, it was necessary to show in order to defeat the claimant, either that the grantors did not acquire a good title under the sale, or that the assignment to the claimant was fraudulent and intended by the grantors to hinder and delay the then existing creditors of the claimant's husband. *Evans v. Kilgore*, 147 P. S. 19.

18. In an action of ejectment by a married woman claiming title against her husband's creditors, where the plaintiff shows that she purchased the property with her own money, she is entitled to recover; otherwise, if the title was put in her name to cheat and defraud her husband's creditors. *Delaney v. Mulligan*, 148 P. S. 157.

19. Where a widow of the testator claimed certain notes as a gift, and a bill filed by the executors against her was dismissed, the court refused to strike off the decree on the petition of a creditor, where it appeared that two of his counsel had notice of the proceedings before the decree was made and there was no proof that the decedent was insolvent at the time of the gift to his wife. *Koons v. Koons*, 148 P. S. 585; affirming s. c. 6 Kulp 317.

20. A wife's joining with her husband, who was financially embarrassed, in the conveyance to a creditor of certain of his real estate encumbered to almost its full value, so as to release her right of dower, is not sufficient consideration to support a conveyance of other real estate by the husband to the wife. *Commonwealth Ins. & Trust Co. v. Brown*, 166 P. S. 477.

See HUSBAND AND WIFE.

III. Between parent and child.

21. That an assignment of real estate to a son in trust, was in fraud of the creditors of the grantor, is no reason why a judgment creditor of the son should be

permitted to interfere with his carrying out the trust. *Dougherty v. Mortland*, 11 Atlan. 234.

22. A bill of sale from an insolvent son to his father, of a leasehold, with the understanding that the property should revert to the son upon payment of the father's debt out of the rents, is void as against the other creditors of the son. *Frey v. Gessler*, 12 Atlan. 854; s. c. 11 Cent. 655.

23. In ejectment by a sheriff's vendee, if the plaintiff put in evidence a deed by the defendant in the execution to her daughter executed and recorded two years before the judgment was entered, the burden is on him to show that the conveyance was made to hinder, delay or defraud the judgment creditor; otherwise he was properly non-suited. *Brown v. McCormick*, 135 P. S. 434.

24. A contract between a father and son providing for an unreasonable and extravagant compensation, is not fraudulent as matter of law; it would not be fraudulent in fact if made when the father is possessed of large means and believed himself solvent, unless made to defraud future creditors. *Adams v. Hitter*, 140 P. S. 166.

25. Where a purchaser of land caused it to be conveyed to his son; it was held, that a creditor of the father, who became such years afterward, could not impeach the deed as procured to defeat creditors. *McDonald v. O'Neil*, 161 P. S. 245.

See GIFT: INFANT.

IV. Conveyances by partners.

26. Where, after a sheriff's sale and purchase by plaintiff of firm property under an individual judgment note given by a member of the firm for a firm debt, the firm subsequently gives its own note for the same debt upon which there is a second sale and repurchase by the plaintiff; it was held that the first sale was no satisfaction and the second sale was not in fraud of other creditors, but merely perfected the purchaser's title. *Stevens v. Diehl*, 127 P. S. 416.

27. Where a partner in the fishing business transferred to his copartner all his interest in the firm, and four days before this assignment he had executed a bill of sale to his brother-in-law, of his interest in a vessel which was owned by the firm, and the brother-in-law was a clerk at a small salary and knew nothing of the fishing business and made no examination of the boat and no inquiry as to its value, and he gave a judgment note for an amount equal to nearly two years of his entire salary, and he knew that the boat was part of the assets of the firm; it was held, that the evidence was sufficient to submit to the jury the *bona fides* of the sale, and that the fact that the sale was registered was immaterial. *Eichenlaub v. Hall*, 163 P. S. 201.

See PARTNERSHIP.

V. By corporations.

28. It is fraudulent as against its creditors, for a corporation to transfer its property to a new company, a majority of whose stockholders are the stockholders in the assignor. *Montgomery Web Co. v. Dienelt*, 133 P. S. 585; s. c. 25 W. N. C. 549; reversing s. c. 5 Montg. 9.

VI. Who may avoid a fraudulent conveyance.

29. The plaintiff in ejectment cannot avoid his own deed to the defendant by showing that it was executed in pursuance of a lottery and therefore invalid. *Allebach v. Hunsicker*, 132 P. S. 349.

30. An assignee for creditors has merely the rights of his debtor; a bill does not lie by him to avoid a previous fraudulent transfer of the debtor's property. *Horlacher v. Bertolet*, 12 Lanc. 17.

31. A fraudulent conveyance is good between the parties, and only persons whom the transaction tended to defraud have a standing in court to avoid it; as against all other persons, the deed vests a good title in the grantee. *McDonald v. O'Neill*, 7 Kulp 126.

32. A conveyance by a grantor of his

whole estate upon a spendthrift trust with power of appointment, and in default of appointment with remainder to the grantor's heirs, is fraudulent and void as to creditors, including those who become such subsequent to the conveyance, and the principal and income of the trust are liable to attachment in the hands of the trustee. *Catherwood's Estate*, 29 W. N. C. 344.

VII. Operation of a fraudulent conveyance.

33. A transfer with intent to defraud creditors is fraudulent though made for a full and valuable consideration, but the purchaser, if ignorant of the fraudulent intent, is protected. *Hager v. Weiss*, 5 Montg. 121.

34. Where the plaintiff in ejectment claimed under unrecorded articles of agreement from A, and the defendants claimed title under a sheriff's deed upon a judgment against A entered subsequent to the date of the agreement, and the plaintiff's testimony tended to show that the agreement was *bona fide* and that notice had been given at the sheriff's sale, while the defendant's testimony tended to show that A after the date of the agreement had continued to occupy the land, had insured the buildings in his own name, and had treated the property as his own, and that the plaintiff had declared three years after the articles were signed that A was the owner of the property; it was *held*, that the case was for the jury. *Hartley v. Millard*, 167 P. S. 322.

35. Where the owner of land which is charged with liens makes a conveyance, which is fraudulent as against creditors, a sheriff's sale under a judgment subsequently obtained against the grantor passes only the title of the fraudulent grantee and the prior liens are not affected. *Niederhofer v. Bange*, 1 York 38.

36. The act 31 March 1860, sec. 130 (amended by the act 23 June 1885, Brightly's Purdon 538), punishing the fraudulent

secretion and removal of property by a debtor with intent to defraud his creditors, does not apply to the fraudulent conveyance of real estate for that purpose. *Comm'th v. Markle*, 1 York 39.

FRAUDULENT DEBTORS.

See ATTACHMENT, III.

FRAUDULENT JUDGMENTS.

See FRAUD: JUDGMENT.

- I. Judgments obtained by fraud.
- II. Debtor's right to prefer creditors.
- III. When a judgment is fraudulent as to creditors.
- IV. Judgments from husband to wife.
- V. Who may attack the *bona fides* of a judgment.
- VI. When a judgment may be impeached.
- VII. How a judgment may be invalidated.
- VIII. Of the intent to defraud.

I. Judgments obtained by fraud.

1. A judgment given by a father to a son without consideration will be opened where there is any evidence of imposition or undue influence. *Brehony v. Brehony*, 5 Kulp 266.

See FRAUD.

II. Debtor's right to prefer creditors.

2. A debtor in failing circumstances may prefer his creditors by a confession of judgment as he sees fit. In giving several judgments to his attorney to be entered up, he may prefer his attorney's judgment to the others. *Harris's Appeal*, 5 Cent. 553.

3. An insolvent corporation may prefer a creditor by confessing judgment to him, where there is no fraud in the contracting of the debt or the confessing of the judgment. *Prouty v. Prouty & Barr Boot & Shoe Co.*, 155 P. S. 112.

III. When a judgment is fraudulent as to creditors.

4. The giving of a judgment note to one of their creditors by a partnership for going bail upon an appeal from a judgment against them individually is not in fraud of the latter's judgment creditors; and this, though part of the debt is the indebtedness of the partnership to the bail. *Cavanovan's Appeal*, 5 Atlan. 820.

5. It is not a fraud in law for an executor to confess a judgment for a *bona fide* debt, barred by the statute. *Woods v. Irwin*, 141 P. S. 278.

6. Where judgment is fraudulently confessed for more than is actually due, it is wholly vitiated by the fraud, and the fact that a sheriff's sale under the judgment did not realize as much as was really due is immaterial. *Lynch v. English*, 4 Del. 481.

7. An affirmative finding by an auditor sustained by the court below, that a judgment is not collusive and fraudulent, will not be reversed by the supreme court except for palpable error. *Baird v. Ford*, 152 P. S. 637.

8. Upon the distribution of the proceeds of personal property where the judgments of the execution creditors were attacked for fraud but the commissioner found in their favor, the court refused to set the finding aside in the absence of gross error in such finding of fact. *Price v. Price*, 3 Northam. 61.

IV. Judgments from husband to wife.

9. Where a creditor of a deceased husband, after his death and before burial, obtained from the wife a judgment note for her husband's debt; it was *held* not to be such fraud as would defeat an action on the note. *Blee v. Giltinan*, 12 Atlan. 479; s. c. 11 Cent. 205.

10. If a wife in good faith takes a judgment from her husband for an amount she believes at the time due her, it can be maintained against his creditors,

though in excess of the amount actually due. *Howard Watch Co. v. Bedillion*, 131 P. S. 385.

11. Where a wife upon a judgment confessed by the husband for money received from the wife levied upon the goods in a millinery establishment; it was *held*, that the proceeding was not in fraud of creditors because the evidence failed to show that the business belonged to the wife; and an attachment issued by a subsequent creditor was dissolved. *Bowen v. Prizer*, 7 Montg. 65.

12. Upon the trial of an issue concerning the validity of a judgment given by a husband to his wife, it was *held* to be incompetent for the wife to prove by her counsel, certain declarations made by her in his office in the absence of the contesting creditor showing the existence of an indebtedness to her from her husband. *Schwartz v. Schwartz*, 5 York 35.

See HUSBAND AND WIFE.

V. Who may attack the bona fides of a judgment.

13. A judgment note given to defraud the creditors of the maker, though void as to creditors, is good and will be enforced between the parties to the note. *Harbaugh v. Butner*, 148 P. S. 273.

14. A rule to open a judgment at the instance of a subsequent creditor will be discharged as a matter of course. The proper practice is to apply for a rule on the plaintiff and sheriff to show cause why the money produced by the sheriff's sale should not be paid into court, and dispute the validity of the judgment before an auditor or apply for an issue to be tried in court. Under the act 16 June 1836 (Brightly's Purdon 854) the right to an issue is not a matter of right; an issue will be refused where the application is resisted and sustained by depositions which are sufficient. *Moore v. Dunn*, 147 P. S. 359; affirming s. c. 10 C. C. 79. As to the proper practice in such cases, see the opinion of Arnold, J., in this case.

15. Where the proceeds of a collusively confessed judgment are in the hands of the sheriff, an execution issued by a *bona fide* creditor, upon a judgment obtained after the sheriff's sale, will bind such proceeds and give such creditor a standing to test the validity of the fraudulent judgment. Where the fund is insufficient to pay the *bona fide* creditor's claim in full, the whole of it should be awarded to him; and this, although the amount was increased by advances of the fraudulent plaintiff to pay off liens prior to his execution, in furtherance of the fraud. *Sullivan v. Tinker*, 140 P. S. 35.

16. Creditors who have not reduced their claims to judgments, have no standing to restrain by injunction the distribution of a sheriff's sale on the ground that the judgment under which the sale was made was fraudulent and collusive. *Kelly v. Herb*, 157 P. S. 41.

17. Upon the trial of a sheriff's interpleader the claimant may attack the *bona fides* of the judgment upon which the execution was issued and show that the same was fraudulent, where the claimant's title is founded upon transactions between him and the defendant in the execution. *Hartley v. Weideman*, 3 Dist. Rep. 336.

18. Where the wife of a defendant was separated from him and petitioned to open the judgment against him on the ground that it was collusively confessed for the purpose of depriving her of her dower; it was *held*, that the judgment would not be opened, but that the proper practice was to direct an issue to determine the validity of the judgment as against the wife. *Taylor v. Neff*, 9 York 5.

See JUDGMENT.

VI. When a judgment may be impeached.

19. Where a judgment is attacked in the common pleas by a judgment creditor, it cannot subsequently be attacked in the orphans' court by the same party. *Ralston's Estate*, 158 P. S. 645.

20. The record and decree of the orphans' court may be impeached in collateral proceedings, where it is alleged that the decree was obtained by fraud. *Phelps v. Benson*, 161 P. S. 418.

See JUDGMENT.

VII. How a judgment may be invalidated.

21. Upon the opening of a judgment entered on a bond and warrant, if fraud be raised as a defence it must be affirmatively and positively proved. *Hipps v. Wardle*, 1 Atlan. 727.

22. On the trial of an issue to test whether a confessed judgment was in fraud of the plaintiff in the issue, the acts and declarations of the defendant in the judgment made in the absence of the plaintiff in the judgment (and defendant in the issue) are not admissible against the latter. *Wolf v. Kohr*, 133 P. S. 13.

23. Upon an issue to test whether a judgment was confessed in fraud of the plaintiff in the issue, the plaintiff in the judgment may show the real consideration; and this, though it may tend to contradict the indorsement of the consideration on the bond. *Ibid*.

24. If, upon distribution of the proceeds of a sheriff's sale, a judgment confessed for the arrears of a dower charge be attacked by other creditors as fraudulent and collusive, the fraud and collusion cannot be established by casual declarations of the plaintiff and defendant not made in each other's presence, the same being denied by both parties under oath. *Kintzel v. Kintzel*, 133 P. S. 71.

25. Where, by a suit in foreign attachment, a judgment in another court in favor of the defendant against the garnishee has been attached and subsequently such judgment is opened, and it appears that an attaching creditor who opposed this action was paid the amount of his claim, and a verdict and judgment is obtained for the defendant, and it appears further that this was in pursuance of a fraudulent agreement between plaintiff and defendant, a case is made out, which,

if unexplained, would justify the jury, upon the trial of the foreign attachment, that there was collusion and fraud; in such case the verdict and judgment for defendant would not be conclusive upon the plaintiff in the foreign attachment, and the burden would be on the garnishee to show that there was nothing really due on the judgment attached. *Palmer v. Gilmore*, 148 P. S. 48. See *Sommer v. Gilmore*, 160 P. S. 129.

26. Upon the trial of an attachment execution where the plaintiff claims that the defendant owes the garnishee money, and it appears that the garnishee held a judgment against the defendant which had been opened and upon the trial of which a judgment had been entered in favor of defendant, and upon which trial the defendant had claimed that the note then in suit had never represented a real debt; it was *held*, that declarations written or oral of either the defendant or the garnishee, which tended to show that the judgment did represent a real debt, were admissible in favor of the plaintiff. *Sommer v. Gilmore*, 160 P. S. 129. See *Palmer v. Gilmore*, 148 P. S. 48.

27. A judgment note cannot be invalidated by the loose declarations of the debtor that he confessed the judgment to defraud creditors. *Drake v. Hayes*, 2 Lack. Jur. 297.

See JUDGMENT.

VIII. Of the intent to defraud.

28. Where a purchaser under articles confessed a judgment in ejectment to his vendor for unpaid purchase money who took possession under an *habere facias*; it was *held*, in ejectment by a purchaser at sheriff's sale, under a judgment obtained against the vendee under articles, prior to the latter's confession in ejectment, that such confession, was not evidence of fraud on creditors, in the absence of proof that the vendor under articles had knowledge of the intention of his vendee to defraud. *Bell v. Throop*, 140 P. S. 641.

29. The relationship of brothers raises no presumption of fraud on the confession of a judgment; in such a case, fraud must be clearly and distinctly proven as in other cases. *Kitchen v. McCloskey*, 150 P. S. 376.

30. Where a judgment was confessed to a brother for money advanced some years before and it did not appear that there was any intention to make a gift of the money; it was *held*, that the judgment was not fraudulent. *Kline v. O'Donnell*, 11 C. C. 38.

31. In an action by a creditor against his debtor and another person to whom the debtor has confessed judgment to recover damages for the loss of the debt caused by an alleged conspiracy between the defendants, the case will be withdrawn from the jury, unless the evidence of collusion does more than merely raise a suspicion. *Merchants' & Manufacturers' National Bank of Pittsburgh v. Tinker*, 158 P. S. 17.

32. Upon an issue to determine whether the judgment upon which the execution was issued was given for the purpose of defrauding creditors; it was *held*, that the jury would not be permitted to infer a fraudulent intent from the mere fact of preference, where it appeared that there was an actual debt due; a judgment cannot be impeached without evidence tending to show either some advantage or benefit to the debtor beyond the discharge of his obligation, or some other benefit to the creditor beyond mere payment of his debt, or some injury to the other creditors beyond mere postponement. *Werner v. Zierfuss*, 162 P. S. 360.

33. Upon the trial of an issue as to the validity of a judgment given by a husband to his wife, the parties are competent to prove their intention at the time the judgment was given, but it is not competent to show that there was no avowal between the parties of an intention to defraud. *Schwartz v. Schwartz*, 5 York 35.

FRAUDULENT MORTGAGES.

1. A mortgage accepted by a vendor in furtherance of a fraud upon the latter's creditors will not be enforced. *Rowland v. Martin*, 4 Cent. 760.

2. Where the mortgage has been assigned by the two owners thereof (one of whom was the defendant in the attachment execution) to the garnishee, and one of the two assignors (the defendant) testified that the assignment was made in fraud of creditors, which was contradicted by the other assignor and the garnishees, who both testified to a full consideration for the assignment; it was *held*, that the court properly instructed the jury to find for the garnishees. *Skiles v. Dickson*, 147 P. S. 117.

See MORTGAGE.

FREEHOLDERS.

See EXECUTION, III.: PRIVILEGE, II.

FUGITIVES FROM JUSTICE.

1. Any person charged with an offence punishable by the penal laws of the state may be arrested in any other state and delivered up as a fugitive from justice. The words "other crime" in the second section of the tenth article of the constitution of the United States, construed. *Comm'th v. Kuchel*, Vaux's Dec. 174.

2. A person charged with crime in another state will be delivered up, no matter what time has elapsed from the commission of the offence until his arrest. *Ibid*.

3. The oath upon which the warrant issues is sufficient to justify a magistrate in holding an alleged fugitive until the necessary requisition papers arrive. *Comm'th v. Fassitt*, Vaux's Dec. 30.

4. A warrant for a fugitive charged with murder need not, under the act of 24 May 1878 (Brightly's Purdon 943), specify either when or upon whom the murder was committed. *Comm'th v. McCandless*, 7 C. C. 51.

5. Under the act of 24 May 1878

(Brightly's Purdon 943), relating to fugitives from justice, the only inquiry is as to the identity of the prisoner. But if he takes out a writ of *habeas corpus*, he is before the court with a full right to have it pass upon the legality of the arrest and holding, as though the act of 24 May 1878 (Brightly's Purdon 943) had no existence. *Ibid*.

6. The governor will decline to grant a requisition for a husband charged with deserting his wife. *Extradition Case*, 9 C. C. 27.

7. A defendant charged with rape and bastardy and surrendered by another state "to be tried for the offence of rape and that only," may be convicted of fornication and bastardy upon the trial of the original indictment. *Comm'th v. Johnston*, 12 C. C. 263.

8. Where the defendants were charged with libel, the governor refused a requisition on the governor of New York where it appeared that the offence was committed in the state of New York, that the libelous paper was published in the state of New York, that the defendants were citizens and residents of New York at the time of the commission of the offence and were not in the state of Pennsylvania, and it further appeared that the offence of libel was actionable in the state of New York. *Spevak's Case*, 13 C. C. 148.

FUTURE ADVANCES.

See EXECUTION, XV. (c): MORTGAGE, VI.

GAMBLING.

See LOTTERY.

1. Betting is gambling within the act of 22 April 1794 (Brightly's Purdon 950), and a check given in pursuance of a bet is void, even in the hands of an innocent third party for value. *Durr v. Barclay*, 8 C. C. 285.

2. The playing of cards, quoits, and other games of chance for drinks is gambling. *Montgomery Co. Licenses*, 4 Montg. 77.

3. The plaintiff in ejectment cannot avoid his own deed to the defendant by showing that it was executed in pursuance of a lottery, and therefore invalid. *Allebach v. Hunsicker*, 132 P. S. 349.

4. For the procedure for the destruction of gambling apparatus under the act 31 March 1860, sec. 59 (Brightly's Purdon 510), see *In re Gamblers' Paraphernalia*, 1 Lack. L. N. 17.

GAME.

See FISH.

1. The act of 3 June 1878, as amended by the act of 25 April 1889 (Brightly's Purdon 946), punishing the having in possession quail between the 15th of December of one year and the 1st of November next following, does not apply to quail killed in another state. *Comm'th v. Wilkinson*, 139 P. S. 298; s. c. 27 W. N. C. 160.

2. An indictment under the act of 14 May 1889 (Brightly's Purdon 949) for killing, etc., "two larks, the same being insectivorous birds," is bad. Such an indictment is bad under the act of 3 June 1878 (Brightly's Purdon 945) without proper preliminary proceedings before a justice and recognizance to appear at court. *Comm'th v. Ream*, 4 Del. 225.

GAS — GAS COMPANIES.

See ELECTRIC LIGHT: NATURAL GAS.

1. A borough has no power to lay gas in the streets to supply citizens with gas, and an ordinance authorizing a private citizen to lay gas pipes is inoperative. *Ransberry v. Keller*, 2 Northam. 305.

2. A gas company organized under the special act of 8 March 1869 (P. L. 1872, 1217), with the exclusive right to furnish manufactured gas to the citizens of Warren for light, was held to have no exclusive right as against a corporation delivering natural gas to the citizens of Warren for lighting purposes under the act 29 May 1885 (Brightly's Purdon 1593). *Warren Gas Light Co. v. Penn-*

sylvania Gas Co., 161 P. S. 510; affirming s. c. 13 C. C. 310.

3. Where a corporation was created by a special act of assembly for the particular purpose of supplying gaslight; it was held, that it could not enlarge its purpose to supply heat by means of gas by accepting the provisions of the act 29 April 1874 (Brightly's Purdon 405). *Keystone Fuel Gas Co.*, 12 C. C. 302; s. c. 31 W. N. C. 231.

4. The right of a gas company to exclusive franchises is limited to those companies incorporated under the general corporation act of 29 April 1874; such exclusive franchises do not inure to a company incorporated prior to that act by virtue of such company having filed a certificate accepting the constitution and the act of 1874 and its supplements. *Consolidated Gas Co. v. Pittsburgh Illuminating Co.*, 4 Dist. Rep. 299.

5. A gas company chartered in 1871 which has accepted the provisions of the act 29 April 1874 (Brightly's Purdon 413) is entitled, under the 26th section of that act, to the exclusive franchises conferred by sec. 34 (Brightly's Purdon 954). *Suburban Gas Co.*, 14 C. C. 519.

6. A company incorporated under the act 29 April 1874, sec. 34, clause 3 (Brightly's Purdon 955), for the manufacture and supply of gas or the supply of light or heat by any other means, has an exclusive franchise until it shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to eight per cent per annum upon its capital stock; the governor will not grant a charter under the act 2 June 1887 (Brightly's Purdon 957) to another corporation for the purpose of the manufacture and supply of gas in the same district until such previous exclusive franchise has expired. *Lansdowne Gas Co.*, 14 C. C. 518; *Suburban Gas Co.*, 14 C. C. 519; s. c. 15 C. C. 126.

7. The courts are the only tribunals for determining to what distance, under the term "vicinity," a gas company has the right to supply gas to the public.

Suburban Gas Co., 15 C. C. 126; s. c. 14 C. C. 519.

8. The right of a gas company to use the streets of a city is subject to the rights of the public; where the public interests require a relocation of gas mains, a private corporation must submit. *Wilkes-Barre Gas Co. v. Wilkes-Barre*, 6 Kulp 431.

9. Where the defendant was the lessee of the ground and cellar floors of a building, the upper floors of which were occupied by other tenants and the meters for the measurement of gas supplied to the upper tenants were located in the defendant's cellar, the court refused to restrain him by injunction, at the suit of the gas company, from removing the meters of the upper tenants and interfering with the inspection of the same by its agents, where the evidence showed that it would not be impracticable nor unusual to locate their meters on the upper floors. *Wilkes-Barre Gas Co. v. Turner*, 7 Kulp 399.

10. A city contractor will not be enjoined from proceeding with a paving contract at the suit of a gas company, seeking to lay its trenches, who have delayed their work for an unreasonable time. *Wilkes-Barre Gas Co. v. Hendler*, 7 Lanc. 42.

See NATURAL GAS.

GIFT.

See CHARITY: FRAUDS—STATUTE OF.

- I. Of the right to give.
- II. Acceptance.
- III. What will amount to a gift.
- IV. From husband to wife.
- V. From wife to husband.
- VI. Gift of land.
- VII. Proof of gift.
- VIII. Gift *mortis causa*.

I. Of the right to give.

1. The power of a husband by gift *inter vivos* to dispose in good faith of his personal property to the exclusion of his wife is absolute. *Lines v. Lines*, 142 P. S. 149; affirming s. c. 2 Northam. 349.

II. Acceptance.

2. The assent to a gift by a donee will be presumed and the title will vest *eo instanti* the gift is made; and this, though he be ignorant of the transaction. The title will continue in the donee until he rejects it, and the burden of proof is on those who allege his refusal to accept. *Tarr v. Robinson*, 158 P. S. 60.

III. What will amount to a gift.

3. A note for \$5000 given by a widower to a trustee for his children upon the day of his second marriage, was held to be an executed gift *inter vivos*, and not in fraud of the rights of his second wife. *Ross's Appeal*, 127 P. S. 4.

4. In the traverse of an escheat it was held, that the fact that five months before his death the decedent gave to defendant a box containing a \$1000 registered bond and certain railroad stock, saying, "Take this and keep it for yourself," and adding that she must not open it until after his death, established a gift *inter vivos* of the bond and stock. *Comm'th v. Crompton*, 137 P. S. 138; s. c. 26 W. N. C. 475; affirming s. c. 46 L. I. 190.

5. Where the obligee in a bond endorses payment of interest on the bond in the presence of the obligor, each time the interest becomes payable, it is a sufficient execution of a gift of the interest to the obligor. *Lewis's Estate*, 139 P. S. 640.

6. An owner of personal property may transfer the title by the gift of it direct to the donee, or he may impress upon it a trust for the donee's benefit; in either case, however, if the transaction remains imperfect and executory, equity will not aid in its enforcement. *Smith's Estate*, 144 P. S. 428. See *Gaffney's Estate*, 146 P. S. 49.

7. Where a check is drawn for the whole amount of the deposit, and the drawer intends, by means of the check, to make a gift to another of the whole fund, the check will operate as an equitable assignment of the fund. *Taylor's Estate*, 154 P. S. 183.

8. Where a mother gave certain bonds and stock to her daughter, and the evidence showed that the gift was a voluntary one, and that the mother was not impoverished by the gift and made no complaint during the life of her daughter, and it further appeared that the mother had a strong will and was not controlled by her daughter or anybody else; it was *held*, that she could not rescind the gift after the death of her daughter. *Yeakel v. McAtee*, 156 P. S. 600.

9. A voluntary bond payable at the maker's death and given for the purpose of defrauding the maker's wife of her rights in his estate, cannot be sustained where the donee is a party to the fraud; where such a bond has been given to a person who is neither a party nor a privy to the fraud, it will be paid out of the personal estate, but the widow will be entitled to compensation against the heirs out of the real estate. *Hummel's Estate*, 161 P. S. 215.

10. Where bonds were found in an envelope endorsed by the decedent as "held for" a certain nephew, and the latter was credited with the interest in a ledger account kept by the decedent; it was *held*, that the latter had made himself a trustee. *Smith's Estate*, 8 C. C. 539; s. c. 47 L. I. 318.

11. A family agreement between the children of a decedent and his widow that the latter shall use the corpus of the estate for her support will be upheld as a gift. *Cocker's Estate*, 11 C. C. 243.

12. Where a mortgage was purchased by a mother and put in a daughter's name, and the latter assisted her mother for many years in the household and store, and a son testified that the mother stated that she intended to compensate her daughter to the amount of the mortgage; it was *held*, after the mother's death, that the mortgage was a gift to the daughter. *Stern's Estate*, 15 C. C. 4.

13. Where a decedent left two benefit certificates of five thousand dollars each made payable to his brother, and at his death he owed his brother, who knew

nothing of the certificates, over twenty-five thousand dollars; it was *held*, that the certificates were gifts to the brother and could not be considered as payments on account of the indebtedness. *Kendrick's Estate*, 15 C. C. 24; s. c. 35 W. N. C. 46.

IV. From husband to wife.

14. Where a husband gave to the plaintiff, trustees for his wife and her children, a bond, conditioned to pay the interest to his wife or to the plaintiffs in trust for her annually during her life, and on her death to pay the principal to her children; it was *held*, in an action by the trustees on the bond, that the wife was the sole owner of the interest on the fund, and her positive and definite declarations *ante motam litem* were admissible and sufficient to show in defence of the action that she made a gift of the interest to defendant. *Galt v. Smith*, 145 P. S. 167.

15. Where a husband makes a deed to his wife as a gift, of a not undue portion of his estate, and such deed is drawn by counsel and executed openly in the presence of one of his children, and acknowledged before a notary, who had known the grantor for many years, without coercion, collusion or fraud, such deed cannot be overcome on the ground of mental incapacity in the absence of clear and unquestionable evidence. *Elcessor v. Elcessor*, 146 P. S. 359.

16. Where a widow of the testator claimed certain notes as a gift and a bill filed by the executors against her was dismissed, the court refused to strike off the decree on the petition of a creditor, where it appeared that two of his counsel had notice of the proceedings before the decree was made, and there was no proof that the decedent was insolvent at the time of the gift to his wife. *Koons v. Koons*, 148 P. S. 585; affirming s. c. 6 Kulp 317.

17. Where it is sought to charge a legatee with money of a decedent in her hands, and the only evidence to support the claim is a declaration of the legatee

herself, that she had received the money from the decedent before his death as a gift, the whole of the declaration must be taken as true in the absence of evidence to the contrary. *Miller's Estate*, 151 P. S. 525.

18. The transfer of a judgment by a husband to a wife at a time when the husband is out of debt is a valid gift; the consideration of natural love and affection will sustain it. *Reese v. Reese*, 157 P. S. 200.

19. Where a deposit was in the name of a wife; it was *held*, that a testamentary paper in her handwriting to the effect that the deposit really belonged to her husband was competent evidence of his ownership; and this, although when the paper was found the signature was torn off; and where it further appeared that the wife had declared that the money belonged to her husband and that she had taken charge of it because he was not much of a business man; it was *held*, that such evidence was sufficient to rebut any presumption of a gift. *Gracie's Estate*, 158 P. S. 521; affirming s. c. 41 P. L. J. 9.

20. Where a husband, upon purchasing real estate, took title in his wife's name, and the latter contributed a small amount of the purchase money and made a will devising the land to her husband and subsequently the property was sold, and with the proceeds the husband bought other real estate in his own name and dealt with it as his own for several years, until there was a separation between himself and his wife; it was *held*, that the evidence was sufficient to rebut the presumption of a gift, but that the wife was entitled to a portion of the purchase money contributed by her, with interest from the time the husband sold the property and began to treat the proceeds as his own. *Moore v. Moore*, 165 P. S. 464.

21. Where it appeared that the decedent in his lifetime had given to his wife a mortgage and judgment bond, which he held against his brother, and directed her

to deliver them to his brother, and that they were delivered to the brother, who returned them to the decedent's wife with a request that she should keep them for him, and they were then placed in a box in which the decedent kept his securities, and it further appeared that the decedent had repeatedly declared it to be his intention to forgive the debt, and had stated in a paper that the mortgage and judgment was satisfied; it was *held*, that the evidence was sufficient to sustain a finding that the debt had been forgiven by the decedent. *Livingood's Estate*, 167 P. S. 191.

22. Where a husband put money in a tin box and placed it in a box in a safe, the combination to which was known only to himself and wife, and he gave his wife one of the two keys to the box and told her he had put money there for her, and that she was to take it and use it when she wanted it, and subsequently, with her consent, he took money from the box himself; it was *held*, that there was a valid gift *inter vivos* to the wife. *Parker's Estate*, 15 C. C. 7; s. c. 34 W. N. C. 370.

23. Where a testator in his lifetime had procured one of his debtors to make notes under seal in favor of his, the decedent's, wife, and such notes were found among his papers after his death; it was *held*, that the gift to the wife was perfected; and it was further *held*, that the maker of the notes having no interest in the question whether the notes were the property of the decedent or his wife, was a competent witness. *Emig's Estate*, 3 York 111.

24. Where the decedent died two years after the death of his wife, and during his lifetime he had endorsed certain obligations due him over to her and they were found after his death among his writings; it was *held*, that in the absence of any evidence showing a delivery they remained his property and were part of his estate. *Emig's Estate*, 3 York 111.

See FRAUDULENT CONVEYANCES: HUSBAND AND WIFE.

V. From wife to husband.

25. From the mere fact of a husband's reception of his wife's money, the law raises a presumption that he received it for her use, and the burden is on him or his heirs to prove a gift. Such a gift cannot be established by his declarations not made in the presence of his wife. *Wormley's Estate*, 137 P. S. 101; s. c. 27 W. N. C. 13.

26. Where a married woman had a separate bank account and drew money at various times from her account and deposited it to the credit of herself and her husband, "either to draw," and after the first advance her husband, by a codicil to his will, acknowledged that the transaction was a loan; it was held, that a presumption arose that the subsequent advances made after the date of the codicil were also loans and not gifts, and that the burden was on the husband's heirs to prove that they were gifts. *McGarvey's Estate*, 5 Del. 440.

27. Where a widow made a claim against her deceased husband's estate of money due before marriage, and it was shown that the day before their marriage she burned the note and said she had given him the amount, but it was further shown by the declarations of the husband, made just before his death, that he still owed her the money; it was held, that an auditor's finding in favor of the claimant would be sustained. *Young's Estate*, 10 Montg. 93.

See HUSBAND AND WIFE.

VI. Gift of land.

28. A parol gift of land, to be followed by a deed, is invalid as against a subsequent grantee of the vendor; and this, though the gift be evidenced by the letters of the owner, and the one to whom the gift was made was in possession at the time of the second conveyance. *Giebner v. Patterson*, 5 Cent. 723.

29. Where a father executes a voluntary deed to a daughter and reserves to himself the full interest and estate in the

property for his life, and to his wife if she survive him an undivided one-half of the property for her life, such a conveyance takes effect as a deed and not as a will. *Knowlson v. Fleming*, 165 P. S. 10.

30. A voluntary deed made by a father to a daughter will not be set aside, where it appears that the deed was made to secure reasonable provision for the daughter and to equalize her share with that of the other children, that the deed was prepared at the grantor's special request, and that he was mentally capable of transacting business and there is no evidence of undue influence. *Knowlson v. Fleming*, 165 P. S. 10.

31. A parol gift of land from father to daughter cannot be taken out of the operation of the statute of frauds unless such parol gift be shown by full, complete, satisfactory and indubitable proof. *Dunning v. Reese*, 7 Kulp 201.

See FRAUDS — STATUTE OF.

VII. Proof of gift.

32. Upon the ownership of a note, the questions of gift and undue influence in procuring the same were both properly left to the jury. *Osthaus v. McAndrew*, 8 Atlan. 436.

33. If no money be paid at the execution of the deed, the question whether it was a gift or whether the consideration was to be subsequently paid is one of fact for the jury. *Horn v. Buck*, 8 Atlan. 609.

34. In replevin for a piano by a daughter against her mother, evidence is admissible of the declarations of the plaintiff's deceased father showing a gift to the plaintiff. *Swab v. Miller*, 9 Atlan. 667.

35. In replevin by a daughter against her mother for a piano, the question of gift by plaintiff's deceased father was properly left to the jury. *Ibid*.

36. An executed gift of money to a daughter may be shown by declarations of the father made when the same was paid over to him; and this, notwithstanding the father was entitled to the money as tenant by the curtesy. *Buck v. Hender-*

son, 4 Cent. 697. See *Henderson v. Buck*, 3 Lanc. 371.

37. In an effort to surcharge an executor with a sum of money received from decedent, the evidence was *held* sufficient to establish a gift. *Ames's Appeal*, 10 Cent. 301.

38. If the words used by a testator be appropriate to express the fact of a gift, the meaning of the words must be left to the jury. The words were, "Where are those notes I gave you?"—"take them and keep them." *Jacques v. Fourthman*, 137 P. S. 428; s. c. 26 W. N. C. 491.

39. A gift may be established by the admissions of the donor, which are deliberate, sufficiently clear, full and precise, and relate to existing facts. *Sourvine v. Claypool*, 138 P. S. 126; s. c. 38 P. L. J. 146.

40. Where a married woman upon her death-bed made a gift to her mother of her furniture then in possession of the donor's father, and after her death the husband said "all right, I am satisfied"; it was *held*, that if the plaintiff's assent was understandingly given, and the donee acted upon it by taking possession of the furniture, she had a good title thereto. *Brown v. Niethammer*, 141 P. S. 114.

41. A gift may be proven by the testimony of one credible witness, and it may be shown by the declarations of the donor made at a time different from that when it is claimed that the gift was made; it is not necessary that the witnesses to prove a gift should be present at the time the gift was made. *Osterhout's Estate*, 148 P. S. 223. See s. c. 2 Lack. Jur. 95.

42. Where an alleged donor has been surrounded during his last illness by the family and relatives of the alleged donee and the claimant has had opportunities to obtain possession, the proof in support of the claim ought to be clear and satisfactory upon every point essential to title by gift. *Scott v. Reed*, 153 P. S. 14.

43. The payee of a check is a competent witness to prove that the check was drawn in the maker's lifetime in order to enable the payee to collect the money

and pay it to a third person to whom the maker intended to present it as a gift. *Taylor's Estate*, 154 P. S. 183.

44. In an action for money loaned to a corporation where the defendant claimed that it was a gift and the receipt for the money stated no time for repayment, and the president of the company testified that no agreement for repayment was made; it was *held* not to be error for the judge in commenting upon the evidence to say that "perhaps he meant that no time for repayment was set." *Halfman v. Pennsylvania Boiler Inspection Co.*, 160 P. S. 202.

45. The gift of a *chose in action* cannot be made by words *in futuro*, nor by words *in præsenti* if unaccompanied by delivery. *Young v. Young*, 7 Lanc. 145.

46. A gift is not established by a statement by a mother to her children that "these things are yours," without evidence of acceptance or delivery. *Griffith v. Messinger*, 1 Northam. 381.

47. In all cases of alleged gift, the proof must be of an actual gift perfected by delivery and not simply of an intention to give; where such proof rests upon the declarations of the donor, such declarations must be unequivocal. *McCarty's Estate*, 4 Dist. Rep. 453.

VIII. Gifts mortis causa.

48. Where the decedent, after being informed that his recovery was hopeless, gave his next of kin three bonds, with a request to keep them, there was *held* to be sufficient evidence to sustain a *donatio mortis causa*. *Stewart v. Lindermuth*, 4 Del. 384.

49. A gift made in prospect of death and professing to pass all the donor's property to another, to take effect after death, is invalid under our statute of wills; and this, no matter what delivery may have accompanied it. *McCarty's Estate*, 4 Dist. Rep. 453.

50. As to the validity of gifts *mortis causa*, see notes to *Emery v. Clough*, 4 Atlan. 800, and *Walsh's Appeal*, 15 Ibid. 473.

GOODS SOLD AND DELIVERED.

See ASSUMPSIT, VII.: SALE.

GRAND JURIES.

See CRIMINAL LAW, X.: HIGHWAYS.

GROUND RENT.

See EXECUTION, XV.: RENT-CHARGE.

GUARANTY.

See FRAUDS—STATUTE OF, II.: PROMIS-
SORY NOTES: SURETY.

- I. Of the contract of guaranty.
- II. Liability of a guarantor.
- III. Notice of acceptance.
- IV. Discharge of guarantor.
- V. Contracts of indemnity.

I. Of the contract of guaranty.

1. A moral obligation will not support a voluntary written guaranty unless there was once a legal obligation. *Martin's Estate*, 131 P. S. 638; affirming s. c. 45 L. I. 196.

2. Where goods are delivered to a purchaser on an order of a third party, such third party is liable as a principal debtor and not as a guarantor. *Watson v. Porzel*, 158 P. S. 513.

3. Where goods were furnished on the strength of the following undertaking, "I will be security to you for goods to the amount of three hundred dollars furnished John A. Gillespie"; it was held to be an original undertaking and not a guaranty. *Owen v. Jeter*, 4 Northam. 111; s. c. 5 Del. 392.

4. No right of action upon a contract lies by a stranger to it; where one railroad company leased another for a certain number of years and covenanted to run the road and apply the surplus to the payment of coupons of certain mortgage bonds previously issued by the lessor, and if such surplus was not sufficient, then to advance money to buy the said coupons and hold them as security for such advances; it was held, that this

did not constitute a contract of guaranty, and that the holder of such bonds or coupons had no right of action thereon. *Freeman v. Pennsylvania R. R. Co.*, 3 Dist. Rep. 733.

II. Liability of a guarantor.

5. Where a mortgage reciting an indebtedness payable by instalments, but with no covenant to pay, and unaccompanied by a bond, was assigned by the mortgagees, they guaranteeing "the collection of said mortgage and all payments thereon at maturity"; it was held, that the assignors were liable on their guaranty, and it was no defence that the premises were worth the face of the mortgage and that the plaintiff might have bid up for his protection. *Waters v. Chase*, 142 P. S. 463.

6. Where the defendant guaranteed the plaintiff for all goods sold to a co-operative association, which, by sec. 8 of the act 7 June 1887 (*Brightly's Purdon* 391), is prohibited from taking credit, and after said guaranty, payments were made by the defendant out of funds belonging to the association, which payments were applied by the plaintiffs upon an account for goods sold on credit to the association prior to the guarantee; it was held, that the defendant could not set up a misapplication of such payments in a suit to recover for the goods sold on the faith of his guaranty. *Arbuckles v. Chadwick*, 146 P. S. 393.

7. Where a person induces another to subscribe for stock, and guarantees that if they do not want it and cannot pay their subscription he will take it off their hands, he is responsible to them for whatever loss they sustain by reason of his subsequent failure to comply with his agreement, and the measure of damages is the difference between what they were obliged to pay for the stock and what they subsequently sold it for. *Herd v. Thompson*, 149 P. S. 434.

8. Where a husband in pursuance of articles of separation agreed to pay fifty dollars per month to his wife's brother

for the care and support of his wife during her natural life, and the defendant guaranteed the payment "of the said several instalments at the time and times when the same becomes due"; it was *held*, that it was no defence on the part of the guarantor in a suit brought after the death of the husband, that the latter's duty to support terminated on his death. *Elmendorf v. Whitney*, 153 P. S. 460.

9. A guaranty for the faithful performance of the building contract to furnish all labor and material, covers damages on account of the payment by the owner of a mechanic's lien. *Miller v. Eccles*, 155 P. S. 36.

10. Where a landlord levied for rent, and the defendant executed a bond conditioned that the same should be void if the tenants should retain and keep all their property in the house and remove none before the first of September following, and the goods remained upon the premises until after the expiration of the time named in the bond, but the tenants barred the house and prevented the landlord from levying for his rent; it was *held*, that the defendant was not liable on the bond. *Crawford v. Evans*, 158 P. S. 390.

11. Where the directors and stockholders of a corporation guaranteed the payments of its notes, upon the consideration that the plaintiff released his right to lien a building of the corporation's; it was *held* to be immaterial that at the time the contract was signed, a release of liens had already been executed. *Koenigsberg v. Lennig*, 161 P. S. 171.

12. Where several persons purchased the charter and stock of a corporation and guaranteed the vendors against any claims for commissions which might be made by an agent in whose hands the charter had been placed for sale; it was *held*, that the purchasers were personally liable on the guaranty, but that the company was not liable in the absence of a clear and unequivocal ratification. *Denniston v. Home Life & Investment Co.*, 162 P. S. 86.

13. Where a guaranty is general the

law adds the usual conditions that there shall be due and unsuccessful diligence used by the creditor to collect the claim from the principal, unless it appears that all diligence would be hopeless; but where the parties themselves fix the terms of the contract, the law implies no such condition. Where the defendant guaranteed the payment of a judgment note "if the same cannot be recovered out of the property purchased of Robert Service's estate by said Howell McNair by deed this day delivered"; it was *held*, that the guaranty was a special one, and the plaintiff by entering the judgment and acquiring a lien on the real estate mentioned and keeping the same alive did all that she was bound to do under the terms of the contract. *Ritchie v. Walter*, 166 P. S. 604.

14. Where a contractor for a building absconds without performing his contract and the guarantor of the contract co-operates with the owner in the completion of the work, examines the contractor's outstanding bills, and draws orders for or authorizes their payment, the owner completing the work under an understanding with him, such guarantor voluntarily assumes the position of surety. *Lender v. Kline*, 167 P. S. 188.

15. Where the plaintiff brought suit on a contract by which the defendant guaranteed to pay to the plaintiff a sum loaned by the plaintiff to a third party in case the latter did not repay the loan at maturity, and it appeared that upon such payment certain securities deposited by the plaintiff were to be returned; it was *held* to be a good defence that the plaintiff had failed to demand payment from the defendants accompanied by tender of the collateral; and it was further *held*, that such tender could not be made at bar upon a hearing of the rule for judgment for want of a sufficient affidavit of defence. *Scott v. Patterson*, 13 C. C. 614; s. c. 30 W. N. C. 324.

16. Where one who was indebted on three overdue judgment notes, gave another judgment for the amount pay-

able *in futuro*, and a year afterwards the mother of the obligor signed a paper under seal guaranteeing the payment of the last note; it was *held*, that although the debts were overdue, yet if upon legal consideration without fraud the mother saw fit to guaranty the note, she was bound thereby; and it was further *held*, that the seal imported a consideration, and although the express consideration was services rendered, yet the bond could not be avoided by proof that in fact no services had been rendered. *Snyder's Estate*, 7 Kulp 409.

17. Where money is deposited by one of two contracting parties as a guaranty of good faith, it is forfeited by a failure of the party making the deposit to fulfil his part of the contract; and this, though there is no clause of forfeiture in the contract. Where such a forfeiture inures to a city, the councils may not refund the money forfeited, in the absence of mitigating circumstances. *Easton v. Mutchler*, 2 Northam. 377.

18. Where the defendant guaranteed the payment of a bill of goods to be sold to a third party, and the latter bought the goods and had them marked with his name and the seller moved them into another room; it was *held*, that there was such a sale and delivery of the goods as enabled the purchaser to dispose of them as he saw fit, and that the defendant was liable for the price. *Goodman v. Wireman*, 2 York 175.

19. In an action upon a note against the guarantor in this state, where it appeared that the principal debtor lived in Maryland and the record of the suit in that state against the principal showed that an execution was issued and nothing was made; it was *held* to be competent for the plaintiff and his attorney to testify to the bringing of the suit and to receiving a certain amount from the trustee of the debtor, with the assurance that that was all that was coming to him. *Aunen v. Miller*, 5 York 195.

III. Notice of acceptance.

20. Notice of acceptance is necessary to fix the liability of the guarantor in all cases except those of absolute guaranty accepted when given; such notice is necessary even if the guaranty is made at the request of the guarantee. *Evans v. McCormick*, 167 P. S. 247.

21. Where the plaintiff wrote to the defendants that A had ordered stone, and asked, "Have I authority to charge the bill to you," and the defendants answered, "You may furnish the stone and charge to A and we will see you paid"; it was *held*, that the contract was one of guaranty and that the plaintiff could not recover upon his failure to prove notice of acceptance. *Wood v. Bevan*, 8 Montg. 189.

IV. Discharge of guarantor.

22. Mere delay in bringing suit against the principal will not release a guarantor. *Stewart v. Jaffray*, 6 Cent. 261.

23. Where there is no binding contract for an extension of time with the maker of a note, but only a voluntary delay of a few days, a surety or guarantor of the note will not be discharged. *Shaffstall v. McDaniel*, 152 P. S. 598.

24. Where the payee of an overdue promissory note upon assigning it to a third party guarantees its payment, the assignee must use due diligence to recover it from the maker in order to hold the guarantor liable; but what constitutes due diligence is a question of fact depending upon the circumstances of each particular case and is usually a question for the jury. *Tissue v. Hanna*, 158 P. S. 384.

25. Where a building contract provides that changes may be made as to the details, but not as to the general construction of the building, the guarantor of the contract is not discharged by a change made in the details; the question of the changes is for the jury. *Miller v. Eccles*, 155 P. S. 36.

26. The guarantor of a building con-

tract which provides for the payment of a round sum, but does not stipulate the time when payment shall be made, is not discharged by the owner making payments to the contractor as the work progresses. *Miller v. Eccles*, 155 P. S. 36.

27. Where a contract to guaranty the payment of promissory notes provided that no extension of the notes should in any way affect or release the guarantor; it was *held*, that the guarantor was not released by the fact that one note of thirty-two hundred dollars at two months was given in place of two notes for sixteen hundred dollars each, one at one month and the other at two months. *Koenigsberg v. Lennig*, 161 P. S. 171.

V. Contracts of indemnity.

28. In a suit on a bond indemnifying plaintiffs against any judgment which might be entered in a pending action against them, an affidavit of defence averring a conspiracy to prevent a proper defence, and that one of the plaintiffs falsely testified to matters that were untrue, was *held* sufficient to prevent judgment. *Shriver v. McIntire*, 130 P. S. 459.

29. A bond indemnifying a mortgagee against mechanics' liens is valid and binding; and this, though given after the execution of the mortgage and the loaning of the money thereon. *Union Building Association v. Hull*, 135 P. S. 565.

30. In a suit upon a contract of indemnity, to indemnify the plaintiff against his liability as an endorser on a promissory note, it must be shown that the note was the one intended by the contract. *Brayton v. Dunne*, 2 Mona. 94.

31. Where, on a purchase of stock by plaintiff from defendant, the latter guaranteed in writing that the plaintiff should not lose any money by his investment, the guaranty to be in force for two years; it was *held*, that the contract was one of indemnity and it was the duty of the defendant at the end of two years to pay to the plaintiff the amount of his

loss, if any, on the investment. *Phipps v. Sharps*, 142 P. S. 597.

32. Upon a covenant by an assignee of a mining lease to indemnify the assignor against claims of a third party and against damages to the neighbors by the operation of washing, the recovery will not be limited to the amount named in the bond which contains the covenant. *Keck v. Bieber*, 148 P. S. 645.

33. Where the defendants gave a bond of indemnity to indemnify and save harmless the obligee from all damages which she might sustain by reason of the drilling and operation of an oil well; it was *held*, that she might recover for injury to the water wells on her property by the drilling of the oil well, where the defendants did nothing to prevent the stream feeding the water wells from being drained off. *Steele v. Todd*, 158 P. S. 515.

34. An affidavit of defence is required in an action to recover damages for the breach of an executory contract, such as a contract of indemnity against bonds and mortgages given by a vendee of land to his vendor. *Mantua Hall Market Co. v. Brooks*, 163 P. S. 40. See s. c. 15 C. C. 601.

35. A person employed and designated as a general agent, with authority to make collections both of cash and notes, has authority to direct an attorney to bring suit, and to indemnify a constable by giving a bond in the name of his principal. *Swartz v. Morgan*, 163 P. S. 195.

36. An attorney-at-law who has been employed to bring suit has an implied authority to give a bond of indemnity to a constable in his client's name. *Swartz v. Morgan*, 163 P. S. 195.

GUARDIAN AND WARD.

See INFANT, II.

HABEAS CORPUS.

See CONTEMPT.

1. If a defendant waives a hearing and gives bail for court, the court will not

go into the merits of the case on *habeas corpus*. *Comm'th v. Walton*, 1 Northam. 289.

2. A writ of *habeas corpus* will not be allowed where the relator is not in custody. *Comm'th v. Glenn*, 48 L. I. 34.

3. In Philadelphia a writ of *habeas corpus* will not be granted when the relator, having given bail, is not in custody; and this, though a bail-piece has been taken out. *Comm'th v. Gill*, 10 C. C. 71; s. c. 27 W. N. C. 311.

4. Where the relator has entered bail and is not in custody, his writ of *habeas corpus* will be dismissed. *Comm'th v. Connell*, 13 C. C. 103.

5. Where a writ of *habeas corpus* was granted on the petition of a defendant, who represented that he was in the custody of a constable under a commitment, and it appeared at the hearing that the constable, instead of serving the commitment, allowed the relator to go about his business, the writ was dismissed. *Comm'th v. Doran*, 15 C. C. 385.

6. Where it appears upon *habeas corpus* that the relator is detained under a commitment from a justice, the court will examine the proceedings of the justice to determine whether he had jurisdiction and will hear testimony for that purpose. *Comm'th v. Walker*, 14 C. C. 586.

7. Where a petition for a writ of *habeas corpus* sets forth that the relator is in custody by virtue of an order of the court adjudging him guilty of contempt and sentencing him to imprisonment for refusing to testify as a witness in a criminal case, it is immaterial that the sheriff's return to the writ does not set out the contempt, or state facts showing the jurisdiction of the court to commit the relator. *Comm'th v. Bell*, 145 P. S. 374.

8. When a witness has been sentenced to imprisonment for contempt in refusing to testify for the commonwealth upon the trial of an indictment, the sufficiency of such indictment cannot be considered upon petition for a writ of *habeas corpus*. *Comm'th v. Bell*, 145 P. S. 374.

9. Where a person has been discharged

on *habeas corpus*, he cannot be again imprisoned for the same offence by any person or court whatsoever, but where such discharge has been secured by reason of the failure of the warrant to charge a criminal offence, he may be again arrested and held under a valid warrant founded on the same transaction. *Comm'th v. Little*, 33 W. N. C. 486.

10. The supreme court will not discharge on *habeas corpus* a convict where the record shows that the ground of his alleged illegal detention arose from the slip or misprision of the clerk in recording his sentence; in such case the petition will be dismissed without prejudice to the petitioner's right to apply to the court in which he was convicted, and the record will be remitted with leave to that court to amend the same as justice may require. *Comm'th v. Wright*, 126 P. S. 464.

11. Under the act of 24 May 1878 (Brightly's Purdon 943), relating to fugitives from justice, the only inquiry is as to the identity of the prisoner. But if he takes out a writ of *habeas corpus*, he is before the court with a full right to have it pass upon the legality of the arrest and holding, as though the act of 24 May 1878 had no existence. *Comm'th v. McCandless*, 7 C. C. 51.

12. Upon the hearing of a writ of *habeas corpus*, the relator will be held to bail for forgery where it is shown that a check proved to be false was found in his possession. *Comm'th v. Sheriff*, 10 C. C. 341.

13. Query, whether under the act 23 May 1887, sec. 1 (Brightly's Purdon 816), a person charged with an offence triable in the oyer and terminer may be held to answer an independent charge not so triable. *Comm'th v. Sheriff*, 10 C. C. 341.

14. Upon a *habeas corpus* for the custody of a child, the court has no power to make an order on the respondent to take the child into a neighboring state and submit her right to its custody to the courts of that state, and a respondent would not be held guilty of a contempt in

disregarding such an order. *Comm'th v. Sage*, 160 P. S. 399; reversing s. c. 2 Dist. Rep. 553.

15. Upon a *habeas corpus* by a father to secure the custody of a child, where the wife filed an answer averring that the relator was not a fit person to have the custody of the child, and it was not denied that both the parties had previously been domiciled in New Jersey and that the relator continued to reside there, and that under the laws of that state he was the natural guardian of the child; it was *held*, that no consideration of comity justified the court in awarding the child to the relator, without inquiring as to his fitness to have its custody. *Comm'th v. Sage*, 160 P. S. 399; reversing s. c. 2 Dist. Rep. 553.

16. Where a pauper minor has been indentured by the overseers, the indenture is conclusive that all the necessary requisites existed at the time, and the existence of such requisites is not traversable on *habeas corpus*. The court will not interfere for a parent of insufficient ability to support the child. *Comm'th v. Miller*, 8 C. C. 525.

17. A guardian's right to the custody of his ward is superior to that of a step-mother, and such right will be enforced on *habeas corpus* unless it would be against the best interests of the child to enforce it. *Comm'th v. Dugan*, 13 C. C. 83.

18. Upon a *habeas corpus* for the custody of a minor child, the court in a proper case and in the exercise of a sound discretion may permit the custody to remain with the child's maternal grandparents, where the father and mother are divorced, reserving the right of the father to visit the child. *Comm'th v. Wise*, 3 Dist. Rep. 289.

19. No appeal lies from an order in *habeas corpus* proceedings remanding a child into the custody of its father, and directing the writ to stand over subject to the further consideration of the court. *Comm'th v. Blatt*, 165 P. S. 213.

20. For an interesting treatise on the

subject of the writ of *habeas corpus*, see appendix to Vaux's Decisions, page 187.

HABITUAL DRUNKARDS.

See LUNACY.

HANDWRITING.

See EVIDENCE, XVII., XLIX.

HEALTH.

1. The act 28 January 1873, P. L. 100, entitled "an act authorizing the town council of the borough of Carlisle to establish a board of health," violates the provision of the constitution of 1838 which declared that "no bill should be passed containing more than one subject which should be clearly expressed in the title." That act is unconstitutional so far as it imposed the duty of paying the expense incurred by the board of health of the borough of Carlisle upon the taxpayers of the county, and it was repealed by the general act 11 May 1893 (Brightly's Purdon 256). *Quinn v. Cumberland County*, 162 P. S. 55; reversing s. c. 13 C. C. 602.

See BOARD OF HEALTH.

HEARSAY.

See EVIDENCE, XXX.

HIGHWAYS.

See BOROUGHs: CEMETERIES: CONSTITUTIONAL LAW: DEDICATION: ESTOPPEL: EXECUTION: INJUNCTION: LIMITATION: MUNICIPAL CORPORATIONS: MUNICIPAL IMPROVEMENTS: PHILADELPHIA: SUPERVISORS: TURNPIKES AND PLANK-ROADS.

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 - (e) Use of bridges.
 - (g) Care and repair of bridges.
- XXI. State roads.
- XXII. Private roads.
- XXIII. Obstructions of highways.

I. Topographical survey.

1. A topographical survey made under the act 23 May 1889 (Brightly's Purdon 1571) is conclusive of nothing and is of no authority until finally confirmed by the proper court. *York v. Wilhelm*, 5 York 17.

2. The act 23 May 1889, art. XVII. (Brightly's Purdon 1571), providing for a topographical survey in cities of the third class, is constitutional; the passage of an ordinance directing a topographical survey to be made, delegating to a committee the duty of superintending such survey and determining and reporting such new streets and highways as are necessary to

a regular and convenient city plan, a report by such committee accompanied by a plan, the passage of a joint resolution adopting such plan and adopting said new highways, said resolution being approved by the mayor, is a sufficiently regular proceeding to bring the whole matter before the court and invest it with full and complete jurisdiction to confirm, modify or alter the draft or plan. The draft should be accurate and self-explanatory and should represent existing highways as they are; it should give full information in regard to the city datum, and where, if anywhere, it is marked; if limestones have been planted, such fact should appear by note and should also be noted when stones represent grades. The draft should also indicate those portions of existing highways which it is intended in the future to vacate. *In re Topographical Survey*, 6 York 171.

II. Opening of highways.

(a) Jurisdiction.

3. The quarter sessions has jurisdiction to lay out and widen a public road located partly in a borough and partly in a township; but it will not act where the road is deflected into a township simply to give it jurisdiction. *Priceville Road*, 4 Del. 106; s. c. 1 Lack. Jur. 170.

4. If a street be wholly within a borough the quarter sessions cannot appoint viewers to lay it out. The borough authorities must lay out the street; viewers can only fix the damages. *Street in Elizabethtown*, 7 Lanc. 76.

5. The town council of a borough may open a street laid down on the general plan of the town, though it thereby closes up a street not on the said plan but which has become a highway by being the bed of an abandoned turnpike. *Comm'th's Appeal*, 9 Atlan. 524.

6. A road leading from one terminus in a borough to a terminus in a township must be laid out and opened under the general road law. *Winter Street*, 6 Montg. 24.

7. The court of quarter sessions has jurisdiction to open, vacate and widen streets in the borough of Pottsville, the damages assessed to be paid by the county. *Burnish Street*, 140 P. S. 531.

8. The act 24 May 1878 (Brightly's Purdon 253) does not apply to the opening of a new borough street or to the extending of an old street; in such cases the jurisdiction still remains in the court of quarter sessions. *Pine Street*, 1 York 21.

9. Under the act 22 April 1856 (Brightly's Purdon 253) the jurisdiction of the quarter sessions as to damages and benefits in laying out a borough street is exclusive, unless a majority in number and interest of the owners of abutting property petition for the improvement in the manner required by the act 16 May 1891 (Brightly's Purdon 1399). The act of 1856 is not repealed by the act of 1891. *Sewickley Borough v. Jennings*, 12 C. C. 75. See *Pennsbury Alley*, 12 C. C. 213; *Jenkintown Borough v. Firmstone*, 12 C. C. 219.

10. The act 16 May 1891 (Brightly's Purdon 1399) merely provides an additional method for the opening of streets and alleys in municipalities; it does not repeal the jurisdiction of the quarter sessions to lay out and open streets and alleys in the borough of West Chester under the general road law. *West Chester Alley*, 160 P. S. 89.

11. The act 16 May 1891 (Brightly's Purdon 1399), relating to the laying out of streets in the several municipalities of this commonwealth, has taken the place of the act 23 May 1889, art. XIV. (Brightly's Purdon 1563), providing for the laying out, opening, widening, extending or grading of streets in cities of the third class. *Chestnut Street*, 10 C. C. 661.

12. The act 16 May 1891 (Brightly's Purdon 1399), repeals all former laws relating to the opening, widening and straightening of streets in any city of this commonwealth; all petitions for viewers must now be presented to the court of common pleas and in all cases

the number of jurors must be three. *Sharpless's Petition*, 5 Del. 196.

13. Where a borough street is laid out and opened by the borough council and not upon the petition of property owners, the jurisdiction for the assessment of damages is in the quarter sessions under the acts 3 April 1851 and 22 April 1856 (Brightly's Purdon 253), and not in the common pleas under the act 16 May 1891 (Brightly's Purdon 1399). *Speakman v. Coatesville*, 2 Dist. Rep. 386.

14. In ascertaining damages and assessing benefits for opening and widening streets in municipalities, the act 16 May 1891 (Brightly's Purdon 1399) provides for a uniform system and should be followed to the exclusion of all other general acts on the subject, except where such proceedings are governed by local or special laws. *Church Street*, 3 Northam. 309.

15. Where a statute authorizes a court to open a street when the state of improvements requires it, the court has no right to open the street for a part of the distance only. *Washington Street*, 12 C. C. 288.

(b) Petition.

16. Where the report of viewers shows that one of the viewers was also a petitioner, the report will be set aside. *Delmar Township Road*, 13 C. C. 505.

17. Where the record fails to show the residence of the petitioners it will be presumed in the vicinity of the road. *Road in Friendsville*, 16 C. C. 172.

18. Under the act 16 May 1891, sec. 10 (Brightly's Purdon 1401), the majority in interest and number of owners of property who may petition for the opening of a city street, means the majority of owners on the portion of the street to be actually improved, and not the majority on the whole of the street. *Speer v. Pittsburgh*, 166 P. S. 86.

19. Under the act 16 May 1891 (Brightly's Purdon 1399), a municipal street cannot be opened where it appears that two of the persons who signed the petition

and who were necessary to make up a majority of owners, had only a parol agreement with their father to purchase the land, and had paid no money on account of the purchase and had never taken possession. *Iowa Street*, 12 C. C. 611.

20. It is improper to join together in one proceeding before the same viewers, the laying out of two or more separate roads. *Sadsbury Township Roads*, 147 P. S. 471; reversing s. c. 9 C. C. 521.

21. If three proposed roads are designed to form a system and are closely identified with each other, they may be embraced in one petition. *West Goshen Roads*, 7 C. C. 250.

22. Where several petitions were presented for the extension of a street and the widening of three alleys in a borough, and but one set of viewers was appointed, and the reports of the viewers were filed together as though they constituted but one proceeding; it was *held*, that as the street and alleys were in different and distant parts of the borough, the appointment of but one set of viewers was fatal to the proceedings. *Street in Hanover*, 3 York 213.

23. The law does not authorize the joining in a single proceeding the opening of "a street and an alley" in a borough. *Fleetwood Street*, 8 C. C. 210.

24. A rule of court that no new application will be entertained for one year after the failure of former proceedings, will bar proceedings to lay out two roads, which together constitute the first road petitioned for. *Road in Palmer*, 1 Northam. 244.

25. On a petition for an alias jury of view on the original petition, the court will only consider such exceptions as arise on the petition. *West Goshen Roads*, 7 C. C. 250.

26. A petition which describes the beginning point "on another public road and on the land of a property holder," is too indefinite where it appears that such lands extend along the road for nearly a mile. *Pocopson Road*, 7 C. C. 617.

27. The object of a proceeding to relay a road in whole or in part and to vacate what is supplied should distinctly appear in the petition. The form of petition in Smith's Forms is condemned. *Blakely Road*, 8 C. C. 498.

28. In a proceeding to open a borough street, the petition must set forth the courses and distances of the street, describe the lots and give the numbers and also the names of the owners, have a draft attached showing such facts, and also have attached the borough ordinance. *Harbaugh Avenue*, 10 C. C. 440.

29. Where the petition for the appointment of viewers gave the first course as "south" and this did not agree with a stone placed in the ground by the borough authorities to mark the terminus, the variance was held to be fatal to the proceedings. *South Street*, 5 York 45. See *South Main Street*, 5 York 45.

30. Where a borough has ordered a street to be laid out and opened, viewers cannot be appointed to assess damages unless the petition shows affirmatively that compensation for damages or benefits accruing therefrom have not been agreed upon. *Centre Street*, 8 Kulp 21.

(c) Necessity of road.

31. The viewers are the sole judges of the necessity of a road; the court will judge between two roads from the record alone. *Road in Conoy*, 7 Lanc. 67.

32. The necessity of a road is exclusively a question for the viewers. *Road in North Hopewell*, 6 York 10; s. c. 5 Del. 85.

33. Upon a petition to lay out a road, the question, whether or not the proposed road is the shortest and best route and is a necessity or would be a burden, is for the viewers; in the absence of proof to the contrary, they will be presumed to have performed their duty. *Road in East Earl*, 10 Lanc. 340.

34. It is better practice to establish the necessity for a public road by other methods than the reading of anonymous

newspaper communications. *West Goshen Roads*, 7 C. C. 250.

35. A parallel road to one in existence will not be authorized unless it is shown to be a necessity. *Priceville Road*, 4 Del. 106; s. c. 1 Lack. Jur. 170.

36. Exceptions as to necessity and alleging the existence of another similar road will be discharged, in the absence of evidence in their support, or as to the misconduct of the viewers. *Road in Upper Leacock*, 8 Lanc. 76.

37. The report of a jury laying out a road will be set aside where the court is not satisfied that it is necessary. *Blakely Road*, 8 C. C. 592.

38. If a review on the question of necessity or uselessness be not asked for, the report of viewers is conclusive upon the court in the absence of palpable error or misconduct. *Forks Township Road*, 1 Northam. 223; *East Franklin Township Road*, 8 C. C. 590.

39. The burden is on the petitioners to show a necessity for the road, but where the viewers and reviewers differ as to such necessity, the court may adopt either report. *Road in Hatfield*, 8 Montg. 164.

40. Where an application for a review is pending, the court will not consider the question of the necessity for the road. *Alley in Pottstown*, 7 Montg. 204.

41. Where there was a report of viewers in favor of the road and a report of reviewers against it and the testimony did not clearly preponderate in favor of the road; it was held, that the difficulty and expense of keeping in proper repair existing roads was a sufficient reason for refusing to open the new road. *Road in Hazle*, 6 Kulp 463. See *Road in Sugarloaf*, 6 Kulp 469; *Road in Huntington*, 8 Kulp 152.

(d) Width.

42. In a proceeding to open a street or alley in a borough the duty of fixing the width devolves upon the municipal authorities and not upon the court. *Fleetwood Street*, 8 C. C. 210. See *Womelsdorf Alley*, Ibid. 207.

43. When the quarter sessions approves the report of viewers and orders a road to be opened of a certain width, it exhausts its power; any subsequent order is *ultra vires*. *Glenn v. Comm'th*, 5 Cent. 492.

44. A report of re-reviewers will be set aside where the court did not fix the width of the road on its confirmation *nisi*. *Road in Hempfield*, 8 Lanc. 153.

45. Where the report recommended the opening of a street twenty-eight feet wide and was confirmed *nisi*, but no order was made as to the width, the court set the report aside and appointed alias viewers on the original petition. *Marion Street*, 10 Lanc. 175. See s. c. 11 Lanc. 260.

46. The width of a road must be fixed by the court at the term when the report is presented; any subsequent order is a nullity. *Road in Palmer*, 5 Northam. 15.

47. Where the width of the road is fixed by the court at the confirmation *nisi*, but the court fails to endorse such action, the court may direct such endorsement at a subsequent date while exceptions are pending, but in such case the report must lie over one full term for exceptions after the width is endorsed. *Road in Whitemarsh*, 7 Montg. 161.

48. Where a road of different widths is recommended by the jury, it is sufficient for the court to approve the report and fix the width at forty and sixty feet as so recommended; in such a case it is not necessary for the court to more specifically describe the parts of the road to which the different widths are applicable. *Road in Upper Hanover*, 8 Montg. 20.

(e) Crossing railroads.

49. The right of the Pennsylvania Railroad Company to change the site of a public highway exists, where the construction or reconstruction of its roadbed across a highway renders such change necessary. The necessity of such a change is left to the railroad company, and its determination of the question is conclusive. An abuse of its discretion might be restrained by the courts, but township supervisors have no right of their own

motion to reopen the road upon its original site. *Pennsylvania Railroad Co.'s Appeal*, 128 P. S. 509.

50. Where, in order to avoid a grade crossing, a city agrees to lower the grade of a street and a railroad company agrees to elevate its tracks, an owner of land, abutting on the railroad but not on the street, is not entitled to recover damages from the city, where it appears that the injury was not caused by the change of grade of the street but by the elevation of the railroad tracks. *Tucker and Frankford Streets*, 166 P. S. 336.

51. It is a pertinent and proper suggestion in a petition for a road jury that a grade crossing over a railroad be avoided. *Road in Bensalem*, 11 C. C. 398

(g) Termini.

52. A report and draft which simply indicates the proposed road as starting from an undesignated and undescribed place on the side of a road, and ending at an undesignated and undescribed place on a street, are fatally defective. *O'Hara Township Road*, 152 P. S. 319.

53. Where a street laid out by commissioners under the local act 24 May 1873 (P. L. 1874, 379) makes an offset of eighty-seven feet at another street before starting on its extension, viewers may be appointed under said act to assess damages and benefits for the opening of the street beyond the offset. *Locust Street*, 153 P. S. 276.

54. Where the report of the viewers re-located the beginning of a road at a point some thirty rods nearer to the railroad station than did the old road; it was held not to be improper to confirm the report of the viewers. *East Deer Township Road*, 155 P. S. 53.

55. An inversion of the termini in the report is not a fatal objection. *North Lebanon Township Road*, 6 C. C. 598.

56. If one terminus be designated in the petition with certainty, it is sufficient, if the other terminus is capable of being rendered certain by the report of the jury, as where the terminus of one road in the

petition is at a certain point in another proposed road in the same petition. *West Goshen Roads*, 7 C. C. 250.

57. Though the petition for a road defectively describes the termini, the proceedings will not be set aside if the report contains an actual description of the termini. *Road in Bensalem*, 11 C. C. 398.

58. Where the petition for a road fails to set out fixed termini, the proceeding is fatally defective and the report will be set aside. *Montgomery Township Road*, 15 C. C. 384.

59. Proceedings to vacate and relay a road or parts of a road may be properly joined; the court will, however, refuse a petition to lay out a road between certain termini which would cause the vacation of an existing road between the same termini, against which nothing is alleged. *Road in Blakely*, 2 Lack. Jur. 313; s. c. 5 Del. 100.

60. Where the order and petition to vacate part of a public road described it as "leading from the York and Gettysburg turnpike" at one point, to the "York and Gettysburg turnpike" at another point, and as a matter of fact the road led to the Hanover road, the report was set aside. *Road in Jackson*, 3 Lack. Jur. 44.

61. If the report and draft show a substantial conforming with the termini as set forth in the petition, it is sufficient. *Road in Kingston*, 5 Kulp 235.

62. A public road should have its termini in other public roads or at public places, and where a part of a road is vacated, the part not vacated should have such termini. *Road in Lehman*, 7 Kulp 404.

63. Where a petition for viewers and the order and notices referred to the road as beginning at a point in a certain public road about two hundred feet from a creek on land of A and B, and ending at a point in another certain public road on land of C and D, and the report gave the courses and distances from a stone at the place of beginning to a stake at the place of ending; it was held, that the

termini were fixed with sufficient certainty. *Road in East Earl*, 10 Lanc. 340.

64. Suggestions as to the proper form of a petition to change a road. A report will not be set aside because the new portion does not correspond exactly with the termini named in the petition. *Road in Lower Nazareth*, 1 Northam. 81.

65. A terminus of an unopened borough street cannot be adopted as a terminus of a township road. *Plainfield Township Road*, 1 Northam. 369.

66. It is not necessary that an order to viewers should show that the road is to begin in a public road and to end in a public road; it is sufficient if the termini are set forth with reasonable certainty. *Road in West Cocalico*, 4 York 3.

67. Where the report set forth that the terminus of a new road was at a "post in the Middletown and Arendtsville Road," it was recommitted with instruction to more particularly describe the location of the post. *Road in Menallen*, 4 York 128.

68. The report was set aside where the reviewers located one of the termini in an entirely different road and nearly a mile from the point named in the petition and order of view. *Road in Lower Chanceford*, 8 York 8.

69. A report will be set aside where the road is laid out ending at a different terminus from that mentioned in the petition. *Road in Lower Chanceford*, 8 York 165.

70. The terminus of a proposed road must be in a public road either laid out and opened according to law or dedicated to public use and accepted as such; otherwise, the report will be set aside. *Road in Manchester*, 8 York 169.

(A) Location.

71. Where a landowner seeks to locate the road by a route specially advantageous to himself, the burden is upon him to show the propriety of such a location. *Road in Hatfield*, 8 Montg. 17.

72. When a true meridian is established under the act 26 April 1850

(Brightly's Purdon 2086), the report of the viewers must show that the survey was run by the true meridian and not according to the magnetic bearings. *Road in Friendsville*, 16 C. C. 172.

73. Where a borough ordinance for the opening of an alley described the first course as "south one-half degrees east—feet"; it was held to be such a misdescription of the locality as to be fatal to the proceedings. *Newton Alley*, 5 York 45.

74. Roads in villages that are part of a system of streets should conform as nearly as possible to the general plan and avoid unnecessary angles. *Road in Franconia*, 5 Montg. 43.

75. In laying out a road, the route between the extreme termini is exclusively for the viewers. *West Goshen Roads*, 7 C. C. 250; *Road in Lehigh*, 1 Northam. 220.

76. A road cannot be laid out in part longitudinally over a turnpike road of greater width. *Road in Franconia*, 5 Montg. 43.

77. A road cannot be located on another road regularly laid out and opened, but it may be laid on another road so far as it may be necessary to reach the point of ending called for in the order. *Road in Hazle*, 6 Kulp 463.

78. The court may lay out a new road as a modification of a road previously laid out in place of a still older road. *Road in Whiteley*, 15 Atlan. 895.

79. A road may be legally laid out upon another so far as it may be necessary to reach the point of termination called for in the order. *Road in White-marsh*, 7 Montg. 161.

80. An order to open a street on the payment of damages will not be revoked on the ground that the street as opened would not cross, intersect or end in any public highway and would not be of any particular use to the public. *Duke Street*, 11 Lanc. 58.

81. A change in the location of a public road will not be confirmed if the old road is not vacated. *Road in Friendsville*, 16 C. C. 172.

82. A road with an elevation of seventeen and a half degrees for a distance of three hundred and fifty feet will not be confirmed without further evidence. *Road in Plains*, 5 Kulp 222.

(4) Opening.

83. A mandamus will not issue from the court of common pleas to enforce an order of the quarter sessions to open a public road; the quarter sessions has ample power to enforce its own order. *Comm'th v. Holland*, 153 P. S. 233.

84. A supervisor may be indicted for changing the route of a road as laid out by the viewers; and this, though carrying out a change made by a former supervisor. *Comm'th v. Johnson*, 134 P. S. 635; s. c. 26 W. N. C. 158.

85. The quarter sessions has no jurisdiction to grant an order compelling supervisors to open a road to its full width; the remedy is by indictment. *Hamiltonban Township Supervisors*, 11 C. C. 368.

86. In a proceeding against supervisors for contempt in not obeying an order to open a road, it was no answer that the road was unnecessary, that the funds in their hands were needed for other purposes, and that to open the road would involve an increase of the township debt beyond the constitutional limit. *Roaring Brook Township Road*, 140 P. S. 632.

87. Upon the councils of the city of Reading directing the opening of a street under the act of 23 May 1874 (P. L. 230), the proper proceeding is to file a bond in the common pleas, and then proceed to open. *Shaaber v. Reading*, 133 P. S. 643; s. c. 25 W. N. C. 514; affirming s. c. 7 C. C. 230.

88. If the immediate opening of a street, so that a sewer may be constructed in it, be required for the preservation of the public health, the execution of the work will not be enjoined until a bond for the damages is filed. *Bromley v. Philadelphia*, 47 L. I. 318.

89. Where the reviewers of a proposed

road reported that the damages ought to be paid by the county, and the county commissioners reported that the damages were excessive and the report of the viewers was confirmed, but a review of damages was granted upon the application of the county commissioners; it was held, that the court would not suspend the order to open the road until the review of damages was disposed of. *Road in Lower Chanceford*, 4 York 197.

90. Where the cost of opening a road was estimated at \$2000, the court might confirm the road on the voluntary offer by a citizen to give bond to open it for \$400, and the entry of such a bond. *Road in Bern*, 17 Atlan. 205.

91. Where a township's indebtedness had reached the limit beyond which it could not be increased without the consent of the electors, the court confirmed the report of a jury of view in favor of a road, but directed the order to open to be held by the clerk awaiting the opinion of the electors as to the desirability of increasing said indebtedness. *Road in Green*, 3 Dist. Rep. 256.

92. As to the right of viewers to direct the construction of "cattle paths" across the proposed road, see *Road in Benton*, 1 Lack. Jur. 293.

93. Where a street is opened under an unconstitutional act, it cannot be afterwards interfered with; the landowner having assented to the taking of his property and the county having paid the damages assessed against it without objection, are estopped from subsequently complaining. *Oxford Borough Street*, 2 Dist. Rep. 327.

94. Where a city laid out a street and gave a peremptory notice to the owner of a building which encroached upon the street, that he must remove it or the city would do so at his expense; it was held, that the owner, by cutting away from the building in obedience to such order, did not thereby render himself liable in damages to the tenant for interference with the latter's possession of the premises; and this, although the statute under which the city acted was afterwards ad-

judged unconstitutional. Neither a city officer nor a citizen who acts as his representative will incur a personal responsibility by acting under an unconstitutional statute. *Dunn v. Mellon*, 147 P. S. 11.

III. Appointment and qualifications of viewers.

95. The act of 8 May 1889 (Brightly's Purdon 1875), fixing the number of road and bridge reviewers at three, is not unconstitutional by reason of the proviso that it shall not apply to counties having local acts inconsistent therewith. *East Avenue*, 7 Lanc. 164.

96. Seven freeholders must be appointed to assess damages and contributions upon the application by the burgess and council of a borough. The act of 8 May 1889 (Brightly's Purdon 1875) does not apply. *In re Road Viewers*, 8 C. C. 557; s. c. 2 Northam. 237.

97. The act of 8 May 1889 (Brightly's Purdon 1875), fixing the number of road and bridge viewers at three, applies to Monroe county, except in case of a bridge over a stream or a county line, where the number should be six. Three viewers must convene, but two may decide. *In re Road Viewers*, 8 C. C. 557; s. c. 2 Northam. 237.

98. The act of 8 May 1889 (Brightly's Purdon 1875), that but three viewers shall be appointed to lay out or vacate a road, applies to Northampton county. It can be read into the local act of 22 April 1858 (P. L. 464), and is not inconsistent therewith. *Forks Township Road*, 2 Northam. 135.

99. The act 8 May 1889 (Brightly's Purdon 1875), providing for the appointment of three viewers to lay out or vacate public or private roads or to assess damages, does not apply to streets in the city of Philadelphia. *Sewer Street*, 47 L. I. 188.

100. The report was set aside where it appeared that the petitioner suggested to one of the associate judges the name of an individual as a good man for viewer,

and such person was appointed. *Road in Spring Garden*, 6 York 149.

101. Where, after an order had issued to viewers, one of them became sick, and a new viewer was substituted, the appointment being made on the back of the original petition, and no order was ever issued containing the name of the substituted viewer; it was *held*, that he had no authority to act, and that the proceedings must be set aside. *Cherry Street*, 1 Dist. Rep. 41.

102. Where the viewers were originally petitioners, but their names were erased that they might be appointed viewers, an order confirming the road will be reversed. *Road in Green*, 129 P. S. 527.

103. It is necessary that viewers be freeholders, but not that they be owners of real estate clear of encumbrance. *Harbaugh Avenue*, 10 C. C. 440.

104. Where exceptants to a report knew that certain of the jurors were not freeholders, but took their chances of a favorable verdict; it was *held*, that the report would not be set aside for that reason. *Pennsburg Alley*, 12 C. C. 213.

105. That one of the viewers was not a freeholder cannot be alleged as an exception to the report where it appears that that fact was known to one of the exceptors before the view, and could have been known by all of them by the exercise of due diligence. *Street in New Salem*, 5 York 175.

106. An owner of property on the street proposed to be opened in a borough, though not on the parts of the street affected by the borough ordinance, is incompetent as a viewer, and such incompetency may be taken advantage of, even though it was known before the view. *Street in New Salem*, 5 York 175.

107. Upon the opening of an additional portion of a street, property owners on the portion already opened are disqualified from acting as viewers. *Main Street*, 137 P. S. 590; s. c. 38 P. L. J. 126.

108. The objection that a viewer is related to one of the parties must be made promptly. *Road in Kingston*, 5 Kulp 235.

109. That one of the viewers was related to a promoter of the road is an objection which should be made as soon as known. *Road in Hazle*, 6 Kulp 463.

110. After an exceptant has taken his chances as to a report, it is too late for him to object because of relationship between a viewer and the petitioner. *Road in Upper Leacock*, 8 Lanc. 76.

111. An objection that one of the viewers is a brother-in-law of an interested party comes too late after the report is filed. *Road in Whitmarsh*, 7 Montg. 161.

112. Where the exceptor was not present at the view, the report was set aside where it appeared that one of the viewers was a brother-in-law of one of the petitioners. *Road in Hellam*, 6 York 149.

113. An exception that three of the viewers were not, as required, residents of the township, is too late, if made after the filing of the report. *Road in Lower Saucon*, 1 Northam. 41.

114. Where the borough authorities lay out a street and petition for viewers under the act 22 April 1856 (Brightly's Purdon 253), it is not necessary for the court to appoint viewers from adjoining townships to determine whether the street is necessary or not; there is nothing for the viewers to do except to determine the question of damages to property injured and to assess contribution for the benefits. *Pine Street*, 2 York 5; affirmed in *Pine Street*, 2 York 49. See *Pine Street*, 2 York 109.

115. The surveyor provided by the act of 8 May 1889 (Brightly's Purdon 1875), does not supply the surveyor to be furnished by the petitioners under the act of 13 June 1836. *East Avenue*, 7 Lanc. 164.

116. An objection that none of the viewers was a surveyor, as required by the act 8 May 1889 (Brightly's Purdon 1875), should be made before the view; it comes too late after the objector has taken his chance of a favorable report and has been disappointed. *Mill Creek Road*, 9 C. C. 592.

IV. Notice.

117. Where a rule of court provided that viewers should be notified of their appointment by a constable or other disinterested person; it was held, that service of such a notice by one of the petitioners was sufficient cause for setting aside the report, but that such an objection should be made as soon as the fact was discovered. *Road in Aston*, 6 Del. 86.

118. Notices of the time and place of meeting should be signed by the viewers. *Road in Benton*, 1 Lack. Jur. 293.

119. Notices of a view must be signed by some responsible person or persons, and unless it can be shown that the exceptant attended the view, the report will be set aside where it appears that the notices of the view were unsigned. *Road in Springfield*, 6 Del. 94.

120. A notice by advertisements put up in the vicinity of a contemplated borough road at least five days before the meeting of the viewers, is sufficient. *Mathewson v. Supervisors of Clinton*, 8 C. C. 204.

121. Where notice of the time and place of meeting of viewers was posted on a public schoolhouse and on a drag set up against the fence and on the fence, such posting was held to be insufficient within the rule of court in York county. Where exceptions aver that notices were not posted as required by law, it must be proven that notices were duly posted and signed ten days before the view. *Road in Dover*, 5 York 4.

122. Where notices of view were so defectively posted as not to be observed by persons passing, the report was set aside. *Road in Manchester*, 8 York 169.

123. Where 9 A.M. was fixed by the viewers to view the proposed route, but, on account of a storm, they did not reach the place until 2 P.M., the court refused to set aside the report upon exceptions by mere taxpayers and travellers, who were not owners of lands over which the road was to be laid out. *West Fallowfield Road*, 7 C. C. 645.

124. Notice to the owner of seated

lands by posting advertisements, as required by the special act of 24 February 1845 (Brightly's Purdon 1879), of the establishment of a road over it, is sufficient, although personal notice be required by rule of court. *Mathewson v. Supervisors of Clinton*, 8 C. C. 204. See *Womelsdorf Alley*, Ibid. 207.

125. Actual notice must be given to the property owners whose real estate is to be taken, of the time and place of the view. *Harbaugh Avenue*, 10 C. C. 440.

126. Where a land was owned by two sisters and a brother in common, the report was set aside where it appeared that the two sisters had received no notice of the view and no attempt had been made to procure releases from them. *Road in East Cocalico*, 11 Lanc. 118; s. c. 5 Del. 436.

127. Notice of the meeting of viewers should be served on all the owners and occupants of land along the proposed route. *Road in Plainfield*, 1 Northam. 39.

128. A resident of the county having a vested remainder in fee in land along the route of the road, is entitled to notice of the time and place of view. *Road in Lower Nazareth*, 2 Northam. 199. See *Wilbur Street*, Ibid. 226.

129. Notice of a proposed view to the agent of a non-resident owner occupying an office on the premises was *held* to be good; where such agent was unable to give the present address of his principal, it was *held*, that a notice mailed to the last known residence of the latter was sufficient. *Road in Lower Merion*, 7 Montg. 57.

130. Previous notice of the view should be given, but it is not necessary that the report should show it. It may be shown by parol. *Road in Washington*, 1 Atlan. 657.

131. Where a report of viewers appointed to open a street set forth notice to all persons interested and no exceptions were filed to the report, the court refused, after a confirmation of the report, to set aside the same on the ground that no

notice had been given. *Fourth Street*, 158 P. S. 469.

132. The manner of giving notice to property owners by the viewers should be stated in the report so that the court may judge of its sufficiency and legality. *Road in Salem*, 7 Kulp 105.

133. The report may be amended so as to show notice to the supervisors, which had been actually served, but inadvertently omitted to be stated. *Road in Lower Saucon*, 1 Northam. 41.

134. Upon the laying out of a public road, oral proof may be given of notice to a landowner; where a tenant received notice in due time and handed the same to his landlord on the day before the jury of review met, and the latter followed the action of the original jury, and it appeared that the landlord had due notice of the original view and had expressed satisfaction with the report; it was *held*, that the notice was a sufficient compliance with the rule of court requiring five days' notice to owners and occupiers. *Road in Moreland*, 7 Montg. 70.

135. Public notice having been given of proceedings to open a road, a landowner who neglects, as soon as he receives actual notice, to apply to the court to open the decree, is concluded by it. He cannot bring trespass against the township. *Wagner v. Salzburg Township*, 132 P. S. 636; s. c. 25 W. N. C. 476.

136. Where no notice of an assessment of damages for laying out a street is given to certain property owners, such omission can be taken advantage of only by such owners as have not been notified. *Pennsburg Alley*, 12 C. C. 213.

137. A rule of court which provides that before any petition for a new road or to vacate an old one shall be granted, ten days' notice shall be given to the supervisors, is a reasonable rule and should be rigidly enforced. *Cherrytree Township Road*, 10 C. C. 389.

138. Where there was a rule of court that in proceedings to view and lay out a highway, notice of such view should be given to the supervisors; it was *held*,

that notice was not waived by the casual presence of one of the supervisors at the place of view, his presence not being for the purpose of attending the view. *Road in Upper Fairfield*, 11 C. C. 396.

139. The county commissioners are entitled to notice of a road view where the county must pay the damages, but they only can object to the want of notice. *Road in Friendsville*, 16 C. C. 172.

140. Where a party receives due notice of a view to assess damages of the opening of a city street under a city ordinance, and he appears before the viewers and calls witnesses in support of his claim for damages, he will be held to be estopped from objecting to the validity of the ordinance upon the ground that he did not have notice of the proposition to open the street before the passage of the ordinance. *Walnut Street*, 7 Kulp 562.

141. All defects in the notice of view are cured by the presence of the exceptant at the view. *Road in North Hope-well*, 6 York 10; s. c. 5 Del. 85; *Road in Lower Chanceford*, 8 York 8.

142. A defect in the posting of notice of view is cured by the presence of the exceptant at the view. *Road in Lower Chanceford*, 8 York 165.

143. If notice of the view was properly given, the supreme court, on *certiorari*, will presume the finding was on sufficient evidence. *Road in Washington*, 1 Cent. 376.

V. Oath of viewers.

144. The report will be set aside, where it appears that the viewers were not sworn or affirmed before entering on the duties of their appointment. *Road in Butler*, 6 Kulp 443.

VI. Entertainment of viewers.

145. The entertainment of viewers at dinner by one of the petitioners is cause for setting aside their report. *North Branch Road*, 8 C. C. 284; *Priceville Road*, 4 Del. 106; s. c. 1 Lack. Jur. 170.

146. The innocent entertainment of

one of the viewers by a petitioner is good cause for setting aside the report. *Blakely Road*, 8 C. C. 592.

147. The entertainment of viewers by an interested party is good cause for setting aside their report. *Road in Butler*, 6 Kulp 443; *Road in Sugarloaf*, 6 Kulp 469.

148. A report will not be set aside upon an exception that the viewers were entertained at, before and after the view by one of the petitioners, in the absence of evidence showing a sinister purpose to unduly influence the viewers. *Road in East Earl*, 10 Lanc. 340.

149. In the absence of a rule of court the entertainment of viewers to vacate with a "sumptuous dinner" by the petitioners, is not sufficient ground for setting aside the report. *Forks Township Road*, 1 Northam. 223; *East Franklin Township Road*, 8 C. C. 590.

150. A report will not be set aside because of the mere circumstance that on the day of the view some of the viewers partook of intoxicating liquors. *North Street*, 5 York 173.

VII. Of the view.

151. All the viewers must view the proposed road, although only two need concur in the report. *Road in Butler*, 6 Kulp 443.

152. Where the report of the viewers shows that only two of them viewed the road, the report will be set aside notwithstanding that the third viewer met subsequently with the others, and, being duly sworn, joined in the report. *Road in Plains Township*, 5 Del. 423.

153. A view is too late which is made after the beginning of the term to which the order is returnable. *Road in Fairview*, 7 Kulp 232.

VIII. Reports of viewers — Exceptions — Decree.

(a) Of the report and draft.

154. In the city of Philadelphia, the three months within which, under the

act of 6 June 1873 (Brightly's Purdon 1498), viewers are requested to make report, may be extended by the court for a further three months; and this, by a rule *nunc pro tunc* after the first three months have expired. *Magnolia Avenue*, 10 C. C. 159; s. c. 27 W. N. C. 470; 48 L. I. 86. The act of 1873 is since repealed by act 26 June 1895 (P. L. 320).

155. The failure of a jury of view to report at the proper term is good cause for setting aside the report, unless the order to the jury was expressly continued to the next term. *Sharpless's Petition*, 5 Del. 196.

156. Road viewers cannot agree upon their report on the return day of their order, their final conclusion must be arrived at before the next term begins. *Road in Bern*, 3 Dist. Rep. 8.

157. It is unimportant that a report is dated before the order of continuance, it not being presented until after the continuance was granted. *North Lebanon Township Road*, 6 C. C. 598.

158. After the term to which road viewers make their report, they will not be permitted to amend their report either in lengthening a course in the road or by increasing damages. *Road in Salem*, 7 Kulp 305; s. c. 5 Del. 496.

159. Alterations in a report should be made at an adjourned or called meeting of the viewers and not by separate or individual agreement; where the report shows alterations and interlineations, and it is not shown that they were made before the viewers signed the report, or that all of the viewers assented to them, the report will be set aside. *Road in Manchester*, 8 York 169.

160. Where there is no reference to improvements in the report of viewers or in the draft, the presumption is that there are none, but this presumption is rebutted by a report that the viewers have noted the improvements in the draft; in such a case an omission to note them is fatal. *Leet Township Road*, 159 P. S. 72.

161. In proceedings to open a borough

street where the report does not precisely ascertain whether or not there be damages and benefits and the amount of the same and the names of the property owners so damaged or benefited, it is an imperfect performance of the office of viewer, and a mandamus execution will not issue upon such a report unless specific amounts are assessed against or in behalf of certain persons. *Pringle Street*, 167 P. S. 646; s. c. 36 W. N. C. 314; reversing s. c. 7 Kulp 346; 6 Del. 14.

162. A failure to state courses and distances in a report is a fatal defect. *Race Street*, 8 C. C. 95.

163. Where viewers have made a mistake in the name of an owner of land through which the road passes and to whom damages are assessed, the report should be recommitted. *Road in West Manchester*, 10 C. C. 429.

164. In a proceeding to open a borough street, the report should set forth the lines of the street and each lot from which a part is taken, and it should specifically describe the part taken, and should have attached a draft showing the lot in the original condition and as affected by the opening of the street. *Harbaugh Avenue*, 10 C. C. 440.

165. A report of viewers to open a street should contain a description of the property assessed for damages and that assessed for contribution; where it contains no such description the proceedings will be set aside. *Wintergreen Alley*, 11 C. C. 126.

166. Where the viewers complied with all the requirements except that their report failed to show that they assessed damages or obtained releases, the court refused to set the proceedings aside, but recommitted the report. *Road in Chanceford*, 6 York 148; s. c. 3 Lack. Jur. 75. See *Road in Lower Chanceford*, 8 York 8.

167. The report of viewers should designate the county and township wherein the road is located, definitely locate the termini, and definitely state whether the road is for public or private use. *Road in Hanover*, 7 Montg. 25.

168. The report should set forth with particularity the exact location of the road. *Road in Plainfield*, 1 Northam. 39.

169. The court may send a report back to have the plot or draft of the road annexed. *Schweitzer's Appeal*, 7 Cent. 631; affirming *Road in Bethlehem*, 2 L. V. 265.

170. In proceedings under the act 16 May 1891 (Brightly's Purdon 1399), the report of viewers must contain a schedule of benefits and damages, together with a plan showing the improvements and the properties taken, injured or benefited. *McDermott v. Newcastle*, 13 C. C. 474.

171. A report of viewers is not void because it simply refers to an annexed draft as indicating the roads vacated. *Road in Whiteley*, 15 Atl. 895.

172. It is not necessary that the draft should show whether the surrounding properties are improved or unimproved, provided this be shown by the report. *Road in East Earl*, 10 Lanc. 340.

173. Where the draft attached to the petition stated that ninety-six perches of the land of a certain owner would be taken and, as a matter of fact, the street would take one hundred and fifty-one perches of such owner, the report upon exceptions was set aside. *First Avenue*, 5 York 46. See *West Broadway Street*, 5 York 46.

174. A report will not be set aside in the absence of evidence showing the incorrectness of the draft on which the proceedings were based. *Church Alley*, 5 York 46.

175. Omissions in the report or in the draft may be supplied by each other. *Road in Manchester*, 8 York 169.

(b) Exceptions and decree.

176. Under the act 16 May 1891, sec. 6 (Brightly's Purdon 1400), a citizen of a borough, who has no interest in the land taken, has no authority to file exceptions to the report of the viewers in a proceeding to widen the street. *Cedar Street*, 9 Lanc. 169.

177. Where the report stated that no

buildings were taken, when in fact three feet of a barn were taken; it was held, that a person who was not the owner of the barn had no standing to file such an exception. *Road in Upper Hanover*, 8 Montg. 20.

178. The court will not consider exceptions to a report of viewers which have not been sworn to. *Road in Newberry*, 6 York 169; s. c. 5 Del. 240.

179. Exceptions to the report are in time if filed before the expiration of the second week of the session, although the court has already adjourned. *Road in Lower Chanceford*, 8 York 8.

180. Exceptions to a road report are in time when filed on the last day of the second week of the term after the adjournment of the court. *Road in Lower Chanceford*, 8 York 165.

181. The court has no power to permit an exception as to the constitutionality of the act under which the proceedings are conducted, after the time for filing exceptions has passed. Nor will the court entertain an application to set aside the proceedings on the same ground. *Oxford Alley*, 8 C. C. 221.

182. Where exceptions to the report had been filed in time, the court permitted, after the time for exceptions had expired, an amendment *nunc pro tunc* where the object of the amendment was to set up want of notice, and it appeared that the cost of making the road would be of such magnitude that it ought not to be incurred without full notice to taxpayers and others interested. *Cherrytree Township Road*, 10 C. C. 389.

183. Leave will be granted to file exceptions *nunc pro tunc* where such exceptions are legal ones, and are for matter appearing upon the face of the record. *Delmar Township Road*, 13 C. C. 505.

184. Exceptions as to matters appearing on the face of the record may be filed after the final confirmation of the report; if the court refuse to permit such exceptions to be filed *nunc pro tunc*, this does not deprive the exceptants of their

right to assign error in the decree on appeal to the supreme court where the record itself sustains the exceptions. *O'Hara Township Road*, 152 P. S. 319.

185. Upon a report in proceedings to widen a street, an exception is too general which merely sets forth that the assessment is improper and the proceedings are irregular and illegal. *Locust Street*, 10 Lanc. 206.

186. In proceedings by the city to assess damages under the act of 23 May 1889 (Brightly's Purdon 1563), for the opening of a street in the city of Scranton, the city solicitor cannot except to the finding of the jury, because they disregarded a former finding of the commissioners appointed under the act of 3 April 1872. *In re Padden*, 1 Lack. Jur. 382.

187. Inadequacy of damages is no ground for an exception to the report; so, entertaining the viewers after their report has been signed is no cause for setting it aside. *Road in North Hopewell*, 6 York 10; s. c. 5 Del. 85.

188. An exceptant in a road case who does not appear before the viewers and except and object, must be held to have waived any objection as to damages as affected by the course and description of the street in the ordinance and the draft attached to the report. *Frederick Street*, 155 P. S. 623; affirming s. c. 12 C. C. 577.

189. Under the act 3 May 1869 (Brightly's Purdon 1499), providing that in Philadelphia no report of viewers shall be set aside except on exceptions filed in the court below, a decree endorsed on the cover of one set of exceptions "exceptions sustained, and the report of the jury set aside" is a sufficient compliance. *Thirtieth Street*, 147 P. S. 245.

190. The decision of the court in a road case must be based upon the report of either viewers, reviewers or re-reviewers; not upon the testimony taken by a commissioner upon a sort of general appeal. *Ohio & Ross Township Road*, 166 P. S. 132.

191. After a court of quarter sessions has been legally constituted by the presence of two associate judges or of the law judge and one associate, the signature of one of the judges to a confirmation of the report of a jury of view is a sufficient authentication. *Mill Creek Road*, 9 C. C. 592.

192. Under the act 22 April 1856 (Brightly's Purdon 253), in a proceeding to open a borough street, the court has power to refuse to approve and confirm the report; it may either set aside the report, or in a clear case of injustice may modify it by diminishing or increasing the damages awarded. *Pine Street*, 1 York 133.

IX. Releases.

193. Where the viewers fail to apply for releases, the confirmation of their report will be set aside, but the original petition, if in proper form, will be allowed to stand as the basis for another view. *North Union Township Road*, 150 P. S. 512.

194. Viewers of a borough street need not report that they endeavored to procure releases; it is presumed to have been done unless the contrary appears. *Womelsdorf Alley*, 8 C. C. 207.

195. Under the third section of the special act of 24 February 1845 (Brightly's Purdon 1879), the duty of endeavoring to procure releases is imposed only on the original viewers; it is not imposed on reviewers who adopt the same location, but differ with the viewers on the question of damages. *Road in Plains*, 5 Kulp 476.

196. It will be presumed that the viewers endeavored to obtain releases of damages in the absence of evidence to the contrary. *Road in Hazle*, 6 Kulp 463.

197. A report which fails to show that the viewers endeavored to obtain releases will not be confirmed. *Road in Benton*, 1 Lack. Jur. 293.

198. The act 14 May 1874 (Brightly's Purdon 1877), requiring viewers to en-

deavor to procure releases or to assess damages, applies to a case where the proceeding is to widen an already opened public road. *Merion Avenue*, 7 Montg. 102; s. c. 4 Del. 452.

199. Where the legal and equitable owners have been duly notified of the view and the legal owner has appeared, the viewers are not required to seek out the equitable owners, who are non-residents, for the purpose of asking them to release damages. *Road in Hatfield*, 8 Montg. 17.

200. One to whom damages have been awarded cannot have the report set aside on the ground that he was not asked to release damages. *Road in Hatfield*, 8 Montg. 17; *Road in Upper Hanover*, 8 Montg. 20.

201. Where a road as located took a portion of A's land, but the report did not state that fact nor assess damages nor state that efforts were made to obtain a release; it was held, that the report must be set aside. *Road in Heidelberg*, 3 York 214.

202. A statement in the report that "failing to procure releases of damages from the persons through whose lands the road passes, we have made the following assessment of damages," is sufficient to show that an effort was made to procure releases. *Road in North Hope-well*, 6 York 10; s. c. 5 Del. 85. See *Road in Lower Chanceford*, 8 York 8.

203. A report is defective which does not state that the viewers made an effort to procure releases, that the road is of such public utility that the damages should be paid by the county, and which does not specify the improvements; such a report, however, will not be set aside but will be recommitted for correction. *Road in Lower Chanceford*, 8 York 8.

204. Where a report fails to state efforts to procure releases or to state that the jury find the road to be of such public utility that the damages should be paid by the county, the report will be recommitted but it will not be set aside. *Road in Lower Chanceford*, 8 York 165.

X. Damages.

205. The act of 14 May 1874 (Brightly's Purdon 1877), authorizing the assessment of damage by the jury laying out a road, is not unconstitutional. The landowner cannot disregard their determination and apply for viewers to assess damages. *Road in West Whiteland*, 4 Montg. 11.

206. Under the act of 14 May 1874 (Brightly's Purdon 1877), the assessment of damages by a jury of view is conclusive; the act of 13 June 1836 (Brightly's Purdon 1876) does not authorize the appointment of a jury of view or review for the ascertainment of damages alone. *Road in Warriorsmark*, 126 P. S. 305.

207. A report will be set aside for failure to give an opportunity to a landowner whose lands are taken to be heard on the matter of damages, and for not passing upon damages caused by vacations. *West Goshen Roads*, 7 C. C. 250.

208. Where the viewers met and signed a report and adjourned *sine die*, and another report allowing additional damages was signed without a meeting, the proceedings were set aside. *Road in Providence*, 7 Lanc. 81.

209. A report in favor of a road, which makes no mention of damages, is tantamount to a finding that no damages have been sustained. *Road in Kingston*, 134 P. S. 409; affirming s. c. 5 Kulp 239.

210. Viewers should give their opinion as to whether the amount of damages is such that the public interest will be subserved by its payment and the opening of the road. *Road in Benton*, 1 Lack. Jur. 293.

211. Under the act 22 April 1856 (Brightly's Purdon 253), no right of action accrues to a property owner until a borough street is actually opened or widened, and the appointment of viewers to assess damages before such actual widening or opening, is premature. *Fifth Street*, 14 C. C. 400.

212. If a landowner holds a deed for the property and the same is enclosed,

and is in possession, he is entitled to be awarded the damages. The jury cannot decide a dispute as to title between owners. *Western Avenue*, 7 C. C. 223.

213. Where a claimant for damages shows title deeds to the land occupied by her, and enclosed by fences, a jury of view has no authority to decide against her upon a contest raised by the county commissioners alone. *Alley in Pottstown*, 7 Montg. 204.

214. In a proceeding to assess damages for the opening of a street, where it appeared that the land for which the damages was claimed was the bed of the street, and that the owner, prior to the opening of the street, but after it had been placed on the city plan, had conveyed the land on both sides of the street calling for the street as a boundary, the supreme court refused to reverse a judgment on a verdict in favor of the city. *Gamble v. Philadelphia*, 162 P. S. 413; affirming s. c. 2 Dist. Rep. 560.

215. In Philadelphia, a party may technically claim damages for the opening of a plotted street, although the description in his deed calls only for the side of the street as his boundary, but it is for the jury to say whether, under such circumstances, the plaintiff has sustained any damage at all by the opening. *Hancock v. Philadelphia*, 4 Dist. Rep. 345.

216. The grantee of a town lot abutting on an unopened street is entitled to the damages occasioned by the subsequent opening. *Hamilton Street*, 6 Montg. 207.

217. A conveyance to the side of an unopened street duly laid out under an act of assembly, gives to the grantee such an interest in the land occupied by the street as entitled him to a jury of view to assess damages. *Lafayette Street*, 7 Montg. 59.

218. An abutting owner is not entitled to damages for the opening of a town street where his remaining ground is as valuable in the market as the whole tract was immediately before the opening. *Lafayette Street*, 7 Montg. 59.

219. A jury of view will be appointed to assess damages for opening a street even after the street has been in actual use; the owner, by merely permitting the use of the land for a period less than the period of limitation, is not thereby estopped from claiming damages for the taking of the land. *Musgrove Street*, 10 C. C. 180.

220. After the passage of an ordinance opening a borough street, the owner may abandon the land to the borough, and upon notice thereof and demand in writing upon the proper authorities, he may proceed to have his damages ascertained and paid. *Fifth Street*, 14 C. C. 400.

221. One who acquires title after the confirmation of the report in favor of opening the street, but before the actual opening and the commencement of proceedings to assess damages, is entitled to recover damages for such opening. *Fifteenth Street*, 3 Cent. 121.

222. Damages to a lot owner in the opening of a borough street are to be ascertained as of the time of the opening; where the same person owned three lots, A, B, and C, and an ordinance was enacted, establishing a new street occupying the whole of lot A, and afterwards the owner sold lot B and retained lot C; it was *held*, upon a subsequent opening, that the owner was entitled to the value of lot A, undiminished by benefits or advantages to lots B and C; and this, though he obtained an increased price for lot B. *Whitaker v. Phoenixville*, 141 P. S. 327.

223. Where a lease has been terminated by a notice to quit, and the tenant holds over as tenant at will, he has no interest for which he can recover damages for the opening of a street; there can be no recovery for probability of a renewal. *Shaaber v. Reading*, 150 P. S. 402.

224. Where the widow of a decedent filed her election to take under his will, which devised to her a house and lot, and afterwards a street was opened, taking a portion of the lot, and viewers assessed

damages to the widow, from which the executor appealed, and the jury awarded larger damages to him; it was *held*, that a new trial would be granted, pending a rule to strike off the appeal. *Weaver v. Lancaster County*, 8 Lanc. 315; s. c. 4 Del. 510. The appeal was subsequently stricken off. *Weaver v. Lancaster County*, 9 Lanc. 133.

225. Where damages were assessed to A for opening a street through his property, and after the time for appeal had elapsed without A having appealed, although appeals of other owners were pending, A's property was sold by the sheriff, and subsequently the court ordered the street to be opened on payment of the damages; it was *held*, that the portion assessed for A's property was payable to A, and not to the vendee of the purchaser at the sheriff's sale. *Arnold v. Schaum*, 10 Lanc. 377.

226. A borough street laid out by commissioners under a special act, is only to be considered opened from the date of the opening order by the court, and the statute of limitations only begins to run against a claim for damages from that date. *Bush Street*, 5 Montg. 196.

227. Damages should be assessed at the market value and not at what an isolated individual would be willing to give for the land. *Geisinger v. Hellertown*, 133 P. S. 522; affirming s. c. 2 Northam. 97.

228. Upon an appeal to the common pleas, the jury may include interest from the date the report of viewers was filed. *Weiss v. South Bethlehem*, 136 P. S. 294; s. c. 26 W. N. C. 433.

229. In a proceeding to assess damages for the opening of a street, the jury has no right to allow as a distinct item of claim the cost of removing a house from the bed of the street; the damages must be measured by the change produced in the market value of the property. *Grugan v. Philadelphia*, 158 P. S. 337; *Chambers v. South Chester Borough*, 140 P. S. 510.

230. Upon the opening of a city street, the damages should be determined by

considering the effect upon the property on the opened street alone, and not in connection with another street yet unopened. *Negloy Avenue*, 146 P. S. 456; *Grugan v. Philadelphia*, 158 P. S. 337.

231. In a proceeding in a court of common pleas to assess damages for the opening of a street, it was *held* to be improper for the court to charge that the question for the jury was, whether the opening of the street, so far as its effect upon the value of property was concerned, was premature or not. *Grugan v. Philadelphia*, 158 P. S. 337.

232. In the assessment of damages for opening a street the possibility of municipal improvements is not to be considered as an independent claim, but it enters into the question of the market value of the ground after the street is opened. *Reyenthaler v. Philadelphia*, 160 P. S. 195.

233. Upon the trial of an appeal from an assessment of damages for opening a street, where the plaintiff testifies that certain buildings standing in the line of the street had been torn down, evidence is admissible on behalf of the city to show that the buildings, which were old and dilapidated, had been torn down and removed by boys and women for firewood. *Ryenthaler v. Philadelphia*, 160 P. S. 195.

234. Under the act 16 May 1891, sec. 12 (Brightly's Purdon 1402), no person is entitled to recover damages for any buildings or improvements which may be placed upon or within the lines of any located street or alley after the same shall have been located by councils; that act is not in conflict with art. XVI., sec. 8, of the constitution. *Busch v. McKeesport*, 166 P. S. 57.

235. The rule of damages for opening a highway is the same, though the street was on the city plan prior to the opening, and the deed to the owner described the street as one of the boundaries of the lot. *Forty-fourth Street*, 7 C. C. 69; s. c. 46 L. I. 230.

236. No damages can be awarded for improvements since the original ordi-

nance laying out the street. *Western Avenue*, 7 C. C. 233.

237. Where an attachment for part of a furnace building, which was used in the manufacture of pig-iron, was burned down after the commencement of the proceedings for the opening of a street through the property, and it was rebuilt by the owners on the same spot in order to reinstate the business of manufacturing; it was *held*, that the owners could recover damages for injury to the building so rebuilt by reason of the opening of the street. *Thomas v. Lancaster*, 10 Lanc. 113.

238. A final judgment for damages for the opening of a street is conclusive; and this, although appeals of other property owners are undisposed of and the ordinance is afterwards repealed, and although there is no actual taking or occupation of the land. In such a case the property owner is entitled to his execution. *Myers v. South Bethlehem*, 149 P. S. 85; reversing s. c. 3 Northam. 198. See *Sandusky Street*, 41 P. L. J. 241.

239. A petition for a mandamus to compel county commissioners to pay road damages is an execution process and is not affected by the statute of limitations. *Boyer's Petition*, 15 C. C. 531.

240. Where a jury of view laid out a public road and awarded damages to an owner, who appealed and obtained a verdict in the common pleas, and afterwards and before the road was opened, a borough was incorporated including all the land through which the road ran; it was *held*, upon a rule to show cause why execution should not issue, that until the borough authorities adopted a plan of streets including the road, the court would not order the road to be opened, and until it was opened, execution could not issue. *Hibberd v. Delaware County*, 5 Del. 493. See *Hibberd v. Lancaster Co.*, 6 Del. 217.

241. Damages for opening streets in the city of Lancaster, otherwise than for buildings removed or injured, are payable primarily by the county. *Lancaster County v. Frey*, 128 P. S. 593; *Lancaster County v. Kendig*, Ibid. 601; *Lancaster County v. Clark*, Ibid. 602.

242. A false statement made by an auctioneer at a sale of city lots that a street had been opened through the land and damages paid, does not affect the liability of the city for damages caused by the subsequent opening of the street. *Grugan v. Philadelphia*, 158 P. S. 337.

243. Where proceedings were begun to assess damages for land taken for a street under the act 26 April 1864 (P. L. 605), which act made the damages payable by the county within three months after the opening, but the street was not opened and damages assessed until after the passage of the act 23 May 1874; it was *held*, that the city and not the county was liable for the damages. *Boyer's Petition*, 15 C. C. 531.

244. Since the repeal of the local act 8 April 1848 (P. L. 424), relating to Lebanon county by the act 23 May 1891 (P. L. 114), a county is liable for damages for opening public roads and the county commissioners in said county are entitled to notice of views, to lay out a public road. *Road in North Lebanon*, 3 Dist. Rep. 393.

245. Where upon the opening of a street in the city of Lancaster, such opening is the direct cause of an injury to buildings, the city of Lancaster is primarily liable for the injury; the injury must be estimated as damages against the city to be paid out of the city treasury instead of being paid out of the county and subsequently reimbursed by the city. Where the injury to the buildings, however, is not the direct cause of the damage, the county is primarily liable for injury to the whole premises, including a furnace plant as well as for the land taken, the county to be reimbursed by the city in the settlement of accounts between the county and city. *Thomas v. Lancaster*, 10 Lanc. 113.

246. Where the report fails to set forth that the road is of such public utility that the damages should be paid by the county, this defect may be cured by the county commissioners filing an official statement to that effect, or that the damages have been provided for by the par-

ties interested. *Road in Newberry*, 6 York 169; s. c. 5 Del. 240.

247. So much of the act 23 May 1889 (Brightly's Purdon 1563) as relates to the assessment of damages for opening streets in cities of the third class is unconstitutional and void; legislation affecting the assessment of damages for land taken under the right of eminent domain must be uniform throughout the commonwealth. *Gardiner v. Chester*, 5 Del. 69; s. c. 9 Lanc. 246. See s. c. 5 Del. 237, 293.

248. The report will be set aside where the viewers fail to report the width of the land proposed to be taken, or any other description of the land as the basis of their estimate of damages. *Road in Franklin*, 16 C. C. 276.

XI. Discontinuance.

249. The act 16 May 1891, sec. 7 (Brightly's Purdon 1400), relating to the discontinuance of condemnation proceedings by municipal corporations, does not apply to a case where the viewers' report was filed in the quarter sessions on April 13, 1891, and an appeal to the common pleas was filed on April 26, 1891, and was pending when the act passed; in such a case the court should not authorize a discontinuance without requiring the ordinance to be repealed and the payment of all costs and expenses, including counsel fees. *Moravian Seminary v. Bethlehem*, 153 P. S. 583; reversing s. c. 3 Northam. 351. See *Sandusky Street*, 41 P. L. J. 241.

250. Where the councils passed an ordinance for the change of grade of a street upon the assumption that the street was a city street and had an established grade, and as a matter of fact no street has ever been adopted or opened; it was held, that the city would be permitted to discontinue the proceedings to assess damages, but would be ordered to pay the costs, counsel fees and expense to which the owner had been subjected by reason of the proceedings under the ordinance. *Huckestein v. Allegheny City*, 165 P. S. 367.

251. In a proceeding to open a street, a municipal corporation at any time before final confirmation may discontinue the proceedings upon payment of costs. *Penn Alley*, 1 Dist. Rep. 141.

252. A judgment on an appeal from an assessment of damages for opening a street, will not be opened upon proof that the ordinance opening the street was repealed after verdict without payment of the reasonable costs and expenses to which the plaintiff was put in prosecuting the suit. *Cooper v. Kingston*, 6 Kulp 344.

253. The town counsel of a borough may discontinue proceedings for widening a street at any time before taking possession under complete proceedings; and this, though improvements have been made on the faith of such widening. *Keller Street*, 25 W. N. C. 524.

XII. Review.

254. The court has no power, of its own motion to appoint reviewers or re-reviewers; they can only be appointed upon petition, and the court should not permit their names to be suggested by parties in interest. *Road in Upper Yoder*, 129 P. S. 640.

255. Under the general road laws of this state, a review is a matter of right, provided application for it is made at or before the next term of the court after the report of the viewers is filed. The act 23 February 1870 (Brightly's Purdon 1878), allowing an alias review or re-review, applies only to cases in which there is a substantial or formal defect in the petition for a review or re-review. *Leet Township Road*, 159 P. S. 72.

256. A review is of right upon a petition being filed at or before the next term after the report of viewers is filed. *Road in Penn and Warwick*, 11 Lanc. 331.

257. The right to demand a review of the decree of confirmation of a borough street accorded by the general borough act of 3 April 1851 (P. L. 326) was impliedly repealed by the act of 22 April 1856 (Brightly's Purdon 253). A review

cannot be made for the purpose of re-assessing the damages, nor to extend the time for taking an appeal, but only for the correction of some formal error or because of an omission of statutory requisite. *Lincoln v. Birdsboro*, 7 C. C. 539.

258. In York county the report remains open during the full term of the court next succeeding the term to which the order is returnable, during which time petitions for reviewers and re-reviewers may be filed. *Hopewell Township Road*, 12 C. C. 517.

259. The appointment of one of the original petitioners as a reviewer is an irregularity which is fatal to all proceedings subsequent to the petition. *Ohio & Ross Township Road*, 166 P. S. 132.

260. A petition for a review is in time if filed any time during the next term of court; it is not necessary that it be filed on the first day of the term. *Mifflin Township Road*, 16 C. C. 74; s. c. 4 Dist. Rep. 238.

261. Where the court appointed Jacob Tyson as a reviewer and Jacob F. Tyson acted in that capacity, and there was a Jacob Tyson residing in a neighboring township and there was nothing to show who was intended, the court set aside the report and granted an alias review. *Road in Windsor*, 4 York 210.

262. The court set aside a report of reviewers which was presented to court and confirmed on September 2d, when the time for the holding of court at the term to which it was returnable expired on August 27, and the next term began on September 5. *Upper Mahanoy Township Road*, 12 C. C. 618.

263. A report of reviewers is sufficient if it adopts and confirms the original return of the viewers. *Road in Moreland*, 7 Montg. 70.

264. If the viewers and reviewers differ only as to the amount of damages, the court will adopt the report of the reviewers. *Road in Plains*, 5 Kulp 476.

265. A separate review of damages is without warrant of law. *Hopewell Township Road*, 12 C. C. 517.

266. While a petition for review is pending the court will not pass upon the merits of the proposed road. *Winter Street*, 6 Montg. 24.

XIII. Re-review.

267. The court has no discretionary power to order a re-review of its own motion. *Road in Butler*, 6 Kulp 443.

268. If the court be in doubt as to which of two reports to adopt, re-reviewers should be appointed to settle the question of necessity. *Forks Township Road*, 1 Northam. 223.

269. A petition for a re-review must be presented at the next term of court after the viewers report; an order issued on a petition at any subsequent term gives the court no jurisdiction, and a re-review founded upon such an order has nothing to support it. *Road in Palmer*, 5 Northam. 15.

270. A confirmation of the report of the viewers is a disposition of the report of the re-reviewers and of the exceptions thereto. *Road in Kingston*, 134 P. S. 409; affirming s. c. 5 Kulp 239. See s. c. 6 Kulp 341.

271. Where viewers and reviewers report in favor of the road, and re-reviewers report against it, the court may adopt either report. *Road in Ralpho*, 15 Atlan. 725.

272. An order for a re-review will not be awarded without cause shown where the viewers and re-reviewers agree in their reports. *Road in Moreland*, 7 Montg. 70.

XIV. Fees and costs.

273. A report will not be set aside because the jurors were paid excessive fees after they concluded their labors and announced their conclusions. *Winter Street*, 6 Montg. 24.

274. The act of 19 May 1887 (Brightly's Purdon 1878) simply authorizes the court in road cases to direct by whom the costs shall be paid; it does not empower the court to order the payment of witness

fees. *Lebanon & Dyberry Road*, 8 C. C. 461.

275. The act of 19 May 1887 (Brightly's Purdon 1878) does not authorize the court to put the costs of a review upon the question of damages upon the county. *Road in Warriorsmark*, 126 P. S. 305.

276. Under the act 16 May 1891 (Brightly's Purdon 1399), the court may order the payment by the city of costs duly taxed of a review had to widen a city street, where the report of the reviewers has been confirmed *nisi*. *Locust Street*, 10 Lanc. 408.

277. The fees of viewers are payable by the county, but the petitioners must pay the fee of reviewers, the latter being of the same nature of the original view of a private road. *Ackerly v. Lackawanna County*, 1 Lack. L. N. 14.

XV. Appeal.

(a) To the common pleas.

278. A county may appeal from an assessment of damages under the act of 13 June 1874 (Brightly's Purdon 772), and article XVI., sec. 8, of the constitution. *Grant Street*, 7 C. C. 84.

279. A municipality has the right to appeal from the award of a jury appointed under the act 16 May 1891 (Brightly's Purdon 1399), to assess damages for opening a street. *Gardner v. Chester*, 13 C. C. 4; s. c. 5 Del. 237, 293; 3 Lack. 119.

280. Where damages were awarded to petitioners for injuries done to their lands by the city entering and laying water pipes thereon; it was *held*, that an appeal by the city solicitor would be stricken off where it appeared that the appeal was not authorized by the city councils but only by a resolution of the finance committee. *Shroder v. Lancaster*, 15 C. C. 466; s. c. 11 Lanc. 72. See s. c. 170 P. S. 136.

281. In a proceeding to widen and grade a borough street, the borough has a right to appeal under the act 13 June 1874 (Brightly's Purdon 772); and this, though no right of appeal be given by

the act 16 June 1891 (Brightly's Purdon 1399). Such appeal must be taken within thirty days from the ascertainment of the damages, which is the time of the filing of the report of the viewers in court. *Bechtel v. Bechtelsville*, 3 Dist. Rep. 713.

282. An appeal to the common pleas may be taken by either party within thirty days after the filing of the report of viewers. *Grant Street*, 6 Lanc. 145.

283. An appeal lies, under the act of 13 June 1874 (Brightly's Purdon 772), to an assessment of damages for opening a borough street; and this, though the proceedings be under the act of 22 April 1856 (Brightly's Purdon 253), which gives no appeal. *Müller v. Manheim*, 7 Lanc. 291; *Hazel Street*, *Ibid.* 292.

284. An appellant, under the act of 9 April 1856 (Brightly's Purdon 1795), supplementary to the general railroad law, is not required to pay costs or enter into a recognizance for the payment thereof. *Perry's Appeal*, 13 Atlan. 66; affirming *Perry v. Pennsylvania Schuylkill Valley Railroad Co.*, 3 Montg. 43.

285. Where land is taken by the right of eminent domain the right of appeal is mutual; an appeal, however, is fatally defective when the required affidavit that the same is not intended for delay, is omitted. *Hanover Borough Alley*, 4 Dist. Rep. 160.

286. The act 13 June 1874 (Brightly's Purdon 772), giving an appeal within thirty days from the filing of the report, is not irreconcilable with the act 26 May 1891 (Brightly's Purdon 1878), which provides that an appeal may be taken within thirty days from the decree of confirmation. *Vernon Park*, 163 P. S. 70.

287. Under the act 26 May 1891 (Brightly's Purdon 1878), giving an appeal to the common pleas, an appeal will be sustained if entered in the quarter sessions within thirty days from the confirmation of the report; and this, though the transcript be not entered in the common pleas within the thirty days. *Mansfield Borough's Appeal*, 158 P. S. 314.

288. If a case be properly referred back to viewers, the time for an appeal dates from the filing of the second report. *Lincoln v. Birdsboro*, 7 C. C. 539.

289. Upon taking an appeal to the common pleas, the record of the quarter sessions should not be bodily transferred; the proper practice is to file duplicates. But the filing of the original record is not good cause for arresting judgment. *Ibid.*

290. Where a petition was by a widow and heirs and an appeal was taken by the widow, described as "administratrix," judgment on the verdict was arrested. *Ibid.*

291. Under the act 26 May 1891 (Brightly's Purdon 1878), an appeal to the common pleas from the assessment of damages in a road case must be filed after the final confirmation of the report of the jury and within thirty days thereafter; the act 15 April 1891 (Brightly's Purdon 1878) is superseded by the act 26 May 1891. *Cheltenham Road*, 11 C. C. 671.

292. An appeal for a jury trial and exceptions cannot be filed at the same time; the court will require the party to elect upon which to stand and dismiss the other proceeding. *Bechtel v. Bechtelville*, 3 Dist. Rep. 713.

293. An appeal taken to the common pleas within thirty days after final decree, dismissing exceptions and confirming a report of viewers to assess damages on opening a borough road, will not be stricken off because the appeal was not filed in the prothonotary's office within the thirty days. *Helme's Appeal*, 7 Kulp 93.

294. Under the act 15 April 1891 (Brightly's Purdon 1878), as affected by the act 26 May 1891 (Brightly's Purdon 1878), an appeal from a report of a road jury assessing damages, if entered before final confirmation of said report, is premature and will be stricken off. *Heist v. Montgomery County*, 9 Lanc. 304; s. c. 9 Lanc. 355.

295. Pending an appeal in the court

of common pleas, it is error for the quarter sessions to entertain and determine exceptions filed to a report of viewers awarding damages for the widening of a city street. *Chestnut Street*, 128 P. S. 214.

296. Upon an appeal from an award of a jury to view for a road, the whole case comes before the court *de novo*, and every person whose rights or liabilities may be affected in any way by the final decree should be made a party. Upon such an appeal the jury has all the powers which the viewers had. *Hibberd's Appeal*, 5 Del. 91.

297. In proceedings to assess damages for the opening of a borough street under the act 16 May 1891 (Brightly's Purdon 1399), if a lot owner fails to appear before the viewers to raise questions of fact in which he wishes to be heard, he will be *held* to have waived them, but where an appeal is taken by him from the award, but the defendant makes no motion to quash but joins issue and proceeds to trial, it will be *held* to have waived such an objection. *DuBois Opera House Co. v. DuBois Borough*, 16 C. C. 210.

298. An appeal lies to the common pleas under the act 13 June 1874 (Brightly's Purdon 772) from the award of a jury of view awarding damages on the vacation of a street in Philadelphia. *Hare v. Rice*, 142 P. S. 608.

299. In a proceeding to assess damages for a change of grade of a borough street under the act 24 May 1878 (Brightly's Purdon 253), the only appeal from the judgment of the common pleas is to the supreme court. *Brown v. Beaver Borough*, 12 C. C. 313.

300. Where, in a proceeding under the act 24 May 1878 (Brightly's Purdon 253), to assess damages for a change of grade of a borough street, an appeal is taken to the common pleas from the award of viewers under the act 13 June 1874 (Brightly's Purdon 772), such an appeal is not too late if filed after the entry of judgment on the award but

within thirty days from the filing of the award. *Brown v. Beaver Borough*, 12 C. C. 313.

301. An appeal from an assessment of damages for change of grade must be taken thirty days from the filing of the report of viewers; and this, though exceptions be pending to the report. *Rapp v. Norristown*, 7 Montg. 15.

302. Under the act 16 May 1891, sec. 6 (Brightly's Purdon 1400), an appeal lies to the common pleas from an assessment of benefits for a change of grade. *Mount Pleasant Avenue*, 32 W. N. C. 60.

303. An appeal lies to the assessment of benefits for the vacation of a street. *Howard Street*, 142 P. S. 601; affirming s. c. 24 W. N. C. 520.

304. Under the act 23 May 1889, article XIV., sec. 3 (Brightly's Purdon 1564), an appeal is expressly given to parties assessed for benefits, and this right of appeal is not repealed by the act 16 May 1891 (Brightly's Purdon 1399). *Chestnut Street*, 15 C. C. 115.

305. When the right of appeal has been lost by a misapprehension, the court will return the report to the viewers, before whom further testimony may be taken on the question of the amount of benefits. *Chestnut Street*, 15 C. C. 115.

(b) To the supreme court.

306. Upon *certiorari* to the laying out of a public road, the supreme court is wholly confined to the record. *Road in Moon*, 6 Atlan. 762.

307. A *certiorari* to a decree confirming a report of viewers laying out a public road must be taken out within two years after final confirmation, or it will be quashed; and this, notwithstanding a futile attempt to open the decree. *Road in Wilkins*, 5 Cent. 701.

308. No appeal lies to a refusal to strike off an order of confirmation of a report of road viewers five years after such confirmation. *Road in Adams*, 130 P. S. 190.

309. Where an order of confirmation of a portion of a road only was reversed by the supreme court, and the common pleas thereupon proceeded to confirm the report of viewers absolutely, it was held to be an entirely proper proceeding; and this, though the supreme court had not awarded a *procedendo*. *Road in Benzinger*, 135 P. S. 176; s. c. 26 W. N. C. 197. See s. c. 115 P. S. 436.

310. A proceeding in the supreme court to review a road case is but a common law proceeding by *certiorari* and the review is confined to the regularity of the record. When such a case is removed to the supreme court more than two years after final confirmation, the writ must be quashed; and this, though an application to set aside was made and refused within two years. *Roaring Brook Township Road*, 140 P. S. 632.

311. Upon an appeal from the quarter sessions in a road case, the jurisdiction of the court and the regularity of the proceedings are the only questions to be determined; the facts cannot be considered even though they be set forth in the opinion of the court. *Hamilton Street*, 148 P. S. 640; affirming s. c. 7 Montg. 67.

312. Exceptions as to matters appearing on the face of the record may be filed after the final confirmation of the report; if the court refuse to permit such exceptions to be filed *nunc pro tunc*, this does not deprive the exceptants of their right to assign error in the decree on appeal to the supreme court, where the record itself sustains the exceptions. *O'Hara Township Road*, 152 P. S. 319.

313. Upon an appeal from an order overruling exceptions to a report of road viewers, the supreme court can review only the regularity of the proceedings; exceptions which raise only questions of fact will not be considered and it is useless to print the testimony. *Keller's Private Road*, 154 P. S. 547.

314. An order overruling exceptions to the report of a jury of view to open a street under sec. 6 of the act 16 May 1891 (Brightly's Purdon 1400) is not a final

decree pending an appeal by the same parties from the report of the viewers, and an appeal from such an order will be quashed by the supreme court. *Second Street*, 161 P. S. 571.

315. The question of the qualification of the petitioners in a road proceeding must be raised in the court below by a specific exception; it cannot be considered by the supreme court when raised for the first time by an assignment of error. *Swanson Street*, 163 P. S. 323.

XVI. Proceedings under special acts.

316. Under the act 13 April 1854 (P. L. 352), the county of Lancaster may proceed to recover money from the city of Lancaster for opening streets, either by assumpsit or bill in equity, but the remedy by mandamus is inappropriate. That act contemplates yearly statements and the striking of a balance every twelve months, and if the county has not kept the account directed by the act, the court will state an account and will not allow recovery for any items which had accrued six years prior to the date of the suit. *Lancaster County v. Lancaster City*, 160 P. S. 411; affirming s. c. 10 Lanc. 65. See s. c. 170 P. S. 108; affirming s. c. 12 Lanc. 81.

317. The opening of streets on the city plan in the city of Lancaster is regulated by the local act 18 April 1873 (P. L., 811); where the streets are not on the city plan, their opening is regulated by the local act 31 January 1857 (P. L. 9). The report of alias viewers opening a street not on the city plan will not be set aside on the ground that the city authorities did not request or consent to said opening. The act 8 June 1881 (Brightly's Purdon 1399) does not apply to the opening of streets in the city of Lancaster. *Marion Street*, 11 Lanc. 260.

318. While the commissioners of roads of Pine Grove township, under the act of 9 April 1844 (P. L. 230), have a general charge and supervision, they have also a discretion as to the necessity for a road, and an indictment does not lie against them for their refusal to lay out a road in

obedience to a request in writing of citizens of the township. *Comm'th v. Thompson*, 126 P. S. 614.

319. The act of 14 June 1887 (P. L. 386), providing a peculiar method of procedure in road cases in the city of Pittsburgh, was held to be in violation of article III., sec. 7, of the constitution, prohibiting local legislation. *Wyoming Street*, 137 P. S. 494; s. c. 27 W. N. C. 136; *Pittsburgh's Petition*, 138 Ibid. 401.

320. Under the local act 16 June 1836 (P. L. 753), relating to the city of Pittsburgh, a street which has not actually been opened for travel, and is not fairly practicable for travel, is not a public highway but a private way; the owner of such a way is entitled to have his damages assessed as an owner of the land, and cannot maintain a common law action therefor when a statutory remedy has been provided. *Phillips v. St. Clair Incline Plane Co.*, 153 P. S. 230. See *Phillips v. St. Clair Incline Plane Co.*, 166 P. S. 21.

321. When a public highway has once been located, laid out and used by the public, its location cannot be changed except by proceedings under the road laws. The act 14 April 1851 (P. L. 583), appointing commissioners to resurvey Wyoming avenue in the borough of Wyoming, Luzerne county, and fix the original lines of the same, was held to be unconstitutional as not providing due process of law, it appearing that said avenue had been opened of its full width and used as a public highway for very many years prior to the passage of that act. *Hancock v. Wyoming*, 148 P. S. 635.

322. Under the act 17 February 1860, sec. 13 (P. L. 61), providing that where the action of a court or grand jury in York county shall be adverse to the grant of a new road or bridge, no new petition for substantially the same road shall be granted for two years; it was held, that a proposed road beginning within five steps of a proposed former road and terminating within forty-five steps of the former termination, was substantially the same road. *Road in Franklin*, 1 York 145.

323. Under the act 17 February 1860, sec. 2 (P. L. 61), relating to York county, which provides for notice on the route of the proposed road by written or printed advertisements, and the rule of court on that subject; it was *held*, that in the absence of any evidence to show that there was any other mill or tavern along the line of the proposed road than those named in the report, it would be presumed that the notices were properly posted. *Road in Chanceford*, 1 York 145.

324. Under the rule of court in York county, it is not necessary that a notice of view be posted at a tavern in preference to other places, unless the tavern happens to be nearer the route of the proposed road than the other points enumerated in the rule. *Road in Hellam*, 6 York 64.

325. Under the local act 17 February 1860 (P. L. 61), as to York county, a decree dismissing the proceedings upon failure to report is not such a final decree adverse to the granting of the road as will forbid the entertainment of another petition within two years for a road over the same route. *Road in West Manchester*, 10 C. C. 429.

326. Where reviewers failed to state in their report whether they had endeavored to obtain releases, the report was recommended with instructions to comply with the act 17 February 1860, sec. 10 (P. L. 61), relating to York county, and in their second report they stated that they gave notice of the time and place of meeting and proceeded to award damages; it was *held*, that the court had such power to recommit and that such proceedings did not constitute an alias view. *Road in Heidelberg*, 2 York 67.

327. Under the act of 17 February 1860 (P. L. 61), relating to York county, the court has no power to appoint viewers merely to review the question of damages without reopening the whole action of the viewers in laying out the road and estimating the damages. *Road in Spring-garden*, 5 York 28.

328. Under the special act 2 March 1861 (P. L. 84), relating to York county, reviewers will not be appointed where

the first view was a nullity. *Road in Manchester*, 15 C. C. 623.

XVII. Widening streets.

329. The act 16 May 1889 (P. L. 228), relating to streets and sewers in second class cities, was *held* to be unconstitutional in *Whitney v. Pittsburgh*, 138 P. S. 401; overruling *Howard v. Pittsburgh*, 38 P. L. J. 87. See act 16 May 1891 (Brightly's Purdon 1534).

330. Six viewers should be appointed to widen a street. The act of 8 May 1889 (Brightly's Purdon 1875) makes no change in this respect. *Chestnut Street*, 8 C. C. 55.

331. The court has no authority, under the act of 8 May 1889 (Brightly's Purdon 1875), to appoint three viewers to widen a street. *East Avenue*, 7 Lanc. 164.

332. The statute of limitations does not begin to run until the physical widening of a street is actually completed, and the strip taken thrown open to the public. *Brower v. Philadelphia*, 142 P. S. 350; affirming s. c. 8 C. C. 361; s. c. 26 W. N. C. 270.

333. Where a city had notice of the appointment of viewers upon the widening of a street and of their report and the plaintiff's appeal, and when the issue was framed upon the appeal the city pleaded without objection; it was *held*, that the city had waived the right to raise the question of jurisdiction upon the trial of the issue. *Larkin v. Scranton*, 162 P. S. 289.

334. In a proceeding to assess damages for the widening of a street, it is error to charge that the land is taken absolutely and the title is taken from the owner and vested in the city for all time. *Larkin v. Scranton*, 162 P. S. 289.

335. In assessing damages for the widening of a street, the jury may consider the cost of replacing a building, a portion of which is cut away, but it is error to charge that such consideration may be entirely independent of the question of the value of the property taken. *Larkin v. Scranton*, 162 P. S. 289.

336. In a proceeding to widen and

change the grade of a street, the viewers cannot take into consideration another street, laid out but not opened, nor can the proceedings for the assessment of damages caused by the opening and grading of such other street be admitted in evidence. *Markle v. Philadelphia*, 163 P. S. 344.

337. In an action of trespass for damages for widening a street, evidence is admissible for plaintiff to show the cost of the alterations in his building necessitated by such widening. *Allen v. Philadelphia*, 1 Dist. Rep. 216.

338. In an action for trespass in widening a city street, evidence is not admissible for the defendant to show the rental value of the property after the widening. *Allen v. Philadelphia*, 1 Dist. Rep. 216.

XVIII. Vacation of highways.

339. When a street has once been vacated, it is then as if no such street had ever existed, and the fact of its former existence is in no way involved in subsequent proceedings to again open it. *Chestnut Street*, 15 C. C. 115.

340. The public may abandon a street or alley dedicated to public use, and the acceptance of another in place of the original is conclusive proof of such abandonment; adverse possession for twenty-one years by an adjoining owner of half a road or alley abandoned by the public will give title as against the original owner or grantor of said road or alley. *Flick's Estate*, 6 Kulp 329.

341. Where land is bounded by a public road, a conveyance of the land gives the grantee a title to the middle of the road in the absence of a reservation, and upon the vacation or abandonment of the road, the adjoining owners have a right to use the land it had occupied as their own, each to the centre of the street. *Flick's Estate*, 6 Kulp 329.

342. Under the act 5 April 1849 (Brightly's Purdon 277), forbidding the opening of streets through cemeteries, a cemetery company has no right to close an alley because it has purchased ground

on both sides of it. *DuBois Cemetery Co. v. Griffin*, 165 P. S. 81.

343. Under the act 3 May 1855 (Brightly's Purdon 1883), providing for the vacation of the whole or any part of any road which may have been opened in part; it was held, that a road was "opened in part" where a length of eighty-four feet and a width sufficient for ordinary travel was cleared and graded. *Union Township Road*, 10 C. C. 433.

344. Upon the petition of citizens approved by the town council of the borough of Pottsville, the court of quarter sessions has jurisdiction to vacate any street, lane or highway in said borough. *Union Street*, 140 P. S. 525.

345. Under the act 8 May 1854 (Brightly's Purdon 1884), the quarter sessions has jurisdiction to order the vacation of a part of a street. *Swanson Street*, 163 P. S. 323.

346. Upon a petition to open a new road there is no authority to vacate a portion of an old road; the petition should be to lay out and vacate. *Franklin, Liberty, and Great Bend Road*, 7 C. C. 273.

347. Proceedings to vacate may be joined with proceedings to relay a road or parts of a road. Such a petition must comply with the twenty-third section of the general road law. *Road in Blakely*, 4 Del. 233; s. c. 1 Lack. Jur. 235.

348. Under the act of 3 May 1855 (Brightly's Purdon 1883), it is not necessary for a majority of the original petitioners to sign the application to vacate. *Road in North Abington*, 1 Lack. Jur. 416.

349. A road cannot be vacated in a city of the third class by a petition of freeholders; the act 8 May 1854 (Brightly's Purdon 1884), so far as it relates to the vacating of public streets and highways, does not apply to cities of the third class. *Dunmore & Petersburg Road*, 3 Lack. Jur. 165.

350. A petition to vacate a public road should set forth the circumstances which render such vacation necessary; it is not

sufficient to merely state that the road is useless, inconvenient and burdensome. *Road in Abingdon*, 3 Lack. Jur. 187.

351. Where a statute empowered a municipal corporation to vacate streets upon the petition of a majority in interest of abutting owners along the line of the proposed improvement; it was *held*, that the line of improvement meant those parts abutting on the portion of the street vacated, and that the consent of owners further along the street need not be obtained. *Gant's Appeal*, 40 P. L. J. 219.

352. A petition for the vacation of a street which alleges that the street "is opened and used as a public street" contains a sufficient averment that the street is a public road or highway. *Swanson Street*, 163 P. S. 323.

353. A report will not be set aside because the petition does not set forth in a clear and distinct manner the situation and other circumstances of the part of the road to be vacated. Such information is for the court, who may see fit to dispense with it. *Road in Lower Nazareth*, 1 Northam. 81.

354. Upon a proceeding to vacate and change a public road the report was set aside where the report referred to the road as useless, inconvenient and burdensome, and yet, two of the viewers when examined on oath testified that it was neither inconvenient or burdensome, and it further appeared that the viewers were entertained at the house of one of the parties interested in the road and that one of the viewers was an adjoining landowner. *Road in Dover*, 1 York 219.

355. The court will not confirm a report which shows the vacation of part of a public road and leaves a part of it open for private accommodation. *West Goshen Roads*, 7 C. C. 250.

356. The court will not approve a report vacating a public road which is the terminus of another public road. *Road in Upper Hanover*, 5 Montg. 174.

357. A decree for the vacation of an old road is valid, though it be made to take effect when a railroad company

should complete, ready for use, an overhead bridge across its tracks on a new substituted road. *Roads in Londonderry*, 129 P. S. 244.

XIX. Change of grade.

358. After fifteen years' acquiescence a change of grade in a street is presumed to have been done under the direction of the public authorities. *Schlag v. Jones*, 131 P. S. 62.

359. Councils cannot delegate their discretionary power to change the grade of a street to the city engineer or a council committee. It must be done by ordinance. *Wilkes-Barre Paper Mfg. Co. v. Wilkes-Barre*, 5 Kulp 333.

360. Under the act of 24 May 1878 (Brightly's Purdon 253), the burgess and town council may apply for the appointment of viewers to assess damages for change of grade of a borough street. *In re Viewers*, 6 Kulp 13; s. c. 4 Del. 298.

361. Viewers to assess damages for the change of grade of a borough street should be selected outside the borough. *In re Viewers*, 6 Kulp 13; s. c. 4 Del. 298.

362. Where viewers were appointed to fix a grade before there was an ordinance upon which their action could be based; it was *held*, that councils could not adopt the action of such viewers as their own. *Scranton v. McDonough*, 1 Lack. L. N. 177.

363. Where a change of grade is made by the officers of a municipality without authority of ordinance, such unauthorized act may be subsequently ratified and validated; where viewers were appointed to assess benefits and their report was confirmed at the instance of the city, which accepted the work and issued a *scire facias* to recover the assessments; it was *held*, that the ratification was complete. *Shiloh Street*, 165 P. S. 386.

364. Viewers appointed to estimate damages for change of grade are not entitled to mileage. *Reid v. West Conshohocken*, 6 Montg. 205.

365. Where a street railway company received permission to occupy a street

upon condition that it pay abutting land-owners for all the damage done to their property; it was *held*, that the company was liable for an injury resulting from cutting down the street about six feet; and this, although the new grade was in accordance with the direction of the city engineer and was subsequently adopted by an ordinance of councils. *May v. Carbondale Traction Co.*, 167 P. S. 343.

366. Where a change of grade was authorized by councils and actually completed before the passage of the act 16 May 1891 (Brightly's Purdon 1399), it was *held*, that that act was not retroactive and that the damages were payable by the borough and could not be assessed against the property owners. *Morton v. Homestead Borough*, 15 C. C. 646; s. c. 42 P. L. J. 328.

367. In a proceeding under the act 24 May 1878 (Brightly's Purdon 253) to assess damages for a change of grade of a borough street, exceptions to the report must relate to errors or irregularities in the proceedings or report; if no such exceptions be filed and no appeal is taken, exceptions filed as to matters of fact which require the service of a jury to determine, will be dismissed and judgment entered upon the report. *Nahf v. Tamaqua Borough*, 14 C. C. 142.

368. Jurisdiction in damages for widening a street being in the quarter sessions, a decree for such damages is no bar to a subsequent proceeding in the common pleas for damages for change of grade. *Walter v. Easton*, 1 Northam. 73.

369. Where the plaintiff owned a corner lot and the grade of both streets was changed in 1887 and in 1888, a common law action was brought to recover damages for the change of grade, but only one street was mentioned in the declaration, and in 1892 an amendment was allowed so as to include the other street; it was *held*, that the act 16 May 1891 (Brightly's Purdon 1399), which provides that the remedy in such a case shall be by a jury of view, did not prevent the amendment or deprive the court

of jurisdiction. *Brady v. Wilkes-Barre*, 161 P. S. 246.

370. The act 24 May 1878 (Brightly's Purdon 253), providing for damages for change of grade in boroughs, is repealed by the act 16 May 1891 (Brightly's Purdon 1399). *Whittaker v. Homestead Borough*, 13 C. C. 647.

371. The city of Wilkes-Barre not being subject to the municipal act 23 May 1889 (Brightly's Purdon 1541), and there being no provision in its charter for the assessment of damages by viewers consequent upon a change of grade, the remedy of a party aggrieved by a change of grade is by action. *Rowe v. Wilkes-Barre*, 6 Kulp 276.

372. Where a street, being in its virgin condition, had its grade fixed before the adoption of the constitution of 1874, but nothing was done until 1887, when the grade was actually lowered several inches under ordinance of councils; it was *held*, that trespass in the common pleas was the proper remedy, and that the statute of limitations did not begin to run until the actual physical change took place. *Kershaw v. Philadelphia*, 10 C. C. 153; s. c. 48 L. I. 56.

373. The statute of limitations applies to actions brought to recover damages for a change of grade; and this, notwithstanding the act of 24 May 1878 (Brightly's Purdon 253) contains no clause of limitation. *Craft v. South Chester*, 13 Atlan. 216; affirming s. c. 2 C. C. 508.

374. In actions for change of grade the statute of limitations begins to run only from the date of the actual grading of the land. *North Chester v. Eckfeldt*, 1 Mona. 732.

375. Where the first established grade of a street in the city of Philadelphia was fixed upon the city plan in 1871, but nothing was done upon the ground until 1887, when the physical change of grade was effected; it was *held*, that the statute of limitations did not commence to run against a landowner's right of action to recover damages for the change until the

actual cutting of the ground in 1887. *Ogden v. Philadelphia*, 143 P. S. 430.

376. The lapse of six years after the work of excavation was done in changing the grade of a street is a bar to a recovery of damages for the change of grade. *Eisenhart v. Philadelphia*, 154 P. S. 393.

377. Where it is decreed that a street shall be carried across railroad tracks by bridges and viaducts, the statute of limitations runs against the right of action of a property owner from the time when the work has progressed to such an extent as to obstruct ingress and egress to and from his property to the street. *Cass v. Pennsylvania Co.*, 159 P. S. 273.

378. No recovery can be had under the act of 24 May 1878 (Brightly's Purdon 253) for injuries from change of grade before the adoption of the constitution of 1874. *Folkenson v. Easton*, 8 Atlan. 869.

379. The act 2 February 1854, sec. 27 (Brightly's Purdon 1500), giving a right to damages for injuries arising from alteration of grade in Philadelphia to be assessed as in cases of damages for opening streets, applies only to changes of the grades which were already legally established at the date of the act; the quarter sessions has no jurisdiction to assess damages for the change of a street grade established after 2 February 1854; as to such a grade a mere paper change vests no right to damages, and the remedy under sec. 8, article XVI., of the constitution for an actual change upon the land is by action in the common pleas. Where, however, a physical change of grade is made in connection with the opening of the street and the jurisdiction of the quarter sessions has once attached, it will determine the whole cause, including the assessment of the damages arising from such change of grade. *Plan 166*, 143 P. S. 414; *Ogden v. Philadelphia*, 143 P. S. 430. This rule is not affected by the act 16 May 1891 (Brightly's Purdon 1401). *In re L Street*, 12 C. C. 406.

380. Where a property owner has built a house upon his lot in conformity with the existing grade, he can recover from

the city of Philadelphia for depreciation in the value of his property occasioned by changing the actual physical elevation of the highway in front of his lot. *O'Brien v. Philadelphia*, 150 P. S. 589.

381. Where a property owner erects a house after the confirmation of the plan fixing the grade of the street, he is restricted in his right to recover damages to the injury done to his land; injury to his house as an item of damage is properly excluded. *Groff v. Philadelphia*, 150 P. S. 594.

382. The cause of action for change of grade occurs at the time of the physical change. A purchaser with knowledge that he will be compelled to change the grade, may recover damages on the actual change. *Freemansburg v. Rodgers*, 8 Atlan. 872.

383. The right of action for damages caused by changing the grade of a street accrues when the work is done on the ground; such damages belong to him who is the owner of abutting property at the time of the actual grading. *Jones v. Bangor*, 144 P. S. 638.

384. The right to damages for injury to property by grading a street is a personal right; such damages belong to the owner of the property at the time of the actual physical establishment of the grade, and he may then maintain an action therefor. *Bauman v. Newcastle*, 12 C. C. 22.

385. A landowner who lays out a street through his property and dedicates it to public use is not estopped thereby from recovering damages for a change in its grade made by the municipal authorities. *Jones v. Bangor*, 144 P. S. 638.

386. A lot owner, who joins in a request to grade a street, is not thereby estopped from claiming compensation for an injury to his property done by the grading; so the municipality is not relieved by the fact that the plaintiff's purchase of the property was made with the knowledge and understanding on the part of both vender and vendee that the

street would eventually be made to conform to the new grade. *Jones v. Bangor*, 144 P. S. 638.

387. Where a landowner dedicates his land for the purpose of a street with the same effect as if the street had been opened by legal proceedings, he cannot afterwards maintain an action for damages resulting from the grading, where the opening and grading have been done at the same time and in conformity with a plan existing at the time of the dedication. *Richter v. Philadelphia*, 161 P. S. 73.

388. Where a property owner had petitioned a borough for a change of grade, and the change was made without objection; it was held, that after his death under article XVI., sec. 8, of the constitution, his heirs might recover damages for such change unless the constitutional right had been waived. *Lewis v. Darby*, 166 P. S. 613; s. c. 6 Del. 128.

389. If an alley way appurtenant to a property be injured by a change of grade, the owner is entitled to damages though the lot does not abut on the graded street except by the alley or water way. *Geiger v. Norristown*, 6 Montg. 157.

390. Where a person owns a number of contiguous lots with houses thereon abutting on three streets and the grade of one of the streets is changed, he is entitled to damages only as to the lots abutting on the street whose grade has been changed, and not as to the lots abutting on the other two streets. *Lawrence v. Philadelphia*, 154 P. S. 20.

391. Compensation for change of grade is not limited merely to property fronting or abutting on the particular street whose grade is changed; where the plaintiff's houses fronted on a street running along the line of a railroad, and the city depressed two cross streets so that they could go under the railroad, and by reason of such depression, access to plaintiff's houses by vehicles was entirely cut off; it was held, that plaintiffs were entitled to recover. *Mellor v. Philadelphia*, 160 P. S. 614. See *Tucker and Frankford Streets*, 166 P. S. 336.

392. Where the plaintiff's property was injured by the depression of two cross streets and the plaintiff released his damages in other proceedings as to one street, it was not improper, in proceedings as to the other street, to admit testimony showing the damages resulting from the lowering of the grade of both streets. *Mellor v. Philadelphia*, 160 P. S. 614. See *Tucker and Frankford Streets*, 166 P. S. 336.

393. Where councils in Philadelphia have passed an ordinance directing the Department of Public Works to revise the grade of a street so as to carry it over the line of a railroad, the plan adopted by said department is final and conclusive as to the extent to which changes of regulation should go, and the owners of properties on other streets affected by the change may, though not mentioned in the ordinance, present their claims before viewers appointed to assess the damages caused by the change of the grade of the street mentioned in the ordinance. *Enochs v. Philadelphia*, 2 Dist. Rep. 83.

394. Upon an appeal from an assessment for change of grade, a view will not be directed where alterations have been made since the change of grade, and the jury can give no information by a view of the actual state of affairs immediately thereafter. *Longaker v. Norristown*, 4 Del. 20.

395. Where the city changes the grade of the street, it is bound to compensate for consequential injuries; but the power of taxation is sufficient security. *Wilkes-Barre Paper Mfg. Co. v. Wilkes-Barre*, 5 Kulp 333.

396. As to the competency of witness as to the value of the land in actions for damages for change of grade, see *North Chester v. Eckfeldt*, 1 Mona. 732.

397. In assessing damages for change of grade, it may be shown that a building will have to be raised, but evidence of the cost of raising is not admissible. *Chambers v. South Chester*, 140 P. S. 510; affirming s. c. 4 Del. 346.

398. An owner of property abutting on a public street is entitled to damages for change of grade, although he has no title to the land occupied by the street. *Hobson v. Philadelphia*, 150 P. S. 595.

399. In a proceeding to assess damages caused by a change of grade, an expert may be called to testify that the new grade left plaintiff's house in a depression, that one of the ways in which this disadvantage could be remedied would be by raising the house and filling in the ground, and that that process would not only be expensive, but would also entail the loss of valuable trees and shrubbery. *Dawson v. Pittsburgh*, 159 P. S. 317.

400. The act 16 May 1891 (Brightly's Purdon 1535) introduced no new rule for the estimation and measure of damages for opening or change of grade; before that act the practice was for the viewers to report the result of their findings on the two matters of damages and benefits as a single sum, either damages or benefits; but under that act they report both matters separately, but the net result is the same. Both before and since that act, the general increase in value from the development of the neighborhood is not such a local and special advantage to a property owner as to be taken into account as part of the benefits to be assessed upon him. *Dawson v. Pittsburgh*, 159 P. S. 317.

401. In an action for injury caused by change of grade, it is error to charge that, if the uncertainty of the city's action in connection with the opening of future streets affects the value of the property, then the jury may find that the property is worthless, because the city has not defined its future policy in regard to the grade of these streets. *Brill v. Philadelphia*, 167 P. S. 1.

402. In assessing damages for a change of grade of a borough street, the jury must consider the plaintiff's property as of the time when the borough got through the work actually done. They cannot consider the fact that a future change of grade in a sidewalk would increase the

damage. *Wilson v. Beaver Borough*, 13 C. C. 75.

403. A municipal corporation is liable to a property owner whose lands are overflowed by reason of the negligence of its agents in stopping up an existing watercourse while raising a street to the established grade. The fact that the grade has been established on paper for many years does not deprive such owner of his right to damages where the actual change is negligently made, but such damages can only be allowed for the first injury; in such a case, damages cannot be awarded by a jury of view. *Delahunt v. Chester*, 6 Del. 142.

404. As to liability of municipal corporations for change of grade, see note to *Stewart v. Rutland*, 4 Atlan. 423.

XX. Bridges.

(a) Location and erection.

405. Where the petition for a county bridge asks for a bridge over a creek at a place where the public highway crosses said creek near a certain mill, and the report locates the bridge about one-eighth of a mile below the mill and changes the approaches, such location is not unlawful. *Conestoga Bridge*, 150 P. S. 541.

406. After the grand jury have passed upon the propriety of erecting a new county bridge, the whole authority over its construction rests upon the county commissioners, who may disregard a direction in the report of the grand jury that the bridge be constructed of iron. *Rush Creek Bridge*, 13 C. C. 305.

407. If the site of a county bridge be so selected that one of its termini does not connect with any public highway, the county commissioners will not be compelled to construct an approach, until, by appropriate proceedings, a highway has been properly laid out and opened thereto. *Comm'th v. Loomis*, 128 P. S. 174.

408. The court will not interfere by mandamus with the discretion of the county commissioners in the building of an approach to a county bridge. *Comm'th v. Loomis*, 128 P. S. 174.

409. A mandamus will not issue upon the petition of a private relator, unless he show a certain, specific and legal right in himself for which the law does not afford him a specific legal remedy; it will not lie to compel the erection of approaches to a bridge where the substance of the injury alleged is, that customers of the relator are kept from his mill by want of such approaches. *Comm'th v. Westfield Borough*, 11 C. C. 369.

410. A county may build a bridge across a stream at a point wholly within a borough. *Waverly Borough Bridge*, 12 C. C. 669.

411. Under the act 13 June 1836 (Brightly's Purdon 1891), and the special act 16 April 1870 (P. L. 1199), relating to Luzerne and Lackawanna counties, the building of a county bridge across a stream wholly within a borough is authorized; although townships only are spoken of in the said acts, boroughs are evidently also intended to be included. *Miller's Creek Bridge*, 3 Lack. Jur. 33.

412. A mandamus does not lie against supervisors to compel the erection of a foot-log or bridge; such erection is within the discretion of the supervisors, and it seems that the remedy is by indictment. *Garman v. Carroll Township*, 1 Dist. Rep. 530.

413. The confirmation of a report of viewers, laying out a road across a canal, confers no authority to erect a bridge that will obstruct its navigation. *Road in Lehigh*, 1 Northam. 220.

414. The act 25 May 1887 (Brightly's Purdon 1895), prescribing when counties may aid townships in the construction of township bridges, repeals local laws establishing a different rule. *Westfield Borough v. Tioga County*, 150 P. S. 152.

415. Where a bridge has been entered of record as a county bridge and built by the county, the expense of building the approaches must also be borne by the county; the local laws of Tioga county do not exempt it from such liability. *Westfield Borough v. Tioga County*, 150 P. S. 152.

416. The act 4 April 1870 (P. L. 834), relating to contracts for the erection of bridges in certain counties, does not apply to a contract for the erection of a joint county bridge between one of the counties named in the act and a county not named therein; the erection of such a bridge is regulated by the act 13 June 1836 (Brightly's Purdon 1891). *Conemaugh River Bridge*, 164 P. S. 355.

417. The approaches to public bridges must be made by the county and cannot be imposed upon townships and boroughs. *Comm'th v. Westfield Borough*, 11 C. C. 369.

418. Under the act 29 April 1891 (Brightly's Purdon 1895), it was held, that the west branch of the Susquehanna formed the boundary line between Union and Northumberland counties, and did not run between the counties within the meaning of that act, and that the commissioners of Union county were not required to join in the rebuilding of Milton bridge, it having been located within the county of Northumberland. *Milton Bridge*, 12 C. C. 17.

419. Where a bridge has not been destroyed by some sudden or violent casualty, but its destruction was the result of gradual disintegration and decay, the county commissioners cannot build a substantially new bridge, without the sanction of a report of viewers and the approval of the grand jury and court. *Comm'th v. Commissioners of Northampton*, 5 Northam. 23.

420. In a proceeding to erect a county bridge between two boroughs, a decree that the bridge is necessary and would be too expensive for the boroughs, and approving the report and findings and ordering them referred to the commissioners, and that, if approved by them, the same be recorded as a county bridge, was held to be neither effective or final unless the commissioners concurred in the findings of the court and the grand jury; an appeal, taken before the action of the commissioners, was quashed. *Youghiogheny River Bridge*, 168 P. S. 454.

(b) Damages from construction.

421. Where property in a borough is damaged by a change in the location of the abutments of a bridge, which is part of a public highway, the remedy is by the appointment of viewers, under the act 24 May 1878 (Brightly's Purdon 253), and not by action of trespass. *Power v. Ridgway Borough*, 149 P. S. 317.

422. Where land has been condemned for the purposes of a bridge and damages paid to the owner, and subsequently additional land of the same owner is condemned by reason of a change in plans; in the adjustment of damages in the second proceedings, the former proceedings are *res judicata* as to the plaintiff's special benefits from the construction of the bridge; in the second proceedings the inquiry must be limited to the damages sustained and the benefits conferred by the change in the plan. *McElheny v. McKeesport & Duquesne Bridge Co.*, 153 P. S. 108.

423. Where land was appropriated for an overhead bridge across a street, and the owner's agent entered into an agreement with the city as to the price, and the owner also owned the land on the opposite side of the street by a different title; it was *held*, that the agreement as to the price did not estop the owner from recovering consequential damages for the injury done to his other land by the construction of the bridge. *Beaver v. Harrisburg*, 156 P. S. 547.

424. In an action by a mill owner against a county for injury to his water power caused by the construction of a county bridge, a witness may be asked whether the bridge was located in the best practical way to pass the waters in time of flood, and it is not improper for the court to charge, that if, under the circumstances, a larger span would have obviated the damming up and flooding, the plaintiffs were entitled to recover. It was further *held*, that in such a case, the plaintiffs were not estopped by the fact,

that before the erection of the bridge they were informed by the commissioners of its character and manner of erection, and permitted the commissioners to commence and complete the bridge without objection. *Riddle v. Delaware County*, 156 P. S. 643.

425. Where land was injured by the original construction of a railroad bridge and not by the operation of the railroad over the bridge; it was *held*, that a company which leased the bridge after its completion and operated the road was not liable for the injury. *Kearney v. Central R. R. of New Jersey*, 167 P. S. 362.

426. Where a city in grading a street piles up dirt on the retaining wall of a lot which was on a lower level, and the dirt and material slides down on the lot and overturns the retaining wall, the city is liable to the owner in damages. *Gardner v. Scranton*, 11 C. C. 574.

(c) Tolls.

427. The act 6 May 1887 (Brightly's Purdon 263), providing for increased tolls on a certain class of bridges, is not unconstitutional as a local or a special act. *Boston Bridge Company's Case*, 13 C. C. 190.

(d) Freeing toll bridges.

428. Where a bridge is taken by a county for public use, under the act 8 May 1876 (Brightly's Purdon 1894), the measure of damages is the value of the property to the owner, and the property so to be valued includes not only the bridge structure but also the company's franchises; the value of the structure, the amount of net tolls collected and the market value of the capital stock are all elements to be considered; the true question is the value of the bridge, not what it cost, and the county is bound to pay for it at its actual value at the time of the taking. The value of the capital stock being an element to be considered, returns of such valuation to the auditor-general were admissible against the company, and it was

also proper to charge the jury, that if the liability to destruction from flood and ice lessened the value of the property, a verdict should be reduced to that extent. *Mifflin Bridge Co. v. Juniata County*, 144 P. S. 365.

429. The right to free a toll bridge by the exercise of the right of eminent domain is not relinquished by a provision in the charter of a bridge company by which the legislature reserved the right to purchase the bridge after the expiration of twenty years. In such a proceeding evidence is admissible as to the erection and maintenance of free bridges a short distance below the one in question. *Lock Haven Bridge Co. v. Clinton County*, 157 P. S. 379.

430. The act 8 May 1876 (Brightly's Purdon 1894), providing a method for taking bridges erected by corporations, and the supplements of said act, are applicable to Philadelphia county, and they are not affected by the act 26 May 1893 (Brightly's Purdon 1403), relating to the condemnation of bridges for public use. *City Avenue & Germantown Bridge*, 164 P. S. 394.

431. The county of Lehigh, under the act of 8 May 1876 (Brightly's Purdon 1794), may free the toll bridge at Bethlehem if the public necessity requires it; and this, notwithstanding the act 3 April 1892, which provided for the erection of the bridge, and stipulated that the commonwealth, upon making compensation, might make it free. *Bethlehem Toll Bridge*, 12 C. C. 311.

432. In proceedings to free a bridge which has both termini in one county, but some of the spans and piers are in another county, the viewers must be appointed by both counties. *New Street Bridge*, 11 C. C. 390.

(e) Use of bridges.

433. In a proceeding under the act 13 June 1836, sec. 70 (Brightly's Purdon 1897), for the penalty for crossing a wooden bridge faster than a walk, the act must be specifically set forth in the

proceedings, and it must also appear on the face of the proceedings that the notice required by the 63d section of that act (Brightly's Purdon 1892) was placed upon the bridge on which the alleged offence was committed; otherwise, the proceedings will be set aside on *certiorari*. *Dosch v. Strayer*, 2 York 113.

434. A bridge erected for public travel by a corporation is a highway within the act 14 May 1889 (Brightly's Purdon 1823), authorizing the formation of street car companies; and a court of equity will restrain a bridge company from interfering with the preparation and use of the bridge by a railway company for the operation of its cars over and across the same. *Pittsburgh & West End Pass. Ry. Co. v. Point Bridge Co.*, 165 P. S. 37; affirming s. c. 39 P. L. J. 367.

435. Where the proper local authorities have given their consent to the use of a county bridge by a street railway company, the county commissioners cannot arbitrarily refuse the use of the bridge; if they do so refuse, the court may appoint an engineer to examine and report what will be necessary to strengthen the bridge for street railway traffic; and upon filing his report the court will permit the company to enter upon the bridge and strengthen it. And when this has been done to the satisfaction of the court, the company may use the bridge upon giving security to keep it in repair, pay the rental agreed upon, and perform the conditions upon which the municipal consent was given. *Berks County v. Reading City Pass. Ry. Co.*, 167 P. S. 102.

436. The act 14 May 1889 (Brightly's Purdon 1823) does not authorize the construction of a street railway upon a county bridge; upon the purchase of a bridge with the county funds, the same becomes a county bridge, and the title vests in the county commissioners, who have no power to grant street railway companies the right to lay tracks and pass cars over the same. *Venango County Commissioners v. Oil City Street Ry. Co.*, 3 Dist. Rep. 546.

437. The county commissioners are the proper parties to maintain a bill for an injunction to restrain the illegal occupancy or obstruction of a county bridge. *Venango County Commissioners v. Oil City Street Ry. Co.*, 3 Dist. Rep. 546.

438. Under the act 14 May 1889, sec. 4 (Brightly's Purdon 1824), the city of Philadelphia has power to license a street railway to cross one of its bridges and to grant a like privilege to another company to complete a circuit; the proviso in that section does not vest in a street railway company the exclusive right to cross a city bridge and to prevent any other road forever from using that bridge. *Hestonville, Mantua & Fairmount Ry. Co. v. Forty-Second Street & West Park Ry. Co.*, 4 Dist. Rep. 343.

(g) Care and repair of bridges.

439. The act of 18 March 1869 (P. L. 415), imposed upon the county of Lebanon the duty of maintaining only those bridges which, at that date, the townships were required to maintain. *North Lebanon Township v. Lebanon County*, 6 C. C. 538.

440. The duty to keep a public highway in repair devolves, at common law, upon the township upon which rests the duty of opening it. Except in counties where the act of 13 April 1843 (Brightly's Purdon 1892) is in force, it is the duty of the township to keep in repair a bridge originally built by the county under the act of 13 June 1836 (P. L. 555). The act of 13 April 1843 is not in force in Erie county, and the proceeding in this case was not under the act of 5 May 1876 (Brightly's Purdon 1894). *Erie County v. Comm'th*, 127 P. S. 197.

441. Blair county is subject to the act of 13 April 1843 (Brightly's Purdon 1892), making it the duty of county commissioners to repair all bridges; and this, though it was erected by the act of 26 February 1846 (P. L. 64) out of two counties to which the act did not apply. *Shadler v. Blair County*, 136 P. S. 488; s. c. 26 W. N. C. 487.

442. It is the duty of the county com-

missioners and not of the township supervisor to repair county bridges. *Dougherty v. Supervisors of Upper Allen*, 12 C. C. 304.

443. Where a turnpike road is freed from tolls under the act 2 June 1887 (Brightly's Purdon 2049), a bridge on the line of the road does not become a county bridge, and if such a bridge is destroyed by ice the township must repair it and not the county commissioners, under the act 16 June 1891 (Brightly's Purdon 1895). *Bedford & Stoystown Bridge*, 14 C. C. 296.

444. The county commissioners have power to repair a county bridge if it is deemed necessary for the accommodation of public travel, without first obtaining the consent of the court and grand jury; the only province of a jury of view in questions relating to bridges is to decide whether or not the bridge is necessary, and whether or not the county should construct it because it is too burdensome for the city. *Comm'th v. Commissioners of Northampton*, 14 C. C. 299.

445. A prior estimate of cost is not required under the act of 13 June 1836 (Brightly's Purdon 1891), where a new bridge is erected in place of an old one, which was decayed and likely to fall. *Thirteenth Street Bridge*, 2 Mona. 58.

446. Under the act 16 June 1891 (Brightly's Purdon 1895), the county commissioners may be compelled by mandamus to rebuild destroyed and abandoned bridges, upon the petition of ten citizens and taxpayers; as to bridges wholly in one county, it is the duty of the county commissioners of the county to repair the bridge; as to bridges partly in one county and partly in another, the commissioners of the respective counties are required to act jointly. A stream is equally the boundary, whether the line is at its middle or at its edge. *Keiser v. Commissioners of Union*, 156 P. S. 315.

447. Where a railroad company built a branch line crossing a turnpike at grade, and built a bridge to carry the turnpike over its roadbed, and a trolley

company acquired the right to build its line over the bridge; it was *held*, that if it was necessary for the protection of the railroad company that the bridge should be strengthened in order to sustain the trolley cars, it must be done at the expense of the railroad company, and that thereafter it would have to be kept in repair at the joint expense of the railroad company and the trolley company. *Conshohocken Ry. Co. v. Pennsylvania R. R. Co.*, 15 C. C. 445; s. c. 10 Montg. 186; *Pennsylvania R. R. Co. v. Conshohocken Ry. Co.*, 15 C. C. 454; s. c. 10 Montg. 195.

XXI. State roads.

448. Where an act of assembly authorized the issuing of warrants for a state road by commissioners as the work progressed, a judgment on one warrant is no bar to a recovery on another warrant for subsequent work under the same contract. *East Union Township v. Comrey*, 9 Atl. 290.

449. Under the act of 21 March 1865 (P. L. 506), providing for a state road in Cameron and Potter counties, the commissioners are not entitled to any portion of the road taxes on unseated lands after the completion of the road; and this, though a part of the indebtedness remains unpaid. *Lumber Township v. Cameron County*, 134 P. S. 105.

450. To repeal a prior statute by implication, there should be such a manifest and total repugnancy as to lead to the conclusion that the latter abrogated and was intended to abrogate the former. The act 22 April 1856, giving the court of quarter sessions jurisdiction to examine the accounts of the superintendent of the national road, was not repealed by the act 4 April 1877, requiring the superintendent to submit his accounts to the county auditors. *Hendrix's Account*, 146 P. S. 285.

XXII. Private roads.

451. The act of 13 June 1836 (Brightly's Purdon 1888) does not authorize a private road from a coal bank. *Calhoun's Road*, 8 C. C. 222.

452. The general borough law of 3 April 1851 (Brightly's Purdon 252), does not repeal the act 13 June 1836 (Brightly's Purdon 1888), authorizing the court of quarter sessions to lay out private roads. *Private Road in Huntingdon*, 149 P. S. 133.

453. The general borough act of 3 April 1851 (Brightly's Purdon 252) does not repeal the general road law of 13 June 1836 (Brightly's Purdon 1888), authorizing the quarter sessions to lay out private roads; and this, although such private road be entirely within the borough limits. *Palo Alto Road*, 160 P. S. 104; affirming s. c. 13 C. C. 537.

454. The borough authorities alone have power to open a public alley in a borough incorporated under the borough act of 3 April 1851, but the jurisdiction to open a private road or alley in such a borough is in the quarter sessions, under the act 13 June 1836 (Brightly's Purdon 1888). *Selinsgrove Road*, 9 C. C. 611. See *Road in Huntingdon*, 11 C. C. 119.

455. The taking of land for a private road will not be permitted except upon strict necessity and notice to the owner. The owner is entitled to be heard on the assessment of damages. A private road which crosses a railroad at grade will be refused. *Harbaugh's Road*, 8 C. C. 671.

456. In a proceeding to lay out a private road, where the viewers fail to report that the owner of the land had personal notice of the time and place of meeting, the better practice is to refer back the original report, or the viewers may, by permission of the court, file an amended report to that effect. *Thompson's Private Road*, 154 P. S. 541.

457. In proceedings as to a private road there must be personal notice to the land-owners of the view, and it is not sufficient to state in the report that an application

was made to them for a release of damages; a view made after the beginning of the term to which the order is returnable, without personal notice to the landowner, is bad. *Private Road in Union*, 14 C. C. 436; s. c. 7 York 166.

458. A notice of view posted at a remote blacksmith shop, instead of at a private house along the route of a private road, is insufficient. *Road in West Manheim*, 6 York 64.

459. In the case of a private road the court may at a subsequent term correct a mistake in fixing the width, allowing another term to elapse before confirming the report. *Private Road in Union*, 14 C. C. 436; s. c. 7 York 166; *Road in Kingston*, 5 Kulp 235.

460. Viewers of a private road cannot annex a condition that the owner shall build the fence on one side and the petitioner on the other. *Road in Kingston*, 5 Kulp 235.

461. Where a private lane runs between two farms, and from one public road to another, and it is closed by the owner of the land upon which the lane is situated, the other owner may build a division fence along his side of the lane and compel his neighbor to contribute to the cost of the fence. *Odenwelder v. Frankenfield*, 153 P. S. 526.

462. The acts of assembly providing for private roads to mines of coal and other minerals do not provide for private roads partly over and partly under the surface of the land to a fire-clay mine. *Dunbar Township Private Road*, 4 Dist. Rep. 430.

XXIII. Obstruction of highways.

463. The mere plotting of a city street does not give the public any rights of travel. In the absence of a definite, uniform and adverse user by the public under a claim of right for twenty-one years, a defendant will not be punished for, or restrained from, building a fence across the so-called streets. *Comm'th v. Philadelphia & Reading Railroad Co.*, 135 P. S. 256; s. c. 26 W. N. C. 154.

464. An ordinance which forbids the construction of bay-windows projecting more than twenty-eight inches into the street, by implication permits their erection within that limit. Such matters are within municipal control, and regulating ordinances of that character are valid, if reasonable in their provisions and general in their application. *Livingston v. Wolf*, 136 P. S. 519; s. c. 27 W. N. C. 5.

465. Occupants of places of business have a right to use their sidewalks in receiving and setting out merchandise; the length of time a person in such use may allow his property to remain on the sidewalk, without incurring the charge of negligence, is for the jury. *Vallo v. United States Express Co.*, 147 P. S. 404.

466. Where an ordinance prohibited the placing of any goods for sale in front of any house from the line of a street to a greater distance than four feet three inches; it was held, that there was a necessary implication that goods might be placed within such limits, and a property owner would not be enjoined from maintaining a fruit stand not extending more than four feet three inches from the house line. *Philadelphia v. Sheppard*, 158 P. S. 347.

467. Where an alley was laid out in 1873 equidistant from two named streets, bringing complainant's buildings within the lines of the alley, but the draft located the building on the north side of the alley, and the surveyor testified that he had been directed to so make the draft as to conform to the lines of the then existing alley previously dedicated, which would not affect the buildings, and after the report had been confirmed the buildings were destroyed by fire, and before rebuilding the borough surveyor gave the complainant the old lines as the new ones, and she re-erected the buildings on the old foundations; it was held, that ten years afterwards the borough authorities would be enjoined from removing the buildings. *Elliott v. Evans*, 8 Montg. 217.

468. No usage or custom will justify an encroachment on a public highway or

the presence therein of an obstruction which renders it unsafe for the uses to which it is dedicated. *McNerney v. Reading*, 150 P. S. 611.

469. Where a person, under an agreement with the owner of the soil, deposited lumber and bark upon the highway, and when the agreement had expired, he refused to remove it; it was *held*, that the owner of the soil was not liable as a trespasser for removing the lumber and bark from the road to her own land; no one has the right to deposit and maintain material upon a highway without the consent of the person who owns the fee and the soil of the road. *Wheelock v. Fuellhart*, 158 P. S. 359.

470. A person is not entitled to recover damages for the obstruction of a street in which he lives and does business, where the injury which he suffers is common to the public generally. *Hobson v. Philadelphia*, 155 P. S. 131.

471. Where plaintiff's house was situated on the lower side of a street which was cut out of a hillside, and he built a retaining wall along the lower line of the street to protect the house and lot, and defendant deposited a large amount of earth upon the street in such a way that the water was stopped from flowing along the street and soaked down through the earth, loosening the hillside, so that its downward pressure injured the plaintiff's wall and house; it was *held*, that the plaintiff was entitled to recover, and that the measure of damages was the cost of remedying the injury, unless such cost exceeded the value of the property injured, when such value became the measure. *Lucot v. Rodgers*, 159 P. S. 58.

472. As to the right of action of a landowner for an obstruction of a public highway, see note to *Holmes v. Corthell*, 12 *Atlan.* 730.

473. Any one who negligently leaves an obstruction or creates a defect in the highway, is at once liable to a party injured, and the liability of the municipality does not cancel the liability of the obstructor. *Gates v. Pennsylvania R. R.*

Co., 150 P. S. 50. See s. c. 154 P. S. 566.

474. Where the posts of safety gates at a railroad crossing or the warning sign are planted within the travelled roadway, they are an unlawful obstruction of the street, and the railroad company is liable in damages for an accident caused thereby. *Greenwood v. Railroad Co.*, 4 Del. 459.

475. A city is not responsible for injuries from an obstruction to the highway, the danger from which was occult, and would not naturally attract attention; as of a gate which, when opened outwardly, extended ten inches over the highway. *Eisenbrey v. Philadelphia*, 24 W. N. C. 231; s. c. 46 L. I. 250.

476. Where a road is opened by the supervisors and maintained as such by the public, any one obstructing it is guilty of a public nuisance and so indictable. *Glenn v. Comm'th*, 5 Cent. 492.

477. If a street be declared by statute a common highway, any private occupation of the same is indictable as a nuisance; and this, though the street has never been passable otherwise than on foot, and though there be no evidence that the travel of foot passengers thereon has been actually incommoded. *Comm'th v. McNaugher*, 131 P. S. 55.

478. A landlord is not criminally liable for the act of his tenant in obstructing a highway, even though he knew it and did not dissent. *Comm'th v. Switzer*, 134 P. S. 383; s. c. 26 W. N. C. 46.

479. Upon the question of public user of a borough street, a map not proven by the surveyor who made it, nor accompanied by the original draft, was improperly admitted in evidence. *Comm'th v. Switzer*, 134 P. S. 383; s. c. 26 W. N. C. 46.

480. Upon an indictment for obstructing the highway by the erection of a stone wall within its limits, the only question is whether the wall is upon any part of the highway as laid out and used. *Comm'th v. Marshall*, 137 P. S. 170; s. c. 27 W. N. C. 67.

481. It is an indictable offence to haul stone on a public highway with a traction engine, making a train fifty feet long, weighing, when loaded, from thirteen to fourteen tons; and this, though there be no evidence that the train interfered with travel by frightening the horses or that it obstructed travel. *Comm'th v. Allen*, 148 P. S. 358. See act 30 June 1885 (Brightly's Purdon 1885).

482. An indictment for obstructing a street by a fence cannot be sustained, where the fence is not upon the opened and travelled part of the street nor in that portion which has been actually accepted by the public authorities. *Comm'th v. Royce*, 152 P. S. 88.

483. A person cannot be convicted for obstructing an alley-way in the city of Altoona, where it appears that, although the alley was on the plan annexed to the report made by the commissioners under the act incorporating the city, the alley was never actually opened. *Comm'th v. Kline*, 162 P. S. 499.

484. Riding a bicycle upon a sidewalk is an offence within the act 7 May 1889, sec. 3 (Brightly's Purdon 1890), providing for the summary conviction of any person wilfully and maliciously riding or driving any horse or any other animal upon a sidewalk. *Comm'th v. Forrest*, 170 P. S. 40; reversing s. c. 3 Dist. Rep. 797.

485. A municipal corporation is liable to indictment for neglecting to keep its streets in repair. If the defendant refuse to plead to the indictment, the court will not direct a plea to be entered until there is an appearance; an appearance may be compelled by summons and distress infinite, according to the usage of the common law. *Comm'th v. Lansford Borough*, 14 C. C. 376.

486. Any unauthorized permanent structure which materially encroaches upon a public street of a city and impedes travel is a nuisance, notwithstanding spaces left for the passage of the public. An ordinance declaring every obstruction of a street, except by authority of an ordinance or

permit, to be a common nuisance and imposing a fine for its violation, will sustain a conviction for erecting any permanent structure in the highway. *Wilkes-Barre v. Burgunder*, 7 Kulp 63; s. c. 5 Del. 265.

487. A second story bay-window projecting into the street will not be enjoined on the master's finding that it causes no appreciable injury to the plaintiff. *Livingston v. Wolf*, 136 P. S. 519; s. c. 27 W. N. C. 5.

488. Upon a bill filed by the attorney-general to restrain the maintenance of an obstruction upon a public highway, where the defendant averred that the erection was not an obstruction, that it had been in existence for eighteen years and that he had been acquitted upon an indictment for its maintenance; it was held, that the laches of the commonwealth, coupled with the acquittal, justified a chancellor in refusing the injunction. *Comm'th v. Croushore*, 145 P. S. 157.

489. The power to construct a bridge carries with it the right to elevate the bridge to a sufficient height to avoid the danger of ice and floods; such elevation may be changed to the extent that experience shows to be necessary, and such right carries with it the right to construct reasonable and proper approaches, and the elevation over a highway will not be enjoined as a public nuisance where the public convenience is increased thereby and public travel is not interfered with to any appreciable extent. *Comm'th v. Pittston Ferry Bridge Co.*, 148 P. S. 621. See s. c. 8 Kulp 29.

490. A railroad company which has condemned land for depots, stations, etc., has a base fee therein and has sufficient title to maintain a bill for the unlawful obstruction of an adjoining highway. *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 P. S. 18.

491. Where buildings are erected upon a public street, the persons erecting them must be conclusively presumed to know

that they are wrongdoers, and in such a case nothing short of acts of encouragement will estop an adjoining owner from complaining of the erection. *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 P. S. 18.

492. Where plaintiff and defendant, who were all the parties entitled to the use of a private street, agreed to vacate the same, and the defendants agreed to lay out two streets on their own land, one of which was described as running to the line of plaintiff's ground, and the two streets were at right angles with each other, and one of them projected beyond the other for a distance sufficient to reach plaintiff's line, forming a *cul de sac*, and the defendants executed a deed of dedication to the city but the blind end of the street was not placed upon the city plan; it was *held*, that the plaintiff had a right to use the blind end of the street and defendant would be enjoined from obstructing the same by the construction of a fence across it. *Wilkinson v. Suplee*, 166 P. S. 315.

493. A borough will not be restrained from removing a stone wall, which is built upon and is an obstruction to a street, merely because its removal will injure private property. *Walsh v. Olyphant*, 7 C. C. 124.

494. Where a railroad company was granted by city ordinance a right of way upon a public street, south of the centre line thereof, and the remaining part of the street was wide enough for free and convenient access to the properties on the north side; it was *held*, that an owner of property on the north side was not entitled to enjoin the railroad company from proceeding under the ordinance. *Beck v. Erie Terminal R. R. Co.*, 11 C. C. 363.

495. Where an individual complains of an encroachment on a public highway and he has himself been guilty of the same act at the same place, equity will not interfere by injunction in his behalf. *Schofield v. Pennsylvania Schuylkill Valley R. R. Co.*, 8 Montg. 125.

496. A nuisance in a highway can only

be restrained by an abutting owner where the nuisance is in that portion of the highway fronting his land; for a nuisance not specially injurious to his property redress can only be had at the suit of public authorities. *Collins v. Northeastern Elevated R. R. Co.*, 32 W. N. C. 379.

497. An obstruction upon a public street will not be enjoined by preliminary injunction except when the plaintiff's right is clear and not doubtful. *York v. Wilhelm*, 5 York 17.

HOLIDAYS.

1. An appeal from a justice may be entered on a legal holiday. *Worthington v. Hobensack*, 8 C. C. 65.

2. A party is not bound to attend and choose arbitrators on the 30th of May, Decoration day, nor can a lawful choice be made in his absence. *Doles v. Powell*, 1 Lack. Jur. 429.

HOMICIDE.

See CRIMINAL LAW, XXVI.

HOUSE OF REFUGE.

1. When a complaint is made by a parent against an incorrigible child, the justice may commit the child to the house of refuge, but he has no power to bind him over for trial or to commit him to jail. *Comm'th v. Patton*, 5 Del. 290.

2. Upon the subject of commitments to the house of refuge, see *Comm'th v. Cornell*, Vaux's Dec. 144.

HUSBAND AND WIFE.

See AGENCY: BUILDING ASSOCIATIONS:
CEMETERIES: CONFLICT OF LAWS:
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XII. Divorce from bed and board.

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XIV. Breach of promise of marriage.

I. Antenuptial contracts.

1. A condition that the obligation should cease at the marriage of the promisor, does not make it a contract in restraint of marriage. *Shafer v. Senseman*, 1 Northam. 389; affirmed in 125 P. S. 310.

2. A note for \$5000 given by a widower to a trustee for his children, upon the day of his second marriage, was held to be an executed gift *inter vivos*, and not in fraud of the rights of his second wife. *Ross's Appeal*, 127 P. S. 4.

3. Where an intended wife executed an antenuptial contract by which she released her future interest in her intended husband's estate; it was held, that it was conclusive as to her rights; a promise by the husband, afterwards violated, to preserve unrevoked a codicil to his will, giving her the one-third of all his estate, was without sufficient consideration to operate as a revocation of the settlement. *Kesler's Estate*, 143 P. S. 386; reversing s. c. 7 C. C. 598.

4. Where an antenuptial agreement provided that if the wife should separate herself from her husband, the husband should receive one-third part of the income of the "presently acquired property"; it was held, that the words "presently acquired property" did not include any portion of property subsequently devised to the wife for her sole and separate use, and further, that being for her sole and separate use, the trusts were beyond the control of the parties to the antenuptial contract. *Hughes-Hallett v. Hughes-Hallett*, 152 P. S. 590.

5. Under the act 8 April 1833, sec. 16 (Brightly's Purdon 2104), a will executed by a single woman is absolutely revoked by her subsequent marriage; and this, although her husband has given his written consent prior to the marriage, to a will by which he is excluded from participating in her estate. While such consent may operate as an antenuptial agreement, as against the husband, a child born after the marriage is not concluded

from sharing in its mother's estate, and the probate of the revoked will will not defeat the rights of such child. *Craft's Estate*, 164 P. S. 520.

6. Upon an antenuptial agreement that upon the death of either the survivor should inherit, the heirs of the wife dying first hold the legal title as a naked trust for the heirs of the husband, who can convey the title in fee simple. *Wind v. Haas*, 8 C. C. 645; s. c. 7 Lanc. 121.

7. Where an antenuptial contract provided that in the case of either the death of the husband or wife, the property of the one dying should go to his or her heirs free from any claim by the survivor; it was held, that upon the death of the husband the wife could not claim her exemption. *Venus's Estate*, 2 York 193.

8. As to the effect of antenuptial conveyances in fraud of the marital rights of the wife, see note to *Champlin v. Champlin*, 15 Atlan. 87.

II. Contract of marriage.

9. A wife is a competent witness to prove the marriage with her deceased husband. *Drinkhouse's Estate*, 151 P. S. 294; affirming s. c. 11 C. C. 144.

10. The widow of a decedent is a competent witness to prove her marriage in a matter in which she is interested. *Odenwalt's Estate*, 1 York 189.

11. To establish a contract of marriage, it is necessary that words in the present tense be used by both parties. *Wertzel v. Central Lodge*, 11 C. C. 269.

12. The marriage license act 23 June 1885 (Brightly's Purdon 1296) is not repealed by the act 1 May 1893 (Brightly's Purdon 1295); the latter act simply does not become effective until October 1, 1895. *Marriage License Acts*, 15 C. C. 345. See act 18 June 1895 (P. L. 202).

13. The marriage license docket is a public record and is open to the inspection of the public, and a citizen may inspect and take a memorandum therefrom, and the clerk of the orphans' court is not entitled to a fee for permitting him to do

so. *Marriage License Docket*, 4 Dist. Rep. 162; contra, *Marriage License Docket*, 4 Dist. Rep. 284. See act 22 May 1895 (P. L. 99).

14. The declarations of a decedent that he was not married to one who claims to be his widow, not made in her presence, are not evidence against her. *Moore's Estate*, 7 C. C. 284; s. c. 46 L. I. 432.

15. In an issue involving the legitimacy of offspring, admissions by one of the parties that a marriage had taken place, when in fact no marriage had been contracted, while greatly weakening the force of subsequent admissions, will not have the effect of excluding them altogether. *Drinkhouse's Estate*, 151 P. S. 294; affirming s. c. 11 C. C. 144.

16. A marriage was held to be sufficiently established by the declarations of a decedent that the claimant was his wife, by proof that their children were baptized as such and that the baptismal certificates were framed and hung up in the house, by the church register recording the death and burial of one of their children, and by their reputation among the neighbors as man and wife and proof of their cohabitation as such. *Odenwalt's Estate*, 1 York 189.

17. Cohabitation as man and wife under an agreement to marry on a specific day is not marriage. *Grimm's Estate*, 131 P. S. 199; affirming s. c. 35 P. L. J. 213.

18. Insufficient or indirect evidence of an original meretricious cohabitation will not have the effect of eliminating subsequent cohabitation as a fact from which marriage may be inferred; evidence showing courtship, declarations as to marriage, cohabitation, birth and parental care of acknowledged issue, was held sufficient to support a finding of marriage. *Drinkhouse's Estate*, 151 P. S. 294; affirming s. c. 11 C. C. 144.

19. An agreement to cohabit as husband and wife, followed by public recognition, will constitute a marriage. Such a marriage cannot be contradicted by the husband's declarations to the contrary

made in his wife's absence. *Moore's Estate*, 9 C. C. 338; s. c. 48 L. I. 4.

20. Upon a question of legitimacy, the relation of the ancestors of the claimant will not be presumed to have been illicit, from evidence which is as consistent with the theory of a valid marriage as of its opposite. *Drean's Estate*, 9 C. C. 559; s. c. 27 W. N. C. 574; 48 L. I. 76.

21. If the relation was of illicit origin, there must be proof of a subsequent actual marriage; a marriage will not be presumed from cohabitation and reputation. *Hunt v. Cleveland*, 6 C. C. 592.

22. Continuous habitation and reputation as husband and wife for fourteen years, accompanied by mutual acknowledgments of the relationship, was held to constitute a legal presumption of marriage, which was not affected by proof that the wife would have preferred a legal ceremony, and that upon the occasion of her third marriage after the death of this, her second husband, she described herself as the widow of her first husband. *Janney's Estate*, 12 C. C. 550.

23. Where it appeared that at the time of the birth of her child the decedent bore the name of the child's father, and continued to bear his name for ten years until her death, and during that time she was known and addressed as his wife, and the certificate of the child's birth named its parents as husband and wife, and the father drew checks to her which she endorsed and collected as his wife, and he also procured insurance on his life for her benefit, describing her as his wife, and real estate was conveyed to her as such and letters were so addressed to her; but there was testimony that there had been no marriage nor was there any contract of marriage when the child was born, and that after the child's birth the father left the mother, and although he contributed to her support and allowed her to assume his name, yet he never cohabited with her; it was held, by a divided court, that the evidence was sufficient to establish a lawful marriage. *Strauss's Estate*, 168 P. S. 561; s. c. 36

W. N. C. 374; affirming s. c. 14 C. C. 593; 34 W. N. C. 478.

24. Where a man and woman were married in 1851, and the wife, after living with the husband for about three years, abandoned him upon the rumor that he had been previously married, and in 1856 she married his brother and lived with him until he died in 1887; it was *held*, that she was not the widow of the latter, having failed to establish by legal evidence the first marriage of her first husband, or his death prior to her second marriage. *Culver's Estate*, 7 Kulp 219.

25. Where parties had lived together as man and wife under an alleged marriage which was void by reason of the incapacity of one of the parties to contract; it was *held*, that a subsequent marriage could not be proven except by direct evidence of an express contract, which must show words in the present tense sufficient to constitute marriage, spoken by both parties. *Weitzel v. Central Lodge*, 9 Lanc. 243.

26. Where an estate is claimed by first cousins of a decedent and also by persons claiming as children of his half brother, whose legitimacy is denied, there is a presumption of marriage and legitimacy, and this presumption is strengthened by lapse of time, and cannot be overcome after ninety years, except by strong, direct and satisfactory proof. *Pickens's Estate*, 163 P. S. 14.

27. Where a marriage contract is established by direct proof, reputation upon the subject is of little importance. *Agnew's Estate*, 11 C. C. 137; s. c. 29 W. N. C. 520.

28. The invalidity of the marriage of a minor in Ohio may be shown by its statutes and laws. *Easley v. Comm'th*, 11 Atlan. 221.

29. The validity of a marriage is to be determined by the law of the place where such marriage was celebrated. *Moul's Estate*, 1 York 185.

30. In ejectment where the defendant claims title under a deed in which the grantors are described as man and wife,

evidence is admissible that the grantors were married; and this, although it appears that the woman was married eighteen years before to another man and there is no evidence either of the death or divorce of the first husband. *Moore v. Miller*, 147 P. S. 378.

31. Upon an issue to determine the sanity of an intestate at the time of his marriage to a woman who claims administration as his widow, the inquiry is, as to the decedent's mental condition at the very time of the marriage ceremony, but evidence is admissible of his condition both before and afterwards as bearing upon his mental condition at the time of the marriage. *Nonnemacher v. Nonnemacher*, 159 P. S. 634.

III. Rights and liabilities of the husband.

(a) Generally.

32. The power of a husband by gift *inter vivos* to dispose in good faith of his personal property to the exclusion of his wife is absolute. *Lines v. Lines*, 142 P. S. 149; affirming s. c. 2 Northam. 349.

33. Upon a devise to "heirs," a husband is entitled to take. *Langshaw's Estate*, 47 L. I. 505; *Ashton's Estate*, 134 P. S. 390; s. c. 26 W. N. C. 40.

34. Where a wife's will was read to her husband and she left everything to her children, and she gave him a check for two hundred and fifty dollars which he accepted, and expressed himself satisfied with the will in his wife's presence before she executed it; it was *held*, that he was estopped from claiming against the will. *Osmond's Estate*, 161 P. S. 543.

35. Prior to the act 3 June 1887 (P. L. 332), where goods were purchased by a married woman for the purpose of carrying on her own business, the husband was liable therefor. *Boas v. Malone*, 140 P. S. 572.

36. A husband is not responsible for the trespassing of his wife's cattle unless he had separate custody and control over them. *Arthurs v. Chatfield*, 38 P. L. J. 53.

37. As to a husband's liability for his

wife's torts, both civil and criminal, see note to *Doherty v. Madgett*, 2 Atlan. 118.

(b) **Necessaries.**

38. A husband is liable for groceries purchased by his wife and necessary for the use of his family, in the absence of notice not to sell to her on his credit; and even after such notice, if he himself has not furnished all the means requisite to purchase such supplies. *McGrath v. Donnelly*, 131 P. S. 549.

39. Notwithstanding the act of 3 June 1887 (P. L. 332), a husband is still liable for his wife's necessities, and such bills will be charged against his share of her estate. *Weber's Estate*, 25 W. N. C. 220.

40. Where a wife obtains necessities for the family of herself and husband, the presumption is that she does so as his agent; the act 3 June 1887 (P. L. 332) did not relieve the husband of his primary liability to support his wife and family. *Kooker v. Williams*, 3 Dist. Rep. 446.

41. Where a husband and wife live together, he is bound to provide necessities for her support, and if she sends for a physician she will not be held liable to pay for his services out of her separate estate, unless she expressly agreed to do so. *Moore v. Copley*, 165 P. S. 294.

42. A husband is primarily liable for necessities, although they were contracted for by the wife on the credit of her own separate estate. *Roll v. Davison*, 165 P. S. 392.

43. A husband is primarily liable for medical attendance and other expenses incident to his wife's illness and death; and this, although she has a separate estate. Where he is insolvent such expenses will be deducted from his distributive share of her estate. *Waesch's Estate*, 166 P. S. 204; affirming s. c. 14 C. C. 387.

44. A husband is primarily liable for the funeral expenses of his wife; even where, by direction of her will, such expenses are to be paid out of her own estate, he will not be allowed to claim as creditor for such expenses so as to exhaust the estate and deprive other credit-

ors of payment. *Wheeler's Estate*, 4 Dist. Rep. 265.

45. Where the plaintiff advanced money to a married woman for her transportation to her husband in a distant city; it was held, that it was not such a necessary for which the husband could be held liable without his consent. *Donahue v. Tobin*, 11 C. C. 496.

46. Where a husband without justification deserts his wife and child, and neglects to provide for them, he is liable for necessities ordered by and delivered to his wife for the use of herself and child; and this, although the wife has repudiated the husband's offers of allowance. *Llewellyn v. Levy*, 163 P. S. 647; reversing s. c. 12 C. C. 527.

47. A husband separated from his wife is not liable for necessities furnished her by a merchant having knowledge of the separation, unless the latter can show that the said husband is separated from his wife without cause. *Guthrie v. Gorrecht*, 8 Lanc. 25.

48. Where a husband is insolvent, the estate of his deceased wife is liable for her medical attendance and funeral expenses. *Scott's Estate*, 15 C. C. 316.

49. A married woman is liable for necessities purchased by her on her own credit and charged to her. *Raber's Estate*, 5 York 202.

50. Where an action for necessities was brought against husband and wife and the judgment against the wife was reversed on *certiorari* in the common pleas, but the judgment against the husband was sustained; it was held, that such reversal as to the wife was no bar to a subsequent action against the wife alone. *Roll v. Davison*, 165 P. S. 392.

51. A judgment against a married woman on a transcript from a justice will be stricken off unless the record show affirmatively that it was proven before the justice that she contracted the debt and that the articles furnished were necessities. *Rauch v. Young*, 9 C. C. 416.

52. All the facts necessary to confer jurisdiction in a suit against a husband

and wife for necessities must appear on the justice's record. *Conlan v. Hirsch*, 5 Kulp 395.

53. Where a rule of court provides that upon appeals from justices the issue shall be raised by a declaration for money had and received and a plea of non assumpsit, and the cause be tried upon the merits without regard to form, the transcript is substituted for the statement of fact, and where such transcript shows affirmatively the liability, it will sustain a verdict against a married woman for necessities. *Kooker v. Williams*, 3 Dist. Rep. 446.

IV. Rights, powers and liabilities of married women.

(a) Of the right to her services.

54. In an action for injuries received by plaintiff's wife by falling upon a defective pavement, the plaintiff may recover for any loss of earning power of the wife, and the expenses incurred for her medical attendance. *Readdy v. Shamokin*, 137 P. S. 98.

55. In an action by the wife in her own name for personal injuries, where she was living with her husband, doing the work of the family, she cannot recover damages for diminution of her earning power; such damages must be recovered in a suit by the husband, as he is still entitled to her services, notwithstanding the act of 3 June 1887 (P. L. 332). *Carr v. Easton*, 7 C. C. 403; s. c. 142 P. S. 139.

56. Where the wife is injured by the negligence of another, the husband is entitled to recover for the medical attendance upon his wife during her illness and for the loss of her services, while unable to attend to her domestic duties. *Henry v. Klopfer*, 147 P. S. 178.

57. In an action by a wife for personal injuries after the husband has filed a stipulation as provided by the act 11 June 1879 (Brightly's Purdon 1302), the wife is entitled to recover not only for her own injuries but also for whatever sum the

husband was entitled to recover in an action brought by himself. That act does not violate sec. 3 of article III. of the constitution, relating to titles of acts. *Kelley v. Mayberry Township*, 154 P. S. 440. See act 8 May 1895 (P. L. 54).

58. Where a husband claimed against the estate of a decedent for money earned by his wife prior to the act 3 June 1887 (P. L. 332); it was held, that his debt to the estate might be set off against the claim. *Bowler's Estate*, 8 C. C. 522; s. c. 47 L. I. 298.

59. A husband is not entitled to his wife's earnings since the act of 3 June 1887 (P. L. 332); so a justice's judgment in favor of the husband for the same will be reversed on *certiorari*. *Frey v. Rein-smith*, 7 C. C. 115.

60. Since the act 3 June 1887 (P. L. 332), the wages of a married woman earned by her labor belong to her, and where a married woman attends upon a boarder, cleans his room and administers medicine to him when he is sick, she is entitled to recover compensation for her services in her own name, although the contract for boarding was made with her husband. Such services are not those of an ordinary house servant, and therefore the fact that she did not present a claim for her services for a considerable time after they were performed will not prevent a recovery. *Lewis's Estate*, 156 P. S. 337; reversing s. c. 10 Lanc. 145.

61. Where a married woman leases and runs a boarding-house, its profits belong to herself and not to her husband; and this, though he be permitted to live and to be maintained upon the property and voluntarily bestows labor upon it. *Phillips v. Hall*, 160 P. S. 60.

62. A suit for the value of the services of a married woman in the temporary employment of nursing is properly brought in the name of the husband alone; where, however, the employment is of a permanent character so as to become a trade or business, she is entitled, under the act 3 June 1887 (P. L. 332), to recover in her own name. *Himes v. Sheneman*, 9 C. C. 363.

63. The earnings and services of a wife in her husband's business do not belong to him, and property bought with such earnings are not subject to levy and sale by a husband's creditors. *Smith v. Aze*, 14 C. C. 532.

(b) Deeds by married women.

64. A deed of her land by a married woman is void unless also executed by her husband. *Henrici v. Davidson*, 149 P. S. 323.

65. Where a deed was made by a married woman without the joining of her husband, and a purchase money mortgage given by the grantee; it was *held*, that while the title of the grantee was void under the deed, yet she was estopped by her mortgage from denying her title, and this estoppel operated as against her judgment creditor, who had obtained a judgment against her subsequent in date to the second deed of conveyance to her executed by the original grantor and her husband. *Hirsch v. Tillman*, 13 C. C. 251.

66. Since the passage of the act 8 June 1893 (Brightly's Purdon 1299), a separate acknowledgment of a deed by a married woman is no longer necessary. *Reed v. Stouffer*, 14 C. C. 505.

67. Where the wife of one of the assignors for creditors joined in the deed of assignment upon the representation of her husband, that the debts of the firm amounted to only two hundred and fifty thousand dollars, whereas they in fact exceeded six hundred thousand dollars, and that if she joined in the deed she would save her husband and her son the business, which in point of fact was untrue, the court enjoined the assignee from selling the wife's real estate. *Fleming v. Ogden*, 152 P. S. 418.

68. As to whether a married woman who joins in a conveyance of her husband's real estate is bound by the covenants in the deed, see *Trullinger v. Charles*, 129 P. S. 289.

See **DEED**.

(c) Powers and liabilities in general.

69. The "married persons' property act" of 3 June 1887 (P. L. 332) was *held* to apply to marriages existing when it was passed. *Loftus v. Farmers' & Mechanics' Nat. Bank*, 133 P. S. 97; s. c. 25 W. N. C. 459; affirming s. c. 46 L. I. 46.

70. The power of a married woman to contract, under the act of 3 June 1887 (P. L. 322), is limited to contracts in any trade or business in which she may engage; contracts for necessities, and for the use and improvement of her separate estate. *Reed v. Hurley*, 7 C. C. 125.

71. Upon a limitation of personality to the "heirs" of a first taker, the word "heirs" includes a widow or a husband. *Ashton's Estate*, 134 P. S. 390; s. c. 26 W. N. C. 41; 7 C. C. 366.

72. A recognizance for owelty in partition in the orphans' court is a lien even upon the interest of a recognizer which he takes by descent; and this, though the recognizer be a married woman. *Snively's Estate*, 129 P. S. 250.

73. Quere — Whether a married female heir has, independent of her husband, the right to bid for land in partition proceedings in the orphans' court. *Snively's Estate*, 129 P. S. 250.

74. A married woman who is a stockholder in a bank is liable under the individual liability clause in its charter. *Dreisbach v. Price*, 133 P. S. 560; s. c. 26 W. N. C. 61.

75. A married woman is not competent, even since the act 3 June 1887 (P. L. 332), to be one of the five subscribers to a certificate for a corporation of the second class under the general corporation act 29 April 1874. *New Century Club Society*, 9 C. C. 355.

76. Under the general corporation act 29 April 1874, there must be five persons, free from all legal disability, to form a corporation; this number must be exclusive of married women. *Potter Gas Co.*, 15 C. C. 347. The act 8 June 1893 (Brightly's Purdon 1299) does not enlarge a married woman's capacity to become one of the

persons essential to the creation of a corporation. *Piso Company*, 15 C. C. 348.

77. A corporation will be chartered for the purpose of maintaining a society for beneficial or protective purposes to its members from funds collected therein, said funds to be used in assisting the members in times of sickness or disability and aiding their families in case of death; and this, although the subscribers are composed entirely of married women. *First Independent Ladies' Aid Society*, 40 P. L. J. 105.

78. A married woman who has complied with her part of a contract may insist on the other party performing his part; coverture in such case is no defence. *Ray v. West Pennsylvania Natural Gas Co.*, 138 P. S. 576; s. c. 27 W. N. C. 230.

79. Where there are mutual covenants stipulating reciprocal benefits in an executory contract, and one of the parties, who is a married woman under disability, has performed her part of the contract, equity will compel the performance on the part of the other. *Yerkes v. Richards*, 153 P. S. 646; reversing s. c. 8 Montg. 47. See s. c. 11 Lanc. 308.

80. Even prior to the act 3 June 1887 (P. L. 332), when the promise of a married woman was made in consideration of the transfer of property to her, equity would not permit her to retain the property and repudiate the promise. *Dunlevy's Estate*, 10 C. C. 454.

81. Where a married woman had a power of appointment by will over the trust fund, and induced the trustee, upon giving him full release, to pay over the corpus contrary to the terms of the trust, and the same was lost; it was held, that the trustee would not, at her instance, be surcharged with the fund upon the filing of his account. *Cooper's Estate*, 11 C. C. 617; s. c. 30 W. N. C. 285.

82. A family arrangement, whereby the heirs requested the executor to make advances to another heir to save her home from sale by execution, and charge the same against their shares, will be up-

held even against a married woman. *Good's Estate*, 150 P. S. 307.

83. Where a married woman obtains a stay of execution for the purpose of ascertaining the amount due by the plaintiff in another suit, she will not be permitted, after obtaining judgment in such second suit, to repudiate her own proposal of such a mode of settling, on the faith of which the stay of execution was granted. *Miller v. Klopp*, 141 P. S. 375.

84. Where an agreement is entered into by counsel, that a judgment upon a mechanic's lien be amended so as to change the first name of the wife, one of the defendants, and that the judgment be stricken off, and the defendants permitted to file an affidavit of defence, such an agreement cannot afterwards be repudiated by the wife. *Jobe v. Hunter*, 165 P. S. 5.

85. Where money was loaned by a husband upon mortgage, and the mortgage placed in the wife's name without her knowledge, and the wife subsequently, at the husband's request, assigned the mortgage to one who knew that the wife had no interest in the mortgage or in the money loaned; it was held, that there was no warranty of title upon which the wife could be held legally liable upon the failure of the mortgage. *Moore v. Joyce*, 161 P. S. 138.

86. A married woman who accepts money for safe-keeping, and refuses to return it when demanded, cannot take refuge behind the plea of coverture. *Fullam v. Rose*, 160 P. S. 47.

87. The estate of a married woman is liable for money held by her in trust for a servant; it is not competent for her children to set up the disability of coverture. *Raber's Estate*, 5 York 202.

88. As to the validity of a contract of the wife, see note to *Jones v. Holt*, 15 Atlan. 215.

89. A creamery building erected by a married woman on her property is a reasonably necessary improvement, and a mechanic's lien filed against said building will be sustained; and money ex-

pended at her request in erecting said building may be recovered from her estate. *Marsh's Estate*, 8 Lanc. 353; s. c. 4 Del. 526.

See MECHANICS' LIENS.

(d) Under the act of 3 April 1872.

90. The presentation of a petition under the act of 3 April 1872 (Brightly's Purdon 1301), and a decree that it be filed and recorded, is sufficient protection to those contracting with her, although the petition be not in fact recorded. *Haupt's Estate*, 6 C. C. 583; *Mulligan v. Shea*, 7 Ibid. 118.

91. In an action by a married woman against a constable for levying on her separate estate for a debt of her husband, her petition under the act of 3 April 1872 (Brightly's Purdon 1301) is evidence in her behalf. *Bennethum v. Long*, 13 Atlan. 776.

92. When a debt is contracted by a married woman under the act of 3 April 1872 (Brightly's Purdon 1301), such facts need not be set forth in the narr., but may be set forth in a replication to a plea of coverture. *Mulligan v. Shea*, 7 C. C. 118.

(e) Sale of real estate.

93. A married woman cannot bind herself to convey real estate, except by an agreement in writing, separately acknowledged. *Caldwell's Appeal*, 7 Atlan. 211.

94. A married woman's title to real estate is not divested by a contract of sale, not duly acknowledged by her in accordance with the statute; she is not estopped by acts or declarations, which would estop her were she a *feme sole*. *Stivers v. Tucker*, 126 P. S. 74.

95. Under the act 3 June 1887 (P. L. 332) it was held, that a married woman had the right to sell her land with the same effect as if she were a *feme sole*, and that such right to sell included the right to employ an agent to sell for her and to make a contract fixing his compensation. *Bauck v. Swan*, 146 P. S. 444. See *Real Estate Investment Co. v. Roop*, 132 P. S. 496; *Moore v. Joyce*, 161 P. S. 138.

96. A contract of a married woman in relation to her real estate, void under disability of coverture, cannot be validated by estoppel. *Cryon v. Ridelberger*, 7 C. C. 473. See *Jennings v. Longdon*, 11 Atlan. 212.

97. A married woman cannot be compelled to specifically perform a contract for the sale of real estate, where she had signed but not acknowledged the agreement of sale; the act 8 June 1893 (Brightly's Purdon 1299) does not change the law in this respect. *Whillinger v. Jack*, 16 C. C. 112.

(g) Mortgages by married women.

98. A married woman's mortgage of her separate estate to secure the consideration of a property purchased by her is valid, if not obtained by fraud or coercion. *Zents v. Shaner*, 7 Atlan. 197.

99. A mortgage given by a husband and wife on her separate property to secure a loan to her husband is a valid mortgage. *Citizens' Saving & Loan Ass'n v. Heiser*, 150 P. S. 514.

100. Where a wife's land is mortgaged for the husband's debt, a subsequent judgment creditor of the husband cannot claim that the mortgagee shall proceed first against the property of the wife, nor can he claim to be subrogated to the mortgagee's security against the wife; in such a case the wife is but a surety for the mortgagee of the husband. *Zeller v. Henry*, 157 P. S. 1.

101. Under the act of 3 June 1887 (P. L. 332), a married woman might mortgage her separate estate to secure the debt of another, her husband joining, and she being fully informed of its contents and purpose. *Mansman v. Cady*, 9 C. C. 54.

102. Where a married woman gave her note which was endorsed by her husband and another to the plaintiff, and she afterwards executed a mortgage upon her separate estate to secure the note and her husband joined in the mortgage, it was held, that, as the note was a valid debt as to the endorser,

the mortgage was also valid. *Union Nat. Bank v. Moyer*, 1 Dist. Rep. 432.

103. Where a husband has deserted his wife and lived apart from her and contributed nothing to her support for a number of years, the wife has full authority to execute a valid mortgage upon her real estate; and this, though the husband does not join therein. *Evans v. Watten*, 9 Lanc. 316.

104. Upon a *scire facias sur mortgage* against a married woman, it is a good defence that her liability was to be only that of a guarantor of her husband upon certain notes held by the plaintiff, on which her husband was an endorser. *First National Bank v. Scofield*, 168 P. S. 407.

105. Where a married woman, prior to 1888, became a member of a building association and borrowed money therefrom and mortgaged her land for payment, she was liable only for the actual amount of money received with interest; but where her husband is the member and purchases the loan and she gives a mortgage of her separate estate to secure the payment of his debt, premiums, fines and interest will not be deemed usurious. *Freemansburg Building & Loan Ass'n v. Reinbold*, 5 Northam. 33.

106. A married woman may mortgage her land to pay any indebtedness of her husband, which he may legally contract to pay. *Freemansburg Building & Loan Ass'n v. Reinbold*, 5 Northam. 33.

(h) Bonds.

107. A bond given by a married woman, signed in Pennsylvania prior to the act 3 June 1887 (P. L. 332), and delivered in Delaware, accompanying a purchase money mortgage of real estate situate in Delaware and purchased by the married woman, being valid in that state as a personal obligation, will be enforced against her in Pennsylvania; the contract is governed by the place of delivery. *Baum v. Birchall*, 150 P. S. 164; reversing s. c. 11 C. C. 222.

108. A married woman who has borrowed money from her father to purchase a farm and who has given a bond and mortgage to secure the debt cannot, after her father's death, relieve herself from liability upon the bond by tendering to his executor a deed for the land. *Willock's Estate*, 165 P. S. 522; affirming s. c. 41 P. L. J. 446.

109. A married woman has the power to purchase a home in which she may reside and to bind herself to pay therefor. *Packer v. Taylor*, 12 C. C. 521.

(i) Transfer of stock, loans and notes.

110. Prior to the act 3 June 1887 (P. L. 332), a married woman could not transfer stock without the consent of her husband, but such consent might be shown by the fact that he filled in the blanks in the transfer and power of attorney in his own handwriting and signed the same as a witness to his wife's signature. *Souder v. Columbia Nat. Bank*, 156 P. S. 374; affirming s. c. 10 Lanc. 217.

111. A married woman may transfer loans of the city of Philadelphia, in person or by attorney appointed by her, without the joinder of her husband. And this, though she be a citizen of a foreign country. *Loftus v. Farmers' and Mechanics' Nat. Bank*, 133 P. S. 97; s. c. 25 W. N. C. 459; affirming s. c. 46 L. I. 46.

112. A married woman holding notes of her debtor has no right to transfer them to him in consideration of an annual payment of interest during her life, without the knowledge and consent of her husband; and this, even since the act of 3 June 1887 (P. L. 332). *Hinkle v. Landis*, 131 P. S. 573.

(k) Confession of judgment.

113. A married woman's judgment note for the purchase of land is valid; parol evidence is admissible to prove the consideration. *Hamilton v. Baum*, 4 Cent. 708.

114. Under the act of 3 June 1887 (P. L. 332), a married woman can bind herself by her contract or confess a valid judgment only in three cases—where she engages in trade or business, in the management of her separate estate, and for necessities. *Real Estate Investment Co. v. Roop*, 132 P. S. 496; s. c. 25 W. N. C. 380.

115. Since the act 3 June 1887 (P. L. 332), a confession of judgment by a married woman is valid where it appears that the judgment bond was given to secure a loan made by the plaintiff to the defendant for the purpose of being used by her to pay for the erection of buildings on her own land, and that the money was paid to the contractor who erected the building. *Latrobe Building & Loan Ass'n v. Fritz*, 152 P. S. 224.

116. A married woman has power to confess a judgment to pay off a lien upon her land, where the money is actually used for that purpose. *Abell v. Chaffee*, 154 P. S. 254.

117. A judgment may be confessed by a married woman in part payment of furniture and household effects sold and delivered to her by the plaintiff. *Adams v. Grey*, 154 P. S. 258.

118. When a married woman has a separate estate, she may make all contracts that a party *sui juris* may make; she may confess a judgment as security for money borrowed to pay off a debt contracted for repairs for her separate estate and for necessities for herself and family. *McCormick v. Bottorf*, 155 P. S. 331.

119. Since the act 3 June 1887 (P. L. 332), (since supplied and repealed by the act 8 June 1893, Brightly's Purdon 1299), a married woman may engage in business and enter into contracts in regard to it or in regard to the management of her separate estate or for necessities as fully as a *feme sole*; and she may confess a judgment for an indebtedness whenever by her contract she may subject herself to the liability to be sued; such a judgment cannot be questioned on distribution,

by a stranger to it, on the ground that the record does not exhibit facts showing that it was authorized. *Koechling v. Henkel*, 144 P. S. 215.

120. A judgment confessed by a married woman without fraud, and representing an actual indebtedness, binds her estate, and a sheriff's sale under such a judgment carries the title of the defendant to the purchaser. *Wells v. Bunnell*, 160 P. S. 460.

121. A married woman may confess judgment to secure the payment of the purchase money for a pair of mules bought by her for use upon her farm. *McNeal v. McNeal*, 161 P. S. 109.

122. Under the act of 3 June 1887 (P. L. 332), a married woman may confess a judgment for money borrowed for her own use. *Ewing v. Ewing*, 7 C. C. 260.

123. Upon an amicable *scire facias* to revive a judgment against a married woman given prior to the act of 3 June 1887 (P. L. 332), a judgment confessed since the passage of that act is valid. The original judgment is sufficient consideration to support the new undertaking. *Lyons v. Burns*, 47 L. I. 222.

124. A married woman having conveyed land to another person to enable him to become surety for her husband, afterwards took a reconveyance and confessed a judgment in lien thereof; held, that the judgment was a valid lien on the land but of no force as against the other property; and this, though given since the act of 3 June 1887 (P. L. 332). *Lutkens v. Paris*, 46 L. I. 422; s. c. 6 Lanc. 396.

125. In entering a judgment against a married woman a statement may be filed therewith showing the nature of the indebtedness for which the note was given. *Krumrine v. Bottorf*, 12 C. C. 67.

126. Since the passage of the act 3 June 1887, the judgment of a married woman is presumably valid and not presumably void as before that act. *Abell v. Chaffee*, 154 P. S. 254; *Adams v. Grey*, 154 P. S. 258; overruling *Reed v. Hurley*, 7 C. C. 125; *Hartley v. Decker*, 7 C. C.

127; *Richey v. Carpenter*, 9 C. C. 106; s. c. 7 Lanc. 407; *Raymond v. Goetz*, 9 C. C. 353; *Jacobs v. Toliver*, 10 C. C. 623; *Singer Manufacturing Co. v. Cole*, 11 C. C. 214; *Second Poplar Building Ass'n v. Johnson*, 11 C. C. 453; *Ritter v. Crater*, 7 Montg. 47; *McDonald v. McDonald*, 37 P. L. J. 253; *Barney v. Fahs*, 10 C. C. 424; *Stouffer v. Thomas*, 10 C. C. 421. See *Klinger v. Koons*, 13 C. C. 641; *Jester v. Hunter*, 2 Dist. Rep. 690.

127. A judgment entered upon the judgment note of a married woman will not be opened although it does not, on its face, disclose sufficient ground to sustain a judgment against her, where the statement, however, filed with the note, alleges a cause of action within the statute. *Glassmire v. Neill*, 10 C. C. 418.

128. Where a married woman confessed judgment before a justice and a transcript was entered in the common pleas, the court refused to strike off the judgment although the record showed her coverture and did not show her liability. *Shreiner v. Walker*, 11 Lanc. 318.

129. Where a judgment against a married woman does not show on its face her coverture, such judgment will not be stricken off although the fact that she was a married woman may appear in the evidence, if such evidence also establishes facts which render her liable under the act 3 June 1887 (P. L. 332). *Krumrine v. Bottorf*, 12 C. C. 67.

130. A judgment against a married woman will not be stricken off where there is some evidence under the rule, that the judgment was given by her in the prosecution and management of the business in which she was engaged. *Rosenberry v. Getty*, 8 Montg. 80.

131. A judgment note by a husband and wife for money loaned to the husband to purchase land is good for nothing as against the wife, and a sheriff's sale thereunder of land purchased with the money in the wife's name will pass no title. *Bigler v. Wilson*, 5 Cent. 253.

132. Where a judgment was entered upon a bond executed by a married

woman for her husband's debt, and to save the contents of his store from being sold by the sheriff, and it appeared that she was in no way interested in the store and was not originally liable for the debt; it was held, that the judgment was properly opened. *Harris v. Reinhard*, 165 P. S. 36.

133. Where a judgment note is given by a husband and wife for part of the consideration money of land conveyed to the husband, a judgment entered thereon as to the wife will be stricken off. *Wentz v. Bealor*, 14 C. C. 337.

134. Upon a rule to open a judgment the defendant will be permitted to prove that she is a married woman if the record fails to show it, but the plaintiff will also be permitted to show that her husband has deserted her, and that she is still liable under the acts 22 February 1718 and 4 May 1855 (Brightly's Purdon 903). *Krebs v. Clark*, 9 C. C. 420. See *McIntire v. Bimber*, 9 C. C. 463.

135. A judgment entered against a married woman upon a judgment note executed by her as surety for her co-obligor is void and will be stricken off. *Moyer v. Capp*, 15 C. C. 126.

136. Where a beer bottler who was an owner of real estate, gave to a brewing company a judgment note to secure payment for beer purchased, and such note was signed by himself and his wife, who was also the owner of real estate, the judgment against the wife was stricken off. *Germania Brewing Co. v. Hambright*, 8 Lanc. 305.

137. To bring a married woman within the act 4 May 1855 (Brightly's Purdon 903), it was held, that it must be shown that she afterwards transacted business as a *feme sole* trader; where a husband had deserted his wife, it was held, that a judgment entered upon a bond with warrant of attorney accompanying a mortgage and executed by the wife a few days after the desertion was void. *Nace v. Shreiner*, 2 York 97.

138. Under the act 29 February 1872 (P. L. 21), authorizing married women to con-

tract for sewing machines; it was *held*, that a judgment entered upon a bond with a warrant of attorney executed by a married woman in payment of a sewing machine was void and would be stricken off. *Singer Sewing Machine Co. v. Wilson*, 2 York 98.

139. Upon a rule to strike off a judgment, where the evidence is conflicting as to whether the judgment was given by a wife as a guaranty for her husband or was given for property used in the management of her separate estate, the court will open the judgment for the purpose of taking testimony. *Guignon v. Covell*, 10 C. C. 195.

See JUDGMENT, IV.

(I) Judgments against married women.

140. Since the passage of the act 3 June 1887 (P. L. 332) a judgment against a married woman will not be stricken off because the record fails to set out the facts which before the passage of that act were necessary to give the judgment validity. *Reifsnnyder v. Missimer*, 9 Montg. 94; *Spahr v. Hess*, 9 Montg. 192.

141. Where a judgment was entered by default against a married woman upon a note executed before the year 1887; it was *held*, that an affidavit that the defendant at the time was a married woman living with her husband, and that the note was not given for necessities or purchase money, was sufficient to authorize the court to strike off the judgment. *Hunter v. Kimble*, 10 Montg. 35.

142. Where the record of a judgment shows that the defendant is a married woman but does not affirmatively show her liability on a contract within the act 3 June 1887 (P. L. 332), the judgment is void and a sale of her property upon an execution thereon will confer no title upon the purchaser. *March v. McCardle*, 1 Dist. Rep. 677.

143. Upon a rule to strike off a judgment, where the fact of the defendant's coverture does not appear upon the face of the record, proof may be given of her coverture, but the judgment will not be stricken

off if the circumstances, consideration and purposes of the contract appear to be such as to invest her with the powers and liabilities of a *feme sole*. *Janeway v. Fisher*, 2 Dist. Rep. 123.

144. Upon a *scire facias* to revive a judgment, no defence can be made except one which has arisen since the judgment; where a judgment had been entered against husband and wife and revived without any indication of the relationship of the defendants; it was *held*, that upon its again being revived against them as husband and wife, the presumption was, that the coverture took place after the first revival, and that therefore coverture could not be pleaded upon a *scire facias* to revive the last judgment. *Lauer v. Ketner*, 162 P. S. 265.

145. The record of a judgment before a justice against a married woman is valid which shows that the debt had been contracted by her for necessities, to wit, medical attendance furnished by the plaintiff to the use of her family. *Weber v. Detwiller*, 8 Atlan. 910.

146. A justice's judgment against a married woman, under the act of 11 April 1848 (Brightly's Purdon 1302), is void unless it show all the requisites required by the statute. So, if it be in default of an appearance, it is void if it do not show that some testimony was heard. *McKinney v. Brown*, 130 P. S. 365.

147. A judgment against a married woman for commissions on the sale of property will be stricken off in the common pleas where the transcript of the justice shows that the contract was signed by her husband alone. *Murdock v. Wasson*, 158 P. S. 295.

148. Where the transcript of a justice's judgment in the common pleas failed to show that the defendant was a married woman, depositions were heard to establish the coverture, and where they showed that the cause of action was not such as to render a married woman liable, the transcript was stricken off. *Barney v. Fahs*, 10 C. C. 424; overruled in *Abell v. Chaffee*, 154 P. S. 254.

149. Since the passage of the act 3 June 1887 (P. L. 332), the record of a judgment against two persons, apparently husband and wife, for necessities, will not be reversed on *certiorari*, although the fact of the marriage and the purchase by the wife, or at her instance and request, are not formally set forth on the record. *Burnes v. Maloney*, 7 Kulp 341.

150. Prior to the act 3 June 1887 (P. L. 332), where a justice gave judgment against a married woman, and his docket did not show a binding cause of action against her; it was *held*, that the judgment was void, and that a transcript filed in the common pleas would be stricken off. *Rice v. Foy*, 2 Lack. Jur. 419. See *Foy v. Rice*, 3 Lack. Jur. 17. But see *Abell v. Chaffee*, 154 P. S. 254.

151. A justice's judgment against a married woman for a debt upon which she was not liable was, prior to the act 3 June 1887 (P. L. 332), void, and would be reversed upon *certiorari*. *Foy v. Rice*, 3 Lack. Jur. 17. See *Rice v. Foy*, 2 Lack. Jur. 419.

152. A justice's record showing a judgment against a married woman for "goods sold and delivered" will be stricken off. The act of 3 June 1887 (P. L. 332) did not authorize a married woman to bind her estate generally as a *feme sole*. *Brannon v. O'Neill*, 7 Lanc. 162; s. c. 5 Kulp 458.

153. The transcript of a justice's judgment against a married woman which does not show affirmatively her liability under the statute will be stricken off. *Royer v. Wolf*, 7 Lanc. 315.

154. Where a judgment is entered on a justice's transcript and it is shown that the defendant was a married woman when the judgment was given, and the transcript does not show that the cause of action is such as would render a married woman liable, the judgment will be stricken off. *Barney v. Fahs*, 8 Lanc. 193; s. c. 4 Del. 442. See *Davidson v. McWilliams*, 4 Del. 456; overruled in *Abell v. Chaffee*, 154 P. S. 254.

155. Where a transcript of a judgment

before a justice against a husband and wife did not show that the debt was contracted by the wife or incurred for anything for which she could bind herself, and it appeared that the copy of the summons for the husband was left with the wife without setting forth his absence from home, the judgment as to the wife was stricken off, but the court *held* that the judgment as to the husband was at most only irregular and voidable and was conclusive until reversed by legal proceedings. *Dornes v. Staley*, 10 Lanc. 89. See *Shreiner v. Dommel*, 10 Lanc. 90.

156. If the record of a justice's judgment against a married woman fails to disclose her liability the proceedings will be set aside on *certiorari*. *Gentner v. Van Winkel*, 4 Montg. 165.

See JUDGMENT, IV.

(m) Power to borrow money.

157. A married woman has the right to borrow money on a promissory note with which to buy a horse. *Evans v. Evans*, 155 P. S. 572.

158. One who lends money to a married woman is not bound to see that she actually applies the money to use in business. *Spotts's Estate*, 156 P. S. 281.

159. Where a married woman was deserted by her husband, and three years afterwards borrowed money for the purpose of paying premiums on a life policy on her husband's life and to enable her to go into business; it was *held*, that under the acts 22 February 1718 and 4 May 1855 (Brightly's Purdon 903), the lender was not entitled to recover from her the money loaned. *Raffensparger v. Bender*, 2 York 39.

160. Where a person loans money to a husband and takes a judgment note executed by the husband and wife, and the lender has knowledge that the title is in the wife's name, the presumption is that he loaned the money upon the husband's credit and he cannot resort to the wife's land. *Hockemeyer v. Hartman*, 2 York 173.

(n) To make promissory notes.

161. Where a married woman repudiates a note which she has given as consideration for a release, she destroys the consideration upon which the release was given, and the recovery may be had against her upon the original debt. *Saeger v. Runk*, 148 P. S. 77; affirming s. c. 3 Northam. 13.

162. Where a married woman living in Maryland bought certain goods at a sheriff's sale of her husband's property and gave a note signed by herself, her husband and two sureties, and the note was subsequently paid by the wife and the sureties, and the husband coming to Pennsylvania, the property was again sold as his property, and the wife brought an action for damages; it was held, that evidence was admissible on behalf of the plaintiff, that under the law of Maryland a married woman's note to be binding upon her must be signed by her husband. *Bollinger v. Gallagher*, 163 P. S. 245. See s. c. 170 P. S. 84.

163. A married woman may bind herself by a promissory note given by her for the premium for a policy on the life of her husband, issued for her benefit, if living at the death of her husband, but if she should then be dead to be paid to her children. *Mitchell v. Richmond*, 164 P. S. 566.

164. A married woman who is in reality but an accommodation endorser for her husband cannot be held liable upon her indorsement. *Patrick v. Smith*, 165 P. S. 526.

165. The burden is on a married woman to show that her contract is void; a note given by a married woman for implements used by her husband and son on her farm is valid. *Allen v. Johnson*, 13 C. C. 218.

(o) To purchase on credit.

166. If property be purchased by a wife on credit, she having no separate estate, it is liable for her husband's debts; and this, though a third party endorse the notes and execute a deed of trust

that he has contributed money for the purchase, and upon its repayment the property shall belong to the wife. *Vowinkle v. Johnston*, 11 Atlan. 634; s. c. 10 Cent. 385.

167. Since the act 3 June 1887 (P. L. 332), since supplied and repealed by the act 8 June 1893 (Brightly's Purdon 1299), a married woman, without separate estate, may, for the purpose of engaging in business, purchase property wholly on credit, and hold the same against her husband's creditors. *Walter v. Jones*, 148 P. S. 589.

168. Under the act 3 June 1887 (P. L. 332), it was held, that a married woman might purchase land on credit and give any kind of lawful lien upon it as security for the purchase money. *Campe v. Horne*, 158 P. S. 508.

169. Under the act 3 June 1887 (P. L. 332), a married woman may enter into a contract to purchase real estate for the purpose of a residence for herself and family, and she is personally liable for the money borrowed to pay for it. *Steffen v. Smith*, 159 P. S. 207.

(p) Promise after discovery.

170. Where money is loaned to a married woman, an acknowledgment alone, after discovery, is not sufficient to validate the contract; the promise to pay must be clear and distinct and is then enforceable only according to its terms. *Kelly v. Eby*, 141 P. S. 176.

171. A bond executed by a married woman will not become binding upon her after discovery by a mere naked ratification by her, or by a simple acknowledgment of her signature. *Nesbitt v. Turner*, 155 P. S. 429; affirming s. c. 7 Kulp 41.

172. A judgment entered upon the judgment note given by a married woman for a debt due by her husband will be stricken off; to establish a ratification of such a note after the death of her husband, the promise must be clear and distinct and the recovery must be on the new promise. *Eppleman v. Bott*, 7 York 185.

(q) Suits by married women.

173. The earning capacity of a husband is not the property of the wife, and she cannot maintain during his life an action for its impairment by the deed or neglect of another; where a man of known habits of intemperance has been furnished with liquor, and while under the influence thereof committed a crime for which he was sentenced to prison; it was *held*, in an action under the act of 8 May 1854, sec. 3 (Brightly's Purdon 1232), that the wife could not recover from the liquor seller damages based on the loss to her through her husband's inability to work for his family during his imprisonment. *Bradford v. Boley*, 167 P. S. 506; s. c. 36 W. N. C. 238.

174. In trespass by a wife against a constable and attaching creditor who have sold property under an execution, which the wife claims to be hers, she is required to establish that she paid for the property out of her separate estate. *Bollinger v. Gallagher*, 144 P. S. 205.

175. Where the father of a minor brought suit against a clergyman, under the act 14 February 1729, 1 Sm. 180, for marrying his child without the consent of its parents, and the mother brought a similar suit and recovered a judgment; it was *held*, that such judgment was a bar to the recovery of the penalty by the father; there can be but one recovert of such a penalty. *Boner v. Miller*, 2 York 176.

176. In a suit by a wife for personal injuries, a release of damages by the husband, under the act 11 June 1879 (Brightly's Purdon 1302), is sufficient to enable her to recover for loss of earning capacity, and this, without any formal transfer to her of the husband's rights. *Baker v. Northeast Borough*, 151 P. S. 234.

177. In an action of trespass for assault and battery upon a wife, the married persons' property act of 3 June

1887 does not enable a wife to recover the loss of ability to do household work. *Walter v. Kensinger*, 13 C. C. 222.

See HUSBAND AND WIFE, IV. (a).

(r) Suits against married women.

178. Since the passage of the act 3 June 1887 (P. L. 332), the husband of a married woman need not be made a party defendant in an action against the wife; and this, although the plaintiff's claim may have originated before the passage of the act. *Littster v. Littster*, 151 P. S. 474.

179. A wife of the defendant who is in actual possession of the goods should be named as co-defendant, in replevin, and, if this has not been done, she will be allowed to intervene and defend, and where the replevin is for household goods, and the plaintiff claims under a bill of sale from the husband, the wife may show that the sale was made to the plaintiff with the intention of defrauding her of her support. *Lawall v. Lawall*, 150 P. S. 626.

180. In partition proceedings of real estate in which a wife has an interest, the husband must be made a party; and this, even since the act 3 June 1887 (P. L. 332). *McCoy's Estate*, 11 C. C. 9; s. c. 29 W. N. C. 412.

181. Where taxes are lawfully assessed upon the separate real estate of a married woman, she is personally liable therefor and may be lawfully sued for the same without a joinder of her husband. *Hunt v. Bennett*, 10 C. C. 427.

182. In an action against a married woman, a statement is sufficient if it meets the requirements of a statement in an action where coverture is not an element; the plaintiff is not required to allege or prove, as a part of his case, that the debt was contracted for necessities. *Harrar v. Croney*, 13 C. C. 193; s. c. 32 W. N. C. 90.

183. It is a sufficient statement to charge the separate estate of a married woman that plaintiff at her special instance and request performed labor and

furnished materials as dressmaker for the said defendant, and that said labor and materials were furnished on the credit of her separate estate, and were necessary. *Crowe v. Lippincott*, 38 P. L. J. 433.

184. Where there is neither an averment or proof of the facts necessary to bring a married woman within one of the exceptions, she cannot be held liable on her contract, and she is not estopped from raising the question on a rule for a new trial by the fact that she did not request the court to charge that, under the pleadings and evidence, she was not liable. In such a case, however, the plaintiff, after verdict, may enter a *nolle pros.* as to her, and enter judgment against the husband. *Turner v. Laubagh*, 6 Kulp 368; s. c. 5 Del. 57.

185. Where a judgment has been recovered against a married woman in another state for a cause of action in which, in such other state, coverture would have been no defence, although it would have been a good defence in this state, such coverture cannot be set up as a defence in a suit upon the judgment in this state. *Thompson v. Owen*, 8 Kulp 36.

See HUSBAND AND WIFE, IV. (b).

V. Matters arising between husband and wife.

(a) Tenancy by entireties.

186. Where land is conveyed to husband and wife, they become tenants by entireties; and when, on a sale of the land so held, they take in their joint names a mortgage for the purchase money, the presumption is that they intend to hold the mortgage as they did the land. Tenancy by entireties is not abolished by the act 31 March 1812 (Brightly's Purdon 1089), abolishing survivorship in joint tenancy; nor by the married persons' property act 3 June 1887 (P. L. 332). *Bramberry's Estate*, 156 P. S. 628.

187. Where a mortgage is assigned to husband and wife in equal moieties, or half parts, as tenants in common, the husband and wife hold by entireties; and

upon the death of either, the survivor takes the whole by right of survivorship. *Young's Estate*, 166 P. S. 645; affirming s. c. 15 C. C. 296; 35 W. N. C. 164.

188. A husband and wife making a deposit in their joint names hold by entireties, and the survivor takes the whole; and this though the husband before his death gave notice of his intention to withdraw. *Donnelly's Estate*, 7 C. C. 196; s. c. 46 L. I. 230.

See JOINT OWNERS.

(b) Title as between husband and wife.

189. After a wife has joined her husband in an assignment of real estate for the benefit of creditors, a sale by the assignee, and a distribution to creditors, she is estopped from asserting a resulting trust in herself. *Jennings v. Longdon*, 11 Atlan. 212. See *Cryan v. Riddelsperger*, 7 C. C. 473.

190. It is presumed that a policy of life insurance taken out by the husband in favor of his wife is intended as a provision for her after her death, and not as a security for his debt to her. *Karch's Estate*, 133 P. S. 84.

191. Money deposited in the name of a wife is, *prima facie*, her money and when claimed by her husband on her decease, the burden is on him to prove that it was his property. *Qualters's Estate*, 147 P. S. 124.

192. The possession of real estate by a wife while living with her husband is, in the absence of a recorded title in her husband, inconsistent with it, sufficient notice of her title to put a purchaser on inquiry. *Brown v. Carey*, 149 P. S. 134.

193. Where a trustee is appointed by the orphans' court to sell land, and the trustee's wife has an interest in the land, he is bound to pay over to the wife her share of the proceeds, and a mere delay by the wife in enforcing her legal demand will not release from liability either the trustee or his surety; in such a case, his promise to convey to his wife some of his own real estate in payment of

her legacy will not discharge his sureties, if the promise be not kept. *Kittel's Estate*, 156 P. S. 445.

194. Where a husband and wife live together upon the land, the presumption that the possession is that of the husband may be rebutted by showing that the wife acquired the right of possession by purchase from her father. *Collins v. Lynch*, 157 P. S. 246; reversing s. c. 7 Kulp 15.

195. Where a deposit was in the name of a wife; it was *held*, that a testamentary paper in her handwriting to the effect that the deposit really belonged to her husband was competent evidence of his ownership; and this, although when the paper was found the signature was torn off; and where it further appeared that the wife had declared that the money belonged to her husband and that she had taken charge of it because he was not much of a business man; it was *held*, that such evidence was sufficient to rebut any presumption of a gift. *Gracie's Estate*, 158 P. S. 521; affirming s. c. 41 P. L. J. 9.

196. Upon a bill for an account, the plaintiff's ownership of certain money given by his wife to the defendant is not sufficiently established by proof that his wife had no property at the time of her marriage and had inherited none since; she might have acquired money in some other way. *Saake v. Dorner*, 167 P. S. 301; 36 W. N. C. 204; affirming s. c. 3 Dist. Rep. 170.

197. Where the defendant while sick had money in hand and deposited it in his wife's name for safety and demanded a check from her, so that in case of her death he would have no trouble to get it; it was *held*, on a distribution of his estate, that the widow as executrix would be surcharged with the amount so deposited. *Young's Estate*, 10 Montg. 93.

198. Where a testator in his lifetime had procured one of his debtors to make notes under seal in favor of his, the decedent's, wife, and such notes were found among his papers after his death; it was *held*, that the gift to the wife was per-

fect, and it was further *held*, that the maker of the notes having no interest in the question whether the notes were the property of the decedent or his wife, was a competent witness. *Emig's Estate*, 3 York 111.

199. Where the decedent died two years after the death of his wife, and during his lifetime he had endorsed certain obligations due him over to her, and they were found after his death among his writings; it was *held*, that in the absence of any evidence showing a delivery they remained his property and were part of his estate. *Emig's Estate*, 3 York 111.

See GIFT.

(c) Taking title to wife's property in husband's name.

200. That a husband bought land partly with his wife's money, sold the land and bought other land with the purchase money, raises no resulting trust in the wife for the land purchased. *Jennings v. Longdon*, 11 Atlan. 212.

201. Where a husband invests his wife's money in real estate and takes the title in himself without her consent, she has a resulting trust in the land, which she can assert at any time she sees proper to enforce it. *Light v. Zeller*, 144 P. S. 570; *Light v. Zeller*, 144 P. S. 582.

202. Where land is bought with the wife's money but the deed is taken without her knowledge in her husband's name, and upon her discovery of the mistake she promptly insists upon a conveyance to herself, the property cannot be sold for a debt of the husband, contracted during the time which the property stood in his name; but it seems that if she allows the title to remain in her husband until he contracts a debt, she will be estopped as against that creditor from denying her husband's title. *Young v. Senft*, 153 P. S. 352.

203. Where land is purchased by a wife and it is paid for with her money, but the deed is made by mistake to her husband, who recognizes her title, no re-

sulting trust arises which must be enforced within five years under the act 22 April 1856 (*Brightly's Purdon* 1212); in such a case as between them, the mere continuance of occupancy by the husband for any space of time, will not operate in equity, or by force of any statute, as an extinguishment or bar to the assertion of her title. *Miller v. Baker*, 160 P. S. 172.

204. Where the title to land is taken in the name of a husband and the wife has contributed a portion of the purchase money, it is not necessary to sustain a resulting trust that the wife's money should have gone into the land at the inception of the husband's title; it is enough if it be paid in instalments as encumbrances fall due, provided such payments be made in pursuance of the contract under which the title was acquired and upon the agreement that she was to have title to so much as she paid for in exchange for her money. *Gilchrist v. Brown*, 165 P. S. 275.

205. Where a husband upon purchasing real estate took title in his wife's name, and the latter contributed a small amount of the purchase money and made a will devising the land to her husband, and subsequently the property was sold and with the proceeds the husband bought other real estate in his own name and dealt with it as his own for several years, until there was a separation between himself and his wife; it was *held*, upon a bill for an account brought by the wife, that the evidence was sufficient to rebut the presumption of a gift, but that the wife was entitled to a portion of the purchase money contributed by her with interest from the time the husband sold the property and began to treat the proceeds as his own. *Moore v. Moore*, 165 P. S. 464.

See USES AND TRUSTS.

(d) Use of wife's property by husband.

206. From the mere fact of a husband's reception of his wife's money the law raises a presumption that he received it for her use, and the burden is on him or his heirs to prove a gift. Such a gift

cannot be established by his declarations not made in the presence of his wife. *Wormley's Estate*, 137 P. S. 101; s. c. 27 W. N. C. 13.

207. A wife who permits her husband to use her rents as his own, cannot recover them from his estate without proof of an understanding that he was to account for them; there is a plain distinction in this respect between his receipt of the principal and his receipt of income; so, proof of acquiescence may be implied from circumstances. *Hauer's Estate*, 140 P. S. 420.

208. Where a husband deals in the estate of his wife, the law will, upon very slight evidence, cast upon him the burden of showing that he has derived no advantage therefrom. *Nichols v. Nichols*, 149 P. S. 172.

209. Equity will not charge a husband as a debtor for arrears of income of his wife's separate estate in the absence of an agreement, express or implied, on his part, to pay interest. *Kittel's Estate*, 156 P. S. 445.

210. The occupation of the wife's premises by the husband for the purposes of his business raises a presumption that he occupied them with her assent and no rent was to be paid therefor. *Gilman's Estate*, 9 C. C. 111.

211. Where a wife endorsed over to her husband checks representing her separate estate, and he received the money; it was *held*, that the legal presumption was that he received it for her, and that she could recover it against his estate in the absence of evidence that it was repaid to her or expended by him for her use, or that it was given to him by her. *Leonard's Estate*, 9 C. C. 410.

212. Where a husband receives and uses his wife's money she can recover the amount from his estate. *Travis's Estate*, 7 Lanc. 129.

213. Where it is shown that a deceased husband received and appropriated a part of the principal of his wife's estate, she is entitled to recover it from his estate with interest from the date of his death, in the absence of evidence that it was a gift;

this rule, however, does not apply to a husband's receipt and use of income or interest due to his wife without objection from her. *Brandt's Estate*, 11 Lanc. 321.

214. Where a husband receives his wife's money to be applied at her request, in the purchase of a home, he is not liable for money so received upon a suit by the wife or her legal representatives to reclaim the same. *Heck's Estate*, 11 Montg. 66.

215. A wife is not entitled to interest from her husband's estate on money of hers used by him in his lifetime, except from the date of his death. *Wormley's Estate*, 27 W. N. C. 13.

(e) Title as between wife and her husband's creditors.

216. Money or property donated to a wife cannot be levied on for her husband's debts. It may be shown by a subscription paper that property levied on as the husband's was bought with money belonging to the wife. *McDevitt v. Vial*, 11 Atlan. 645.

217. If husband and wife are living together, the presumption is that the household property belongs to the husband; the burden is on the wife to show that she owned it before marriage or acquired it subsequently, independent of her husband. *McDevitt v. Vial*, 11 Atlan. 645.

218. If a wife place her property in her husband's salesroom and mix it with his wares, it may be treated as a loan or gift and is liable to seizure by her husband's creditors. *Bennethum v. Long*, 13 Atlan. 776.

219. Where a wife purchased a farm in her own name, paid half the consideration money out of her separate estate and gave her notes for the balance, which were paid partly by execution against a portion of the land and partly from its earnings, she could hold as against the creditors of her husband, and this, though he lived with his wife upon the farm and worked it. *Tate v. Carney*, 14 Atlan. 327; s. c. 13 Cent. 97.

220. A married woman may, in good faith, lend money to her husband for the purchase of a horse to be used in her business; a seizure of the horse for the husband's debts will support an action of trespass against the constable. *Tibbins v. Jones*, 3 Cent. 542.

221. If a married woman purchase personal property on the credit of her personal estate, and her surety become such with that knowledge, she is entitled to hold against the creditors of her husband. *Gregg v. George*, 5 Cent. 464; s. c. 11 East. 380.

222. A married woman having a separate estate, purchasing a store and giving another as surety on her note, can hold the goods against her husband's creditors, it appearing that the surety had become such with knowledge that she was possessed of available means to meet the note when due. *Ibid.*

223. In trespass by a married woman against the sheriff for selling her goods under execution against her husband, the burden is upon the plaintiff to establish by clear and satisfactory evidence that the goods had been bought for her and paid for with money of her separate estate. *Diehl v. Peterson*, 127 P. S. 65.

224. In ejectment against husband and wife for land sold as the property of the husband at sheriff's sale and purchased by the plaintiff, the laboring oar is on her to show that the property was bought with her own means. *Steckman v. Schell*, 130 P. S. 1.

225. A lot purchased by a wife on the credit of her separate estate may be held by her against her husband's creditors; so if a house be built on the lot with money raised on mortgage, the lot having advanced in value. *Perrine v. Dinan*, 133 P. S. 544.

226. In a suit against a sheriff for selling property of the wife under execution against her husband, she may show title by proving that the goods were purchased with the proceeds of the sale of a building paid for by her with the proceeds of a stock of notions

bought by her on credit, and which building she had moved on to her own lot. *Rogers v. McDowell*, 134 P. S. 424.

227. Upon the trial of an interpleader, where it appeared that the household goods had been in the possession of the claimant, a married woman, for over thirty years, and that she received them from her first husband, it was *held*, that the fact that the second husband replaced various articles, which were worn out by use, did not change the wife's title. *Norbeck v. Davis*, 157 P. S., 399.

228. Where a wife in ejectment claims title to real estate sold under execution as the property of her husband, if there be evidence that the property was bought with the wife's money, the case should be submitted to the jury; and this, without regard to the weight of the testimony. In such a case evidence of the husband's insolvency was *held* to be irrelevant, but it was proper to admit evidence of the cost of the building upon the question as to whether the wife furnished all the money. *Campe v. Horne*, 158 P. S. 508.

229. Where real estate is bought by a wife, but paid for in part by the wife and in part by money loaned by the husband, and business is carried on therein in the wife's name, the husband's creditors are entitled, out of the proceeds of a subsequent sale of the property, only to the amount of the purchase money contributed by the husband with interest thereon; they are not entitled to any portion of the profits realized by the wife's venture. *Karstorp's Estate*, 158 P. S. 30.

230. Though a husband furnishes his wife the money to assist her in paying for a farm, his creditors cannot levy on the grain in the ground and other personal property on the farm belonging to the wife, in which her husband never had any interest. *Phillips v. Hall*, 160 P. S. 60.

231. Where two horses were claimed by a wife as her property, and she brought suit against the sheriff for selling them as the property of her husband; it was

held, that the case was for the jury, where the evidence established the fact that the horses were purchased by her husband to supply the place of two horses owned by her in her own right, one of which had died and the other she had sold, and that the notes given by her husband for the price of the horses were subsequently paid by her with money of her separate estate. *Gockley v. Miller*, 162 P. S. 271.

232. In an action by a wife for the levy and sale of her property on an execution against her husband, she must show that the property was hers, that it was paid for by her and was the produce of the earnings of her individual business; in such an action the books, business sign and government returns are evidence to be considered upon the question of ownership. *Smith v. Axe*, 14 C. C. 532.

233. Even before the act 3 June 1887 (P. L. 332), a married woman who had complied with the requirements of the act 3 April 1872 (Brightly's Purdon 1301) might borrow money on her own credit though possessed of no separate estate, and goods purchased with such borrowed money were not liable for her husband's debts; that she may do so since the passage of the act of 1887 cannot be doubted. *Wasser v. Hance*, 7 Kulp 356; citing *Orr v. Bornstein*, 124 P. S. 311.

234. In an action against a sheriff for illegally selling a wife's goods as the property of her husband; it was *held*, that where a married woman owns articles of personal property and sells them and with the money received buys other articles, the latter are as much a part of her separate estate as were the original articles. *Forry v. Wiley*, 1 York 174.

235. A sale to a married woman either for cash or otherwise is no evidence of her ownership; the property is presumably her husband's, unless she shows that she had a separate estate and that such separate estate was the means, with which she purchased the property. *Farquhar v. Stick*, 5 York 53.

236. Where a woman is living with her

husband, her mere possession of property or money is no evidence of ownership by her; in every contest with her husband's creditors she must show by clear and satisfactory proof, her ownership, and that she acquired the property in some manner authorized by law, and that her husband's credit and her husband's money did not go into it. *Quickel v. Finley*, 7 York 169.

237. Equity will enjoin a creditor, in a clear case, from selling real estate standing in the name of a married woman, upon an execution against her husband. *Perry v. Lee*, 6 Kulp 315.

See FRAUDULENT CONVEYANCES.

(g) Conveyances from husband to wife.

238. The voluntary conveyance to a wife by an insolvent husband engaged in a hazardous business, made with intent to place the property beyond the reach of his creditors, is fraudulent and void as to a subsequent creditor, who became such without notice of the conveyance. *Marshall v. Roll*, 139 P. S. 399.

239. Where a husband makes a deed to his wife as a gift, of a not undue portion of his estate, and such deed is drawn by counsel and executed openly in the presence of one of his children and acknowledged before a notary who had known the grantor for many years, without coercion, collusion or fraud, such deed cannot be overcome on the ground of mental incapacity, in the absence of clear and unquestionable evidence. *Elcessor v. Elcessor*, 146 P. S. 359.

240. Where, upon the trial of a sheriff's interpleader, the goods were claimed by the wife of the execution defendant, under a trust deed from the purchasers at a sheriff's sale under judgments against the husband, one of which was in favor of the wife; it was held, that the trust being to pay the grantors' claims and apply the balance in support of her family, it was necessary to show, in order to defeat the claimant, either that the grantors did not acquire a good title under the sale, or that the assignment to the claimant was fraud-

ulent and intended by the grantors to hinder and delay the then existing creditors of the claimant's husband. *Evans v. Kilgore*, 147 P. S. 19.

241. The transfer of a judgment by a husband to a wife at a time when the husband is out of debt is a valid gift; the consideration of natural love and affection will sustain it. *Reese v. Reese*, 157 P. S. 200.

242. If a husband be not indebted at the time, whether a conveyance to his wife was in fraud of future creditors, is for the jury. *Garis v. Fish*, 7 Lanc. 5.

243. Where property was assigned by a husband to his wife whilst the husband was indebted, and it was sold under execution against the husband; it was held, in an action of ejectment by the wife against the sheriff's vendee, that as the referee had found that the wife's money was not used in the purchase of the property, she was not entitled to recover on the ground of a resulting trust. *Flynn v. Metzgar*, 2 York 141.

See FRAUDULENT CONVEYANCES.

(h) Judgment from husband to wife.

244. A judgment confessed by a husband to a wife will not be set aside where the evidence is clear that she had a separate estate and loaned him the money. *Buser v. Buser*, 6 Lanc. 290; s. c. 2 York 97.

245. Where a wife holds a judgment against her husband, her assignment to her husband's creditor as collateral for his debt is valid, upon proof of her husband's oral assent thereto. *Jones v. Jones*, 2 Northam. 341; s. c. 4 Del. 396.

246. A confession of judgment by a husband to his wife was held to be unconditional, and authorized the entry of judgment by the prothonotary. *Richards v. Richards*, 26 W. N. C. 339.

247. Where a judgment note was given by a husband to a trustee for his wife for borrowed money, and was payable one day after date and the wife lived with her husband seventeen years after the date of the note, and the wife's declarations were proven that she did not claim

interest, the supreme court refused to reverse a decree of the court opening the judgment entered after the wife's death with interest, and directing an issue to try how much was due on the note. *Beaver v. Stear*, 168 P. S. 466.

See FRAUDULENT JUDGMENTS.

(4) Claims by wife against husband.

248. Upon the distribution of an assigned estate a judgment confessed by the assignor to his wife for a debt due to the wife and also for debts of the husband assumed by her may be allowed. *Breneman's Estate*, 150 P. S. 494; affirming s. c. 9 Lanc. 129.

249. A bond given by a husband to his wife, conditioned that he shall be kind and faithful, is not void; upon maltreatment, payment may be enforced. *Reamey v. Bayley*, 11 Atlan. 438.

250. Where a husband gave to the plaintiff, trustees for his wife and her children, a bond, conditioned to pay the interest to his wife, or to the plaintiffs in trust for her, annually during her life and on her death to pay the principal to her children; it was held, in an action by the trustees on the bond, that the wife was the sole owner of the interest on the fund and her positive and definite declaration *ante motam litem* were admissible and sufficient to show in defence of the action that she had made a gift of the interest to defendant. *Galt v. Smith*, 145 P. S. 167.

251. A wife who claims that she loaned money to her deceased husband has the burden upon her to establish the fact fully and clearly. *Brunner's Estate*, 6 Montg. 115.

252. Where a married woman had a separate bank account and drew money at various times from her account and deposited it to the credit of herself and her husband, "either to draw," and after the first advance her husband by a codicil to his will acknowledged that the transaction was a loan; it was held, that a presumption arose that the subsequent advances made after the date of the codi-

cil were also loans and not gifts, and that the burden was on the husband's heirs to prove that they were gifts. *McGarvey's Estate*, 5 Del. 440.

253. Where a promissory note is given by a husband to his wife and is payable on demand "with interest from this date until paid," the wife may recover from his estate interest from the date of the note; in such a case, the presumption that the interest was applied from year to year to the family expenses is inapplicable. *Reber's Estate*, 143 P. S. 308.

254. Where a widow made a claim against her deceased husband's estate of money due her before marriage, and it was shown that the day before their marriage she burned the note and said she had given him the amount, but it was further shown by the declarations of the husband made just before his death, that he still owed her the money; it was held, that an auditor's finding in favor of the claimant would be sustained. *Young's Estate*, 10 Montg. 93.

255. To a note held by a wife against her husband other creditors cannot set off advances made by him for the improvement of her separate estate, unless the evidence shows intentional fraud. *Newell's Estate*, 37 P. L. J. 432.

256. For a brief of authorities on the validity of a note given by a husband to his wife and the sufficiency of consideration, see note to *Fuller v. Lumbert*, 5 Atlan. 185.

(k) Suits between husband and wife.

257. A married woman joined with her husband may maintain an action against a firm of which he is a member, for a breach of covenant in a lease of her real estate. *Freiler v. Kear*, 126 P. S. 170. See s. c. 133 P. S. 40.

258. Ejectment lies by a wife against her husband living separate from her, who against her will has taken and retained possession of her real estate. *McKendry v. McKendry*, 131 P. S. 24.

259. The acts 11 April 1856, sec. 3 (P. L. 315), and 11 June 1889, sec. 2

(Brightly's Purdon 1303), giving a wife the right to sue her husband for slander, are repealed by the act 8 June 1893, sec. 3 (Brightly's Purdon 1303). *Mink v. Mink*, 16 C. C. 189.

260. An action on a contract to pay a fixed sum monthly for the support and maintenance of their children cannot be sustained by a married woman against her husband who has deserted her. *Houston v. Houston*, 4 Dist. Rep. 248.

261. A wife who has been deserted by her husband may sue him for her support during the time he has neglected to support her; such a proceeding is not repealed by the act 8 June 1893 (Brightly's Purdon 1229). *Miller v. Miller*, 4 Dist. Rep. 309.

262. The court refused to enjoin a wife from proceedings against the land of her husband in the hands of his vendee, by *venditioni exponas*, though she had joined with her husband in the deed for the premises. *Trullinger v. Charles*, 129 P. S. 289.

(l) Liability of wife for her husband's debts.

263. The contract of a married woman to pay a valid debt of her husband out of her separate estate creates a moral obligation, which is a sufficient consideration to support a bond and mortgage for the same debt executed after her husband's death. *Holden v. Banes*, 140 P. S. 63.

264. Where goods were furnished to a hotel and were charged not to the wife but to her husband, and they were not furnished upon her credit, and she denied that she had any interest in the business; it was *held*, in an action against her for their price, that a non-suit was properly entered. *Gallagher v. Swan*, 155 P. S. 15.

265. A married woman may assign her personal property as security for her husband's debts, and such an assignment will be held good although the husband made false representations to his wife to secure the assignment, if the creditor had no knowledge of the fraud. *Kulp v.*

Brant, 162 P. S. 222; affirming s. c. 9 Montg. 161.

266. Where a married woman charges herself with money loaned to her husband to go into business, she will be held to have signed the paper as guarantor or surety for her husband, and this is forbidden by the act 8 June 1893 (Brightly's Purdon 1299). *Bolton's Estate*, 14 C. C. 575.

267. A married woman may pay her husband's debt with her own promissory note. *Harrar v. Croney*, 13 C. C. 193; s. c. 32 W. N. C. 90.

268. A married woman cannot repudiate a gift or a contract fairly made under which she has delivered the possession of her property; she may use her money in the payment of her husband's debts. *McGuire v. Fitzpatrick*, 8 Montg. 79.

269. The separate estate of a married woman is not liable for a debt contracted by her husband on his own credit; and this, although the materials purchased were used on the wife's property with her knowledge. *Healy v. Lord*, 10 Montg. 91.

(m) Her liability for her husband's acts.

270. Where a husband with his wife's consent institutes partition proceedings on behalf of his wife but in his own name, and a purpart is awarded to him instead of to her, the wife is bound by a sheriff's sale of such purpart under the recognizance entered by the husband for owelty. *Barkley v. Adams*, 158 P. S. 396.

271. Where the plaintiff sued a married woman for the cost of paving a footway and averred that the defendant had authorized her husband to make the contract; it was *held*, that an affidavit of defence was insufficient which averred that she had never employed or authorized any person to employ the plaintiff, that the work was not done in a proper way nor in accordance with her directions, that plaintiffs did more than twenty per cent more work than they were employed to do, and that part of the work was not in accordance with the proper grade and

would have to be taken up, and defendant was entitled to set off the cost of relaying the pavement, but she did not give any figures to fix the amount claimed. *Mack Paving Co. v. Young*, 166 P. S. 267.

272. A dwelling-house being erected on a wife's land by the direction of her husband and with her knowledge and concurrence, his agency and her promise to pay will be implied. *Muckel's Estate*, 8 Lanc. 89; s. c. 4 Del. 386.

See AGENCY:

MECHANICS' LIENS.

VI. Separate maintenance.

273. Upon a bill to set aside articles of separation on the ground of fraud, the court may, upon an answer denying the allegation of the bill, dismiss the same; but in the absence of a cross-bill it is error to further decree that the articles be given full force and effect. *Brockman's Appeal*, 3 Cent. 546.

274. A wife cannot, by an agreement of separation, be enabled to bind herself as a *feme sole*. *Brooks's Estate*, 140 P. S. 84; affirming s. c. 8 C. C. 514; 47 L. I. 298.

275. Where a husband in pursuance of articles of separation agreed to pay fifty dollars a month to his wife's brother for the care and support of his wife during her natural life, and the defendant guaranteed the payment "of the said several instalments at the time and times when the same becomes due"; it was *held*, that it was no defence on the part of the guarantor in a suit brought after the death of the husband, that the latter's duty to support terminated on his death. *Elmendorf v. Whitney*, 153 P. S. 460.

276. Where articles of separation were accompanied by a bond for the wife's support which was signed by the obligor's mother; it was *held*, that an affidavit of defence to the bond, that the defendants were induced to sign it by the threat of the arrest of the husband for adultery, was insufficient to prevent judgment, where there was no averment that there

was an agreement not to prosecute, and that the obligors would not have signed without such an agreement. *Hamilton v. Lockhart*, 158 P. S. 452.

VII. Separate estates of married women.

277. Where a wife owns real estate, she is entitled to the profits of it; and this, although her husband expends in labor for its cultivation. *Forry v. Wiley*, 1 York 174.

278. Where real estate was conveyed to a wife by a stranger and this conveyance to her was recited in the deed from her and her husband; it was *held*, that a purchaser at sheriff's sale under a judgment and execution against the husband after the conveyance to the wife, was not entitled to recover in ejectment on simply showing his title. *Kinyon v. Leonard*, 149 P. S. 318.

279. A separate use estate may still be created in a married woman since the act of 3 June 1887 (P. L. 332); that act has no effect upon the construction of an instrument creating such an estate. *MacConnell v. Lindsay*, 131 P. S. 476.

280. A trust for the separate use of a daughter, unmarried and not in contemplation of marriage, is void though active duties be imposed on the trustee. But, if a part of the testator's purpose was to protect the corpus of the estate for the parties in remainder, the trust will be upheld to support the remainder. *Kuntzman's Estate*, 135 P. S. 578; s. c. 136 Ibid. 142; 26 W. N. C. 445.

281. A devise to the separate use of a married woman to the exclusion of her husband, and after her death to her "issue," excepting a right of curtesy in one-third to the surviving husband, vests but a life estate in the wife. The word "issue" must be read as a word of purchase. *Shalters v. Ladd*, 141 P. S. 349; affirming s. c. 8 C. C. 528. See *Shalters v. Ladd*, 163 P. S. 509.

282. A devise to trustees to pay interest to two married daughters during their

lives, and after their decease the whole to descend to their issue, created an estate for their natural lives with right of survivorship, with remainder to their lawful issue. *Hart's Estate*, 7 C. C. 369; s. c. 46 L. I. 454.

283. The *cestui que trust* in a separate use trust, being neither married nor contemplating marriage at the date of the will, is entitled to the fund absolutely; and this, though she afterwards marry in the lifetime of the testator. *Frank's Estate*, 47 L. I. 465.

284. A deed of a married woman and her husband will convey no title to her separate use property; and this, though the instrument of donation specify that it shall be subject to her control. *MacConnell v. Lindsay*, 131 P. S. 476.

285. Since the passage of the act 3 June 1887, a married woman has the power to give her separate property in trust for her children. *Saake v. Dorner*, 167 P. S. 301; 36 W. N. C. 204; affirming s. c. 3 Dist. Rep. 170.

286. Where a separate use trust is created for a married daughter and no power of alienation is given, she cannot pass an estate by will and a devise to her husband is invalid. *Steinmetz's Estate*, 168 P. S. 175; affirming s. c. 15 C. C. 259.

287. A married woman being a *cestui que trust* under a trust for separate use, cannot assign the income in the hands of the trustee. *Shanty's Estate*, 7 C. C. 199.

288. Upon the conveyance in trust for the sole and separate use of a married woman and her heirs, and the subsequent death of her husband, she is entitled to a conveyance from the trustee. *Chadwick's Appeal*, 7 Atl. 178.

289. A separate use trust with remainder to the issue of the wife's body, is executed by the death of the husband or divorce, but not by the husband's desertion, though the circumstances constitute her a *feme sole* trader. *People's Savings Bank v. Denig*, 131 P. S. 241.

290. The orphans' court will not order the sale of the separate estate in Pennsyl-

vania of a deceased married woman, who died domiciled in Virginia, for the payment of a debt contracted in Virginia by indorsement of her husband's note; and this, though a remedy *in rem* against her estate is given by the Virginia act of 4 April 1887. *Whitehurst's Estate*, 7 C. C. 12.

See USES AND TRUSTS.

VIII. Feme sole traders.

291. The act of 4 May 1855 (Brightly's Purdon 903) does not authorize a *feme sole* trader to dispose of property held for her upon a separate use trust. *People's Savings Bank v. Denig*, 131 P. S. 241.

292. A married woman, declared a *feme sole* trader under the act of 4 May 1855 (Brightly's Purdon 903), may execute a valid mortgage of her real estate. So, she is estopped by her certificate of "no defence." *Hedden's Appeal*, 17 Atl. 29.

293. Where the wife of the defendant claims the goods in a sheriff's interpleader and bases her right under the act of 4 May 1855 (Brightly's Purdon 903), by reason of her husband's profligacy, the question of whether the husband had neglected or refused to provide for her is for the jury. *Bernhardt v. Mitchell*, 7 Atl. 283.

IX. Dower.

(a) Of a widow's right to dower.

294. A testator having devised to his widow one equal third of his estate, in lieu of dower, she cannot take her third under the will, and one-half of an undisposed of surplus against the will. *Jackson's Appeal*, 126 P. S. 105.

295. A widow having renounced under her husband's will, an inquest appraising her statutory dower will not be set aside where the valuation is not grossly inadequate. *Evans's Estate*, 8 Lanc. 17.

296. If a widow's "maintenance" be charged on a farm, she is not limited to

its rental value, but is entitled to maintenance even to the exhaustion of the servient estate. *Phillips's Estate*, 36 P. L. J. 391.

297. A dower interest of an assignor was *held* not to pass by a general assignment, where it was shown that the assignor signed the deed upon the faith of a parol cotemporaneous agreement that it was not to be included in the assignment. *Wanner v. Landis*, 137 P. S. 61; s. c. 38 P. L. J. 129; 26 W. N. C. 529; 7 Lanc. 385.

298. Where the father of the assignor devised to him one of his farms subject to a dower, and an assignment for creditors was subsequently executed, soon after which the assignor's mother died; it was *held*, that the assignor's share of the dower charged against the farm devised to him was distributable as realty, but that his share of the dower charges against the other farms which had belonged to his father was distributable as personalty. *Plank's Estate*, 10 Lanc. 201.

299. Where a widow has not elected to take against the will, and her right to do so has been extended by agreement until final settlement of the estate, she will not be granted an issue to determine the *bona fides* of an alleged indebtedness, which the will expressly admits to be owing and directs to be paid. *Eshelman's Estate*, 143 P. S. 24.

300. As to the right of a widow to accept the provisions of her husband's will and also claim dower, see note to *Endicott v. Endicott*, 3 Atlan. 162.

See ELECTION.

(b) Assignment of dower.

301. A proceeding in the orphans' court by which dower is assigned will not be reviewed on appeal from distribution, the decision as to dower being a collateral proceeding from which no appeal was taken. *Evans's Estate*, 150 P. S. 212; affirming s. c. 8 Lanc. 321.

(c) Of what a widow is dowable.

302. Where, in partition proceedings, it appears that an intestate left a widow and one son, and the latter died leaving a widow and no children, the son's widow is entitled to the interest on one-half of two-thirds, and, if the father's widow dies before her, she is entitled to the interest on one-half of the whole. *Danhouse's Estate*, 130 P. S. 256.

303. A widow is entitled to statutory dower in her husband's real estate in remainder, of which he never had possession. *Lynch v. Lynch*, 132 P. S. 422; s. c. 25 W. N. C. 424.

304. A widow is not entitled to an interest in a fund bequeathed to a trustee, the income to be paid to her husband for life, and at his death the principal to be paid to remaindermen. *Watson's Estate*, 139 P. S. 461.

305. Uncut timber descends as real estate, and if the guardian of minor heirs cuts and sells the timber and pays over one-third of the proceeds to the widow, he will be surcharged with the amount thus paid, and the orphans' court has jurisdiction to compel the mother either to pay back the amount to the guardian or enter security for the payment of it at her own death. *Mulholland's Estate*, 154 P. S. 491.

306. Where the owner of a vested remainder in fee devised the estate absolutely to his wife, and after his death a posthumous child was born which died prior to the death of the life tenant; it was *held*, that the will was revoked by the birth of the child, who took a fee in the real estate subject to the dower interest of the remainderman's widow, and that the widow, although not entitled to the enjoyment of the estate until the death of the life tenant, had an interest which she could convey. *Wilson v. Ott*, 160 P. S. 433; reversing s. c. 5 Del. 393. See s. c. 5 Del. 185, 231.

307. A remainder, upon the expiration of the widow's life estate, to children of

the testator, and the issue of such as may then be dead, is a vested remainder, and the widow of a son, who dies before the mother, is entitled to her interest under the intestate laws. *Bloodgood's Estate*, 8 C. C. 546; s. c. 47 L. I. 298.

308. The statutory rights of a widow in her husband's lands are complete at the moment of his death, and where improvements are made by the heir or his vendee after her title has thus attached and before partition, she will be held in proceedings by her for partition against the vendee of the heir to be entitled to share in the additional value resulting from the improvements; and this, though the vendee was ignorant of the existence of the widow and his deed professes to convey to him an absolute title. *Janney's Estate*, 12 C. C. 636.

309. A widow is entitled to be endowed out of land alienated by her husband, according to the value at the time her dower is assigned. *Gannon v. Widman*, 15 C. C. 474.

(d) How dower is barred.

310. An agreement by the husband to convey before dower attaches, will, if enforced in equity, extinguish the claim for dower. *McClure v. Fairfield*, 153 P. S. 411.

311. Where a husband on the eve of marriage conveyed all his real estate to his children by a former wife for a nominal consideration, after assuring his betrothed wife that the property was his, and he afterwards concealed the conveyance from her; it was held, that as to her the conveyance was void, and that after his death, his widow might have her action of dower and recover her interest in the land. *Hutchinson v. Hutchinson*, 6 Del. 81.

312. Neither desertion by the wife nor adultery which has been condoned will bar a wife's right to participate in the distribution of the husband's estate. *Drinkhouse's Estate*, 151 P. S. 302; affirming s. c. 11 C. C. 144. See *Drink-*

house's Estate, 11 C. C. 96; s. c. 29 W. N. C. 35.

313. A wife who leaves her husband willingly and commits adultery forfeits her right to any part of his estate; otherwise, if she did not leave him willingly. *Beilstein's Estate*, 37 P. L. J. 255.

314. The right of dower is not barred by the wife's adultery without proof that she deserted her husband or eloped or lived with the person with whom the adultery was committed. *Ondis v. Banto*, 7 Kulp 309.

315. Where a woman married again four years after being deserted by her husband, but under a reasonable supposition that he was dead; it was held, that she was not thereby estopped upon discovering that her second marriage was prior to the death of her first husband, from electing, as his widow, to take against the will of her first husband. *Johnson's Estate*, 10 C. C. 461.

316. After a divorce, neither the husband or wife, in case of the death of the other, can claim anything from the estate either under the intestate laws, by dower, curtesy or survivorship. *Hecht's Estate*, 9 C. C. 564; s. c. 28 W. N. C. 183.

317. Voluntary proceedings in bankruptcy do not divest the dower of a wife in real estate owned by her husband and sold by his assignee; in such case the wife loses her statutory dower but does not lose her dower at common law. *Gannon v. Widman*, 15 C. C. 474.

318. Where a wife by articles of separation releases her husband from all duties, liabilities and obligations of every kind whatsoever which otherwise she might or could claim under or by virtue of the marriage relation, she is afterwards barred from claiming any share of his estate under the intestate laws. *Scott's Estate*, 147 P. S. 102; reversing s. c. 38 P. L. J. 259.

319. A widow's receipt for arrearages of her dower, specifying the years for which it was given, extinguishes her title to dower for the years specified, and she

will not be allowed to participate in the distribution of a fund arising from a sheriff's sale of the land on which the dower is charged. *Fassett v. Frost*, 167 P. S. 448; s. c. 36 W. N. C. 272.

320. A widow who acquiesces in a sale under her husband's will and makes claim to the proceeds will be held to have relinquished her dower in the property. The fund, however, will be treated as realty for the purpose of determining the quantum of her interest, which, she having elected against the will, is for life only. *Cunningham's Estate*, 137 P. S. 621; s. c. 38 P. L. J. 129.

321. A decree in partition proceedings instituted by a widow does not deprive her of her share of the rents issued and profits accruing between the death of her husband and the date of the decree; such right ceases only upon security being given for the owelty awarded to her. A court of equity will, however, hold the parties to their agreement fixing a period for the termination of her claim. *Haulenschild's Appeal*, 5 Cent. 702.

322. A sale of land by an assignee for creditors subject to a dower does not discharge the accrued interest on the dower. *Getz's Estate*, 8 Lanc. 150.

323. Where it is agreed that trustees shall purchase land for the use of the *cestui que trusts*, and sell the same for the purpose of converting it into money and distributing the proceeds to the *cestui que trusts* in proportion to their interests, such an agreement works a conversion, and a purchaser from the trustees takes free from liens against the *cestui que trusts* and unaffected by the dowers of their wives. *Hunter v. Anderson*, 152 P. S. 386.

324. A widow who for thirty years preceding the death of the testator did not assert herself to be his wife, but had married another man, will not be permitted to elect to take against his will. *Richardson's Estate*, 132 P. S. 292; affirming s. c. 6 C. C. 653; s. c. 46 L. I. 139, 148.

325. Where a widow has been given by her husband one-third of the yearly in-

come of his real estate in lieu of dower, but makes no demand upon the owners of the land for her share of the income for over thirty-one years, she is thereafter barred by sec. 7 of the act 27 April 1855 (Brightly's Purdon 1211). *Meek's Estate*, 161 P. S. 360.

326. Where a widow entitled to a dower interest subsequently inherits the fee from her son, her dower rights do not merge in the fee. *Danhouse's Estate*, 130 P. S. 256.

327. An agreement between a mortgagor and a mortgagee to transfer the title to a third party by means of foreclosure proceedings, for the purpose of revesting a greater portion of the land in the mortgagor discharged from an easement, was held not to be a fraud upon the rights of the mortgagor's wife, where it appeared that the value of the dower interest in the portion revested in her husband would be many times more than the value of her interest in the whole tract subject to the easement. *Fellows v. Loomis*, 156 P. S. 74.

328. A voluntary bond payable at the maker's death and given for the purpose of defrauding the maker's wife of her rights in his estate, cannot be sustained where the donee is a party to the fraud; where such a bond has been given to a person who is neither a party nor a privy to the fraud, it will be paid out of the personal estate, but the widow will be entitled to compensation against the heirs out of the real estate. *Hummel's Estate*, 161 P. S. 215.

(e) Payment of dower.

329. Where an agreement for the sale of land provided that all arrearages of dower should be paid to the date of the deed, and the vendee went into possession, but, owing to the death of the vendor, no deed was executed for more than a year; it was held, that the vendor's representatives must pay all arrearages of dower to the date of the execution of the deed. *Smith's Estate*, 152 P. S. 102.

330. Where a widow's interest is secured on land conveyed, annual instalments draw interest from the time they fall due. *Van Storch's Estate*, 5 Kulp 389.

331. The widow of a decedent is entitled to her share of the rents realized since his death, but only after the payment of taxes. *Lefever's Estate*, 7 Lanc. 131.

332. Where the estate of a wife had been settled up for upwards of twenty years, and she was entitled to an interest in the principal of her mother's dower; it was *held*, that such interest was subject, on the death of the mother, to a foreign attachment against her husband as defendant, and the owners of the land charged with said dower as garnishees. While an interest in a dower fund is personalty, and passes to personal representatives, this principle has never been extended to cases where the estate has long been adjudicated, but the practice has been to pay over the fund to the heirs of the deceased party, if six years have elapsed since his death. *Haller v. Regar*, 11 Lanc. 77.

333. Pending a contest of a will, the orphans' court has power to make an allowance for the support of the widow, which will give her no more than what she would be entitled to whether the will be sustained or set aside. *Getz's Estate*, 3 York 50. See *Getz v. Getz*, 1 York 137.

334. Where land was sold in partition, and the sale confirmed by the court, on condition that one-third of the purchase money remain a lien for the use of the widow during her life, and after her death that the principal be paid to those entitled, and one of the heirs died before the widow; it was *held*, that his share of the principal should be paid to his administrator, and not to his heirs. *Wagner's Estate*, 6 York 106.

335. Upon the foreclosure of a mortgage, subject to a widow's dower, her interest, which had accrued prior to the day of sale, was payable out of the proceeds. *Close's Appeal*, 13 Atlan. 824.

336. Where a deed recited that it was subject to a dower in a third party, and at her decease the principal to the heirs, and it was subsequently decided that the dower was no charge on the land, an action of debt for the principal of the dower by the heirs will not lie against the grantee, they being neither parties nor privies. *Levan v. Bickel*, 1 Mona. 680; s. c. 17 Atlan. 206.

337. If upon distribution of the proceeds of a sheriff's sale a judgment confessed for the arrears of a dower charge be attacked by other creditors as fraudulent and collusive, the fraud and collusion cannot be established by casual declarations of the plaintiff and defendant, not made in each other's presence, the same being denied by both parties under oath. *Kintzel v. Kintzel*, 133 P. S. 71.

338. Where land is sold under proceedings in the orphans' court, and the purchase money is charged thereon as a dower principal, the orphans' court may enforce payment to the parties entitled on the death of the widow; in such a proceeding, where the purchaser has died after devising the land, it is error on the petition of the devisees to bring in the executor of the deceased purchaser, and to order the dower principal to be paid out of the purchaser's personal estate in relief of the land. *Woodrow's Estate*, 144 P. S. 198; reversing s. c. 7 Lanc. 209; s. c. 8 Lanc. 138.

339. Where one of several heirs taking land in partition gives a recognizance to secure payment of interest on one-third of the valuation money to the decedent's widow during her life, and of the principal at her death to the decedent's heirs, including the recognizor, the latter's share of said principal merges in his title to the land and does not become a lien thereon, and an action of assumpsit cannot be maintained against a vendee of the land by a person claiming to be entitled to recover the recognizor's share of the dower principal. See act 12 June 1878 (*Brightly's Purdon* 1837). *Hollandberger v. Yaukey*, 145 P. S. 179.

340. In an action on a bond given to secure the payment of a dower principal after the death of a widow, it was *held*, that an affidavit of defence was insufficient which averred that the defendant believed he never signed said bond nor authorized any one to do so, and that plaintiff's intestate had sold and assigned all his interest in the estate of his father, and had agreed to relinquish all future rights to any part of his mother's dower. *Pennock v. Kennedy*, 153 P. S. 577.

341. Where land was sold in partition and the widow's dower was secured by bond and mortgage to the administrator as well as by decree, the court refused to set aside an execution issued by the administrator after the death of the widow on a judgment entered on the bond for the deferred payments due the heirs. *Shurlock v. Smith*, 2 Dist. Rep. 347.

342. Against an action of dower for lands alienated by the husband, the statute of limitations does not begin to run until after his death. *Winters v. De Turk*, 25 W. N. C. 511.

343. Where the administratrix was also the widow of the decedent, she was required to give security for the payment to the heirs of the decedent of the principal of the dower fund after her death. *Steward's Estate*, 5 York 9.

X. Curtesy.

(a) Of the husband's right.

344. Under the intestate act of 8 April 1883 (Brightly's Purdon 1067), the birth of issue is not essential to an estate by curtesy in Pennsylvania; but where real estate was devised to a daughter with the provision that if she should die before attaining the age of twenty-five years without leaving any children her share should revert and become part of the testator's residuary estate, and the daughter married and died intestate under the age of twenty-

five years and without ever having had issue; it was *held*, that the daughter had no descendable estate in the land and her husband was not entitled to curtesy. *McMasters v. Negley*, 152 P. S. 303.

345. In ejectment by a husband for his deceased wife's real estate, his election to take it as tenant by the curtesy is evidence pertinent to the issue. *Logan v. Quigley*, 11 Atlan. 92.

346. If a wife die partially intestate, having no children, the husband, electing to take against the will, is entitled to but one-half of the entire estate. He cannot take one-half of what passes under the will and the whole of what is undisposed of. *Lee's Appeal*, 124 P. S. 74; affirming *Lee's Estate*, 22 W. N. C. 45.

347. A surviving husband may elect to take his wife's real estate as tenant by the curtesy, as against her will. Such election was *held* not to be prohibited by the act of 3 June 1887 (P. L. 332). *Teacle's Estate*, 132 P. S. 533; affirming s. c. 6 C. C. 553; *Kneedler v. Leaver*, Ibid. 556.

348. A written consent to his wife's will, signed by a husband before he knew its contents, is not an acceptance under it. *McDonald's Estate*, 37 P. L. J. 275.

349. Upon a decree of partition, an order may properly be made directing certain interest to be paid to the plaintiff as tenant by the curtesy. *Cleman's Appeal*, 11 Atlan. 559.

350. Where a husband is indebted to his deceased wife's estate, he will not be awarded the interest of a fund arising from the sale of her land until his indebtedness has been extinguished; such interest will be applied, as it arises, to extinguish the indebtedness. *Lewis's Estate*, 13 C. C. 191.

351. Where a married woman died testate, leaving a husband but no issue, the husband not being mentioned in the will, and subsequently the husband and legatees agreed that the whole estate

should remain in the hands of the executor and the net income be paid to the husband during his life; it was *held*, that the husband was entitled to interest which accrued previous to the making of said agreement, to wit, from the date of the last payments made to the decedent in her lifetime. *Irwin's Estate*, 12 Lanc. 129.

352. An executed gift of money to a daughter may be shown by declarations of the father made when the same was paid over to him; and this, notwithstanding the father was entitled to the money as tenant by the curtesy. *Buck v. Henderson*, 4 Cent. 697. See *Henderson v. Buck*, 3 Lanc. 371.

353. If a wife acquire lands subject to a mortgage, a sale under the mortgage divests all the rights of her husband as tenant by the curtesy therein. *Collins v. Large*, 1 Cent. 634.

354. Where a deceased wife's real estate was sold for the payment of her debts and the balance of the purchase money was charged on the land during the husband's life, the interest to be paid to him as curtesy; it was *held*, that his interest might be sold under execution without an order from the court for the issuing of the writ, or ten days' notice of the application therefor or ten days' notice of the sale. *Diller v. Groff*, 11 Lanc. 73.

355. Where the decedent was tenant by the curtesy of the real estate of his first wife and he received the purchase money of the property in his lifetime; it was *held*, that his first wife's children were entitled as creditors of his estate to interest on their shares from the moment of his death. *Urian's Estate*, 11 C. C. 495; s. c. 30 W. N. C. 308.

(b) When a husband is entitled to curtesy.

356. A husband is entitled to his curtesy out of an equitable estate in fee in the wife. *Carson v. Fuhs*, 131 P. S. 256.

357. An estate in fee subject to a life estate in another is not an estate of inheritance in possession, and a husband has

no right of curtesy therein. *Steinmetz's Estate*, 168 P. S. 171, 175; affirming s. c. 15 C. C. 259.

(c) When not entitled.

358. A demise of all the coal under the surface, being a sale of the coal, the husband of the lessor is not entitled to curtesy from the royalties. *Fairchild v. Fairchild*, 9 Atlan. 255.

359. A husband is not entitled to curtesy in his wife's estate and remainder where the particular estate is not ended during the coverture. *Schaeffer v. Messersmith*, 10 C. C. 366.

360. After a divorce neither the husband or wife, in case of the death of the other, can claim anything from the estate either under the intestate laws, dower, curtesy or survivorship. *Hecht's Estate*, 9 C. C. 564; s. c. 28 W. N. C. 183.

(d) Forfeiture.

361. A husband does not forfeit his curtesy by a separation rendered necessary by the circumstances of the parties, nor if, for their mutual comfort, they agreed to live apart. *Hart v. McGrew*, 11 Atlan. 617.

362. In ejectment by a husband claiming as tenant by the curtesy, his deceased wife's declarations are admissible for the purpose of disproving the alleged wilful and malicious character of their separation. *Ibid*.

363. In an action by a husband for the property of his deceased wife, as tenant by the curtesy, if the defendant alleges a forfeiture by desertion, under the act of 4 May 1855 (*Brightly's Purdon* 1303), and the plaintiff avers reasonable cause, he must prove such cause as would entitle him to a divorce. The record of desertion proceedings is evidence of the desertion, but is no bar to the introduction of evidence on the question of reasonable cause. *Hahn v. Bealor*, 132 P. S. 242; s. c. 25 W. N. C. 361.

364. A case was not made out, under the act of 4 May 1855 (*Brightly's Purdon* 1303), sufficient to deprive a surviving

husband of his right in his deceased wife's estate. *O'Neill's Estate*, 46 L. I. 220.

365. Where, upon the distribution of a wife's estate, it is claimed that the husband has wilfully and maliciously deserted her, and is not therefore, under the act 4 May 1855, sec. 5 (Brightly's Purdon 1303), entitled to share in the distribution, the finding of an auditor to that effect is sufficiently supported by a bond given by the husband to the commonwealth, in which his desertion of his wife is distinctly set forth and in which he binds himself to the payment of a weekly sum for her support. *Birchard's Estate*, 154 P. S. 89; affirming s. c. 11 C. C. 234.

XI. Divorce.

(a) Jurisdiction.

366. Where a husband deserts his wife in this state and goes to another state, the courts of that state have no jurisdiction to grant a divorce on his petition while she is still domiciled here. *Fyock's Estate*, 135 P. L. 522.

367. The courts have no jurisdiction to grant a divorce for desertion or adultery where the parties were at the time of the occurring of the cause domiciled in a foreign country. *McCartney v. McCartney*, 30 W. N. C. 132.

368. The courts of this state have no jurisdiction to decree a divorce for desertion in a foreign country where the respondent is still domiciled in such foreign country and has not been served with process. *Lewis v. Lewis*, 6 Kulp 429.

369. For an offence committed in another state our courts have no jurisdiction unless the parties were once domiciled here, and the domicile of the injured party continues here still or has been regained; and this, though service be made on the respondent while temporarily in the county. This rule does not apply, however, where the divorce is sought on the ground that the alleged marriage was procured by fraud in another state and has not since been confirmed; in such

case the *lex fort*, rather than the *lex loci*, will govern. *Hines v. Hines*, 10 C. C. 74; s. c. 48 L. I. 34. See an interesting comment on, and approval of, this case by Arnold, J., in the Philadelphia Times, 20 January 1891.

370. Where a husband and wife were domiciled in one county where the cause of divorce was committed and the wife removed to another county; it was *held*, that the court of the latter county had jurisdiction to entertain her proceedings for divorce. *Smith v. Smith*, 11 C. C. 465.

371. Where the libellant and respondent were married in a foreign jurisdiction, where also the alleged cause of divorce occurred, and the libellant subsequently removed to this state and filed his libel for divorce, but it appeared that the respondent had never been within the state; it was *held*, that the courts of this state were without jurisdiction. *Davis v. Davis*, 12 C. C. 541.

372. Where the libellant was a citizen of this state and went to London and married there a citizen of England, and lived with him there until, by his cruel and barbarous treatment, she was compelled to leave him and to return to this state, where she continued to reside for more than a year; it was *held*, that under the act of 8 June 1891 (since repealed and supplied by the act 20 June 1893, Brightly's Purdon 685), the courts of this state had jurisdiction to decree a divorce upon two returns of *nil* and service by publication and personal service on the respondent in England. *Green v. Green*, 13 C. C. 671.

373. A decree of divorce in a foreign jurisdiction against a respondent who resided in this state, and upon whom no personal service was had and to whom no notice was given other than by publication, has no effect in this state and will not bar an order on the libellant for the support of the respondent here. *Comm'th v. Shuler*, 2 Dist. Rep. 552.

374. Where the desertion occurred while the libellant and respondent were residing in another state, and there was

no personal service upon the respondent, and he had not appeared and it was not pretended that either of the parties were residents of this state at the time of the desertion, or that the respondent was or had been a resident here since the alleged desertion; it was *held*, that the courts of this state had no jurisdiction to decree a divorce. *Burdick v. Burdick*, 2 Dist. Rep. 622.

375. The injured party must seek a divorce in the forum of the defendant, unless the latter has removed from what was the common domicil of both. *Tucker v. Tucker*, 1 Lack. Jur. 263.

376. If it be shown that the respondent never resided in this state the proceedings will be dismissed. *Bennett v. Bennett*, 1 Lack. Jur. 453.

377. As to the validity of a foreign divorce, see note to *Gregory v. Gregory*, 3 Atl. 282.

See CONFLICT OF LAWS.

(b) Void marriages.

378. The burden is upon the libellant to show not only the alleged prior marriage of the respondent, but also that the parties to such marriage were living at the date of the second or alleged bigamous marriage. *Stymiest v. Stymiest*, 4 Dist. Rep. 305.

379. Under the act 14 April 1859 (Brightly's Purdon 685), authorizing the common pleas to declare a bigamous marriage void upon the application of the innocent or injured party, a libellant is no less an injured or innocent party because he knew before the marriage that the respondent had previously been married, if it also appears that the person to whom the respondent had previously been married, although not reported dead, had not, at the time of the bigamous marriage, been heard of for seven years. *O'Keefe v. O'Keefe*, 15 C. C. 88; s. c. 34 W. N. C. 531.

380. Where a party asks for a decree declaring an alleged marriage a nullity by reason of a prior marriage, it must be shown that the person applying for the

decree is an innocent or injured party. *Heinzman v. Heinzman*, 15 C. C. 669.

(c) Fraud.

381. To authorize a divorce under the act 8 May 1854 (Brightly's Purdon 684), on the ground of fraud, it is necessary that the statement relied on should be untrue in fact and that the libellant should have been deceived by it; and where threats are relied on to establish coercion, they must be such threats against the life or to do bodily harm as would overpower the judgment and coerce the will. The statement relied on in this case consisted in the fact that the respondent told the libellant before marriage, that she was pregnant in consequence of the intercourse between them. But it did not appear that the libellant believed the statement to be true. *Todd v. Todd*, 149 P. S. 60.

382. Where the libellant has himself been guilty of antenuptial incontinence with the respondent before marriage, her pregnancy at the time of marriage is no ground for a divorce; and this, though such pregnancy was the result of intercourse by her with a third party concerning which she deceived the man she married. *Bartholomew v. Bartholomew*, 14 C. C. 230.

(d) Adultery.

383. A charge of adultery against a husband is not sustained by the testimony of the wife to circumstances of suspicion alone. *Graham v. Graham*, 153 P. S. 450.

384. A divorce will not be granted on the ground of adultery where it appears that the adultery was connived at by the husband, and was directly produced by the temptations with which the wife was surrounded by the husband and certain of his witnesses with a view of producing that result. *Best v. Best*, 161 P. S. 515.

385. In divorce for adultery a witness for the libellant will not be permitted to be asked questions suggesting immoral relations between the witness and a

stranger, when the object is merely to raise a presumption of similar immoral relations between the witness and the respondent and the character of the stranger is not in question; where such questions are permitted to go into the record, the court will order them expunged. *B—— v. B——*, 10 C. C. 558.

386. Where a husband and wife have separated by agreement, the adultery of either after the separation is a good ground for divorce. *Gee v. Gee*, 13 C. C. 382.

387. The court refused to draw the inference of adultery from the testimony of a witness who refused to swear that he would tell the whole truth, the court having no means of knowing what or how much he had suppressed. *Ginther v. Ginther*, 15 C. C. 130.

388. A husband will not be granted a divorce on the ground of his wife's adultery, where it appears that he connived at it or exposed his wife to lewd company whereby she became ensnared to that crime. *Yocum v. Yocum*, 3 Dist. Rep. 615.

389. Where a husband libellant persists in charging his wife with adultery without a single fact to support the charge, such circumstances will be taken into account upon the consideration of other charges preferred against the respondent. *Stymiest v. Stymiest*, 4 Dist. Rep. 305.

390. In divorce proceedings, adultery cannot be established by the mere admissions or declarations of the respondent, unsupported by other proof or corroborating circumstances. *Quick v. Quick*, 6 Kulp 137; s. c. 8 Lanc. 117.

391. A divorce will not be granted for adultery where the charge rests on the testimony of the husband alone and upon alleged confessions made to him and his brother, and it appears that his evidence is manifestly false in its details. *Blank v. Blank*, 5 York 67.

(e) Subsequent bigamous marriage.

392. A subsequent bigamous marriage knowingly contracted is, under the act 13 March 1815 (Brightly's Purdon 682), a good ground for a divorce at the suit of the other party to the first marriage; and this, though the libel do not charge adultery. *Ralston v. Ralston*, 13 C. C. 597.

(g) Desertion.

393. A libel on the ground of desertion must charge the desertion to have been wilful and malicious; a statement that the respondent has deserted and refused to live with the libellant and refused to conduct herself as a kind and loving wife ought, is insufficient and the proceedings will be quashed. *Crone v. Crone*, 14 C. C. 456.

394. A divorce will not be granted on the ground of desertion where the libel sets forth an alleged or supposed marriage; there must be a lawful marriage before there can be a divorce. *Connor v. Connor*, 1 Dist. Rep. 358.

395. Where the testimony proving desertion is taken, concluded and submitted to the court within the two years, the proceedings will be dismissed unless other grounds of divorce are alleged; the report will not be held subject to the entry of a decree at the expiration of the two years. *Stymiest v. Stymiest*, 4 Dist. Rep. 305.

396. Incompatibility of temper will not justify a wife's desertion; and if such a desertion be persisted in for two years the husband is entitled to a divorce. *Van Dyke v. Van Dyke*, 135 P. S. 459; s. c. 26 W. N. C. 227; reversing s. c. 46 L. I. 507.

397. A husband has a right to change his home if his business, his comfort or his convenience requires it, if he provides another suitable place of residence; and if his wife refuse to accompany him to the new home without cause, a refusal constitutes a desertion which will justify a decree of divorce. *Beck v. Beck*, 163 P. S. 649.

398. A wife who leaves her husband for good cause, and then condones the offence, is guilty of desertion if, when requested to return, she refuses to do so. *Hubbard v. Hubbard*, 8 C. C. 189.

399. Failure of a husband to reprove his children when they spoke unkindly of their stepmother in her presence, is not such reasonable cause as will justify the latter's desertion of her husband. *Poley v. Poley*, 6 Montg. 58.

400. Suffering a wife to take her personal property from her husband's house does not constitute separation by mutual consent. *Poley v. Poley*, 6 Montg. 58.

401. To entitle a husband to a divorce for desertion, an intent in the mind of the wife to desert her husband must be shown either by her voluntary separation from him or her voluntary refusal to live with him. *Bowers v. Bowers*, 5 York 182.

402. If the fair inference from the testimony is that the respondent was taken away by his family because he was sick, and that he had failed in supporting the libellant because he was unable to do so, the divorce should be refused. *Neely v. Neely*, 131 P. S. 552.

403. Where a wife leaves her husband's house under the provocation of a blow and soon after returns, and the husband in anticipation of her return locks the door against her, her absence thereafter is not such a wilful and malicious desertion as entitles the husband to a divorce. *Hardie v. Hardie*, 162 P. S. 227.

404. Where the absence of a husband is due to coercion or imprisonment, there is no ground for a divorce because of desertion. *Frantz v. Frantz*, 11 C. C. 467.

405. The mere refusal of a wife to leave her home in a foreign country and join him here is not such a desertion as will authorize a divorce. *Shipman v. Shipman*, 5 Kulp 370.

406. A divorce will not be granted on the ground of desertion where the facts and circumstances are not so testified to that the court can determine whether they constitute wilful and malicious desertion; it is not sufficient for the libellant

merely to testify that her husband has "deserted" her. *Detrick v. Detrick*, 6 Kulp 164.

407. Where the parties were domiciled in New York state, and while the wife was absent on a visit the husband came to this state and took up his residence here, and he did not ask her to join him but she refused to return to her former home; it was *held*, that she was not guilty of wilful and malicious desertion. *Denio v. Denio*, 6 Kulp 197.

408. A malicious desertion by the husband is not established by mere evidence of the wife's return to her former home and her non-receipt of any support from him. *Grimes v. Grimes*, 12 Lanc. 23.

409. Where a husband calculating and practising upon the idiosyncrasies of his wife designedly goads her on to a separation for the purpose of making it the ground for an application for divorce, he will be treated as consenting to the separation and a divorce will not be decreed. *Romich v. Romich*, 12 Lanc. 134.

410. If upon the trial of a support case the wife declares that she will not leave her mother and live with her husband, such a refusal does not constitute a desertion, which will justify a subsequent decree of divorce in the husband's favor. *Smalley v. Smalley*, 2 Northam. 338.

411. Evidence that on one occasion the husband ill-treated their child, whose paternity he denied, by striking it violently a number of times in the face and on the hip, tripping it with his foot and slapping it in the face with his hat, so that it bore marks the next day, and that he remarked that he did not intend to keep house with his wife any longer, was *held* to be insufficient to justify the wife in abandoning her husband, and having abandoned him she could not obtain a divorce for desertion. *Bull v. Bull*, 5 York 69.

412. Upon the question of reasonable cause for a desertion, the declarations of the wife and her manifestations of sorrow at the time are admissible as part of the *res gestæ*, but not so of her subsequent

manifestations. *Hahn v. Bealor*, 132 P. S. 242; s. c. 25 W. N. C. 361.

413. In a proceeding against a wife for desertion where the respondent has not been served, the evidence must be clear and satisfactory; it is not enough simply to prove that she left the domicile of her husband. *Gearing v. Gearing*, 1 Dist. Rep. 418.

414. The judgment of the quarter sessions in proceedings for support is pertinent but not conclusive evidence that the defendant has been guilty of such desertion as entitles his wife to a divorce; when either party withdraws from the residence of the other without cause or consent an intent to desert is manifested. *Barrall v. Barrall*, 6 Kulp 319.

415. A wife will not be granted a divorce on the ground of desertion where it appears that she had not spoken to her husband two or three years before they separated, that she had rented his room in the house to a boarder, and that she had practically crowded him out of the house. *Graham v. Graham*, 153 P. S. 450.

416. In an action by a husband for desertion, where the defence is the cruel and barbarous treatment of the husband, such defence is not established ordinarily by a single blow given in anger; and where there is evidence of other acts of violence and threats, the burden is on the wife to prove that they occurred before the separation. *Hardie v. Hardie*, 162 P. S. 227.

417. A bond to comply with an order to support the obligor's wife is no bar to a proceeding in divorce, but may be taken into consideration on the question of desertion. *Comm'th v. Jones*, 9 C. C. 145.

418. A wife's right to a decree of divorce on the ground of desertion cannot be defeated by proof that she committed adultery subsequent to such desertion. *Leidig v. Leidig*, 13 C. C. 29.

419. In a proceeding by a husband for a divorce on the ground of desertion, the suit is not barred by the fact that the husband after the wife had deserted him

had committed adultery. *Shoemaker v. Shoemaker*, 1 York 133.

420. A husband who refuses to live with his wife or to support her or their children, except to have absolute control of their religious training, is not entitled to a divorce for desertion. *Lindsay v. Lindsay*, 4 Del. 45.

421. Where a husband brought suit on the ground of desertion; it was *held*, that his right was not barred by the payment of five dollars to the wife for sewing done by her for their children, the court being of opinion that the money was not paid as an allowance for the wife's support and that the husband was not consenting to her absence. *Raver v. Raver*, 1 Dist. Rep. 177.

422. A husband's right to a divorce on the ground of desertion was *held* not to be barred by the mere physical presence of the wife in his house for a brief period at occasional intervals without any intention on her part to resume the duties and obligations of matrimonial cohabitation; such presence, however, should require the most careful and searching examination of the evidence. *Raver v. Raver*, 1 Dist. Rep. 177.

423. If the conduct of the parties shows that the proceedings are a mere subterfuge to obtain a divorce and not a *bona fide* desertion the divorce will be refused. *Kunz v. Kunz*, 1 Lack. Jur. 454.

424. Although a husband has abandoned his wife for more than two years, a divorce will not be decreed in her favor where the evidence shows that the wife had denied him his marital rights and would not permit him to sleep in her room, that she had rented his room to strangers, and ordered him from the house, which belonged to her, and had had him arrested in order to keep him away. *Merriman v. Merriman*, 40 P. L. J. 173.

(h) Cruel treatment.

425. A libel which alleges cruel and barbarous treatment must also allege that such treatment forced the libellant to

withdraw from her husband's house and family. *Dunkel v. Dunkel*, 11 C. C. 297.

426. Where a libel by a husband set forth that the wife owned the house in which they lived, and that she treated him cruelly by refusing to cook his meals, hiding herself from him, compelling him to occupy a separate room and driving him away, commanding him to leave and saying she would find some way to make him go; it was *held*, that it did not state a sufficient cause for divorce nor establish a constructive desertion and that it would be dismissed on demurrer. *Smith v. Smith*, 4 Dist. Rep. 397.

427. Where a marriage is void by reason of a prior marriage of one of the parties, a decree of divorce cannot be granted for cruel and barbarous treatment. *Heinzman v. Heinzman*, 15 C. C. 669.

428. Where a libellant deserted her husband in a foreign country and came to this country with the respondent, where a marriage ceremony was performed between them; it was *held*, that she was not an innocent or injured party and was not entitled to a decree of divorce on the ground of intolerable treatment. *Jones v. Jones*, 7 Kulp 515; s. c. 6 Del. 131.

429. Where a libel alleges cruel and barbarous treatment which endangered the libellant's health and life, a divorce will not be granted where the testimony does not show that her life was in danger. *Dunkel v. Dunkel*, 11 C. C. 297.

430. Cruelty which will justify a wife in leaving her husband must be more than meanness or parsimony in providing for her wants; where it appeared that the husband required his wife to get supper on the wedding night and subsequently compelled her to milk the cows and make butter without giving her the proceeds; it was *held*, that this was not such treatment as would justify her in separating from him, and where these facts appeared upon a rule for alimony and counsel fees, an order for the same was refused. *Martin v. Martin*, 6 Kulp 155.

431. Evidence that the wife scolded, would swear at her husband, that they occupied separate beds, rarely ate together, that the wife had made threats of poisoning the husband and his son, does not present such a case of cruel and barbarous treatment as will entitle a husband to a divorce. *Hahn v. Bealor*, 132 P. S. 242; s. c. 25 W. N. C. 361.

432. In a proceeding by a husband for cruel and barbarous treatment, where the wife admitted on cross-examination that she broke the glass door of her husband's store and interfered with his customers, that she broke dishes and threw them downstairs, that she threw hot coffee on the servant-girl, and that on two occasions, when her step-sons complained of the dinner, she brought in slop and threw it on the table, a divorce was properly decreed. *Heilbron v. Heilbron*, 158 P. S. 297.

433. Upon a libel for divorce brought by the husband for cruel and barbarous treatment, a divorce was refused upon evidence that the wife slapped her husband in the face and afterwards, while he was down, kicked him on the head and face three times, but inflicted no serious injury; that she wrote him abusive letters, some of which were anonymous; that she did not occupy the same room with him; but she entered up a judgment note against him for the purpose of ruining his business; that she made extravagant purchases on his credit, knowing him to be in embarrassed circumstances; and that she alienated the affections of his children from him. *Sciple v. Sciple*, 4 Northam. 105.

434. The declarations of the wife, in an action for divorce, as to ill-treatment, made at a time so distant from the occurrence as not to be a part of the *res gestæ*, are not admissible in evidence. *Cain v. Cain*, 140 P. S. 144; affirming s. c. 6 Montg. 34.

435. In a suit by a husband for a divorce for cruel and barbarous treatment, the evidence should be clear and conclusive and consist of something more than

threats by a jealous woman. *Phillips v. Phillips*, 6 Kulp 14.

436. The violent acts of an insane husband do not entitle the wife to a divorce. *Fritzinger v. Fritzinger*, 5 Kulp 507.

437. In an action for divorce on the ground of cruel and barbarous treatment, evidence is admissible, on behalf of the respondent, to show that such treatment resulted from the insanity of the respondent. *Hansell v. Hansell*, 15 C. C. 514.

438. Authorities on the subject of cruel treatment and indignities as causes for divorce are collated in notes to *Hawkins v. Hawkins*, 3 Atlan. 753; *Smith v. Smith*, 5 Ibid. 128; *Holyoke v. Holyoke*, 6 Ibid. 830; and *Wilson v. Wilson*, 13 Ibid. 103.

439. For a remarkable paper-book on the subject of cruel and barbarous treatment and indignities, see *Harris's Appeal*, 3 Leg. Chron. 86; s. c. 2 W. N. C. 331.

(4) Personal indignities.

440. A charge of indignities to the person is sustained by evidence of habitual drunkenness, ill-temper and neglect to provide, public charges of adultery and abortion, and repeated threats to kill, accompanied by acts manifesting a purpose to execute them. *Mason v. Mason*, 131 P. S. 161.

441. A husband is not entitled to a divorce for "indignities to his person." *Phillips v. Phillips*, 6 Kulp 14.

442. A decree can only be justified for indignities to the person, when such indignities have been practised often enough to be fairly described as a course of conduct; the body need not be physically touched; where the indignities render the condition of the sufferer intolerable and her life burdensome and thereby force her to withdraw from her husband's house, she will be granted a divorce; where it was shown that a husband treated his wife more as a servant than as his wife, that he rarely spoke to her or answered her questions, that if his wife entered the room he would leave it, that he compelled her to sleep in another room,

that he helped himself to food at the table and did not help her, that he paid no attention to her when she was sick, and that when she asked him to put the coal on the fire, he refused, saying, "What did I get you for?" a decree of divorce for indignities to the person was awarded. *Brobaker v. Brobaker*, 4 Dist. Rep. 186.

(k) Impotency.

443. A divorce on the ground of impotency may be granted on the uncorroborated testimony of the libellant, if there be no suspicion of collusion. If the testimony of the libellant is persuasive, a medical examination ought not to be required. *Christman v. Christman*, 7 C. C. 595.

(l) Conviction of crime.

444. Under the act 1 June 1891 (Brightly's Purdon 684), where the conviction is outside the state, though punishable in this state by a sentence for two years or more, such conviction is no ground for divorce if the sentence in the other state is only for two years or less. *Frantz v. Frantz*, 11 C. C. 467.

445. An assault with intent to commit rape is not an infamous crime, and a divorce will not be granted, under the act 1 June 1891 (Brightly's Purdon 684) merely upon proof that the respondent has been convicted of such a crime and sentenced to two years and six months in the penitentiary. *Wheeler v. Wheeler*, 13 C. C. 396.

(m) Of the libel.

446. The omission of the affidavit to the libel is fatal to the jurisdiction. *Roberts v. Roberts*, 5 Kulp 528.

447. An affidavit to a libel which omits to state that the complaint is not made out of levity or by collusion is fatally defective. *Fritzinger v. Fritzinger*, 5 Kulp 507.

448. A libel in divorce must show upon its face that the libellant resides in

the county wherein she brings suit. *Gould v. Gould*, 14 C. C. 185.

449. Where the libel failed to set out the citizenship and domicile of the parties at the time of the marriage and since, and the return of service of the subpoena failed to set forth specifically the place where such service was made, and no notice was given to the respondent of the time and place of taking depositions, the libel was dismissed. *Weichel v. Weichel*, 15 C. C. 606.

450. The libel must state the county in which the libellant resides; otherwise an application for a subpoena will be refused. *Johnson v. Johnson*, 3 Dist. Rep. 166.

451. Where the libel sets out a statutory cause of divorce in the terms of the statute, but specifies particulars not within the statutory requirements and tending to negative the general averment, the libel may be amended by striking out such particulars as surplusage, and if the evidence sustains the specific cause of action a divorce may be decreed. *Heilbron v. Heilbron*, 158 P. S. 297.

452. The court will permit a libel in divorce for cruel and barbarous treatment to be amended by adding thereto the charge of adultery. *A— v. A—*, 12 C. C. 608.

453. The court will allow an amendment of the libel by adding to a charge of offering indignities to libellant's person, an allegation of cruel and barbarous treatment; and this, after a master has been appointed in the case. *Dasey v. Dasey*, 13 C. C. 612.

(n) Subpoena and service.

454. It is sufficient for the judge to enter the allowance of the subpoena upon the back of the libel; it is not necessary that he should also sign the subpoena. *McQuaide v. McQuaide*, 8 Montg. 150.

455. Where the petition is filed within thirty days of the next term, the subpoena may be made returnable to the term succeeding the next term. *McQuaide v. McQuaide*, 8 Montg. 150.

456. Service of a subpoena in divorce in another state has not the effect of personal service. *Tucker v. Tucker*, 1 Lack. Jur. 263.

457. A personal service within the county is sufficient though the respondent reside in another state. *Adgate v. Adgate*, 1 Lack. Jur. 353.

458. If the respondent be confined in an insane asylum a committee should be appointed to guard his rights; the libellant cannot proceed by publication. *Fritzing v. Fritzing*, 5 Kulp 507.

459. Where the subpoena is served less than fifteen days before the return day, no step can be taken in the cause at the term to which the writ was returnable; the libellant must wait until the expiration of that term. *Moyer v. Moyer*, 3 Dist. Rep. 239.

460. Where the respondent cannot be found in the county but resides outside of the state, an alias subpoena must issue in all cases although the residence of the defendant may be known; a subpoena in divorce cannot be served personally on the respondent outside of the state. *Briggs v. Briggs*, 5 Del. 76.

461. A divorce will not be granted upon an acceptance of service by the respondent without the state, especially where no one vouches for the identity of the person who signs the acceptance and there is nothing about the paper filed which is authenticated in any way. *Bittinger v. Bittinger*, 4 Dist. Rep. 441.

(o) Bill of particulars.

462. If the libel neglects to state when the desertion began, the respondent is entitled to a bill of particulars. *Raff v. Raff*, 25 W. N. C. 155.

463. On the trial of an issue in divorce it is in the sound discretion of the court to allow an amendment of the bill of particulars and admit testimony under it. *Melvin v. Melvin*, 130 P. S. 6.

(p) Answer.

464. After a divorce proceeding is at issue and before a master, the respondent

cannot amend his answer without an application to the court. *Leidig v. Leidig*, 13 C. C. 29.

(q) Evidence.

465. Where a rule of court provided for ten days' personal notice of the time and place of taking testimony, if the respondent could be found, and otherwise notice by advertising; it was held, that a notice by advertising was insufficient where there was nothing to show that the respondent could not be found. *Adams v. Adams*, 15 C. C. 237.

466. If there be a personal service upon the respondent, the libellant is competent to testify as to the cause of divorce. *Adgate v. Adgate*, 1 Lack. Jur. 353.

467. Where it appears that notice of the master's meeting has reached the respondent through a registered letter, the libellant is a competent witness to testify generally; and this, though the subpoena has not been served on the respondent and he has not appeared. *Kolp v. Kolp*, 3 Dist. Rep. 1.

468. If there is no service or appearance the libellant is not a competent witness in divorce, except to prove the fact of marriage. *Shipman v. Shipman*, 5 Kulp 370.

469. Where the defendant has not been served personally and has not appeared, the plaintiff is not a competent witness except as to the fact of marriage, and where the plaintiff has testified before the examiner generally and the examiner recommends a decree of divorce, his report must show the exact facts upon which the decree is to be based, and must also show affirmatively that his conclusion is not based on the incompetent evidence of the plaintiff. *Koup v. Koup*, 7 Kulp 342.

470. Where there has been no personal service either of the subpoena or of the notice to take depositions, the libellant is not a competent witness as to anything except the marriage. *Grimes v. Grimes*, 12 Lanc. 23.

(r) Costs and counsel fees.

471. The sum of five hundred dollars for the wife's counsel fees was considered a sufficient allowance, though the husband was worth one hundred thousand dollars. *Bay's Appeal*, 6 Atlan. 40.

472. If the husband be libellant, the wife, on a rule for counsel fees, need not show the husband's ability to pay. If he cannot pay the proceedings will be stayed. *Deemer v. Deemer*, 7 C. C. 554.

473. An order for alimony and counsel fees will not be made until the court has definite and particular knowledge of the financial ability of the husband and the nature and character of the professional services of the wife's counsel. *Baer v. Baer*, 7 Kulp 244.

474. Where a decree of divorce has been opened and the case referred back to a master, the wife will be granted alimony, counsel fees and expenses upon her affidavit that she had no knowledge of the divorce proceedings. *Quelin v. Quelin*, 11 C. C. 265.

475. Counsel fees will be allowed to a wife although it be proven that she has been guilty of adultery. *Pratz v. Pratz*, 11 C. C. 252; s. c. 1 Dist. Rep. 699.

476. Where the wife is living in her husband's house as a member of his family pending the divorce proceedings, the court has no authority to make an order for alimony *pendente lite*, but it may allow her a counsel fee. *Frey v. Frey*, 10 Lanc. 215.

477. The court ordered the husband respondent to pay to the wife thirty dollars to enable her to prosecute her suit. *Baumgardner v. Baumgardner*, 7 Lanc. 276.

478. Where, as in Lackawanna county, the testimony is taken before a judge, the fees of the stenographer must be paid by the libellant. *Kunz v. Kunz*, 1 Lack. Jur. 454.

479. The fees of an examiner in divorce as taxed by the prothonotary, if supported by the evidence, will not be disturbed by

the court on appeal. *Uhrich v. Uhrich*, 1 Northam. 128.

480. The right to enforce the payment of costs in a case of divorce *a vinculo matrimonii* by attachment is more than doubtful. *Uhrich v. Uhrich*, 1 Northam. 59.

481. Where the libellant is a minor and suit is brought through his father as next friend, an attachment will issue against him for non-payment of counsel fees and alimony; and this, without proof of his ability to pay alimony. *West v. West*, 11 C. C. 254.

482. A foreign attachment will lie to recover the costs of a divorce suit awarded to the libellant therein. *Harter v. Harter*, 4 Dist. Rep. 211.

(s) Issue.

483. An application for a trial by jury is too late after the filing of the examiner's report. *Uhrich v. Uhrich*, 1 Northam. 58.

484. An issue will not be granted after the examiner has examined some of the witnesses. *Lathrop v. Lathrop*, 2 Northam. 9.

485. An issue will not be awarded where the respondent attended the hearing before the examiner, cross-examined the witnesses and announced that he had no evidence to offer. *Hines v. Hines*, 5 York 69.

486. A rule of court which requires that a demand by the respondent for an issue shall be made in his answer will be strictly enforced. *Reinbold v. Reinbold*, 15 C. C. 335.

487. Where a rule of court provides that if an answer be filed it shall state whether the respondent demands an issue, or otherwise a jury trial shall be taken to be waived, and the answer filed does not contain any demand for an issue, it is too late to demand an issue at the hearing before the commissioner, where the libellant was in attendance with counsel and witnesses. *Johnson v. Johnson*, 4 Dist. Rep. 460.

488. Upon the trial of an issue in

divorce, it is not improper for the libellant's counsel to ask the jurymen before they are sworn whether they are conscientiously opposed to the granting of divorces. *Beck v. Beck*, 163 P. S. 649.

(t) Decree.

489. After the lapse of the term, the court has no power to set aside a decree discharging a rule for divorce. *Glover v. Glover*, 1 Lack. Jur. 262.

490. A decree in divorce will not be disturbed after a delay of four years, unless it be clearly shown that the proceeding is illegal. *McQuaide v. McQuaide*, 8 Montg. 150.

(u) Effect of decree.

491. After a divorce, neither the husband nor wife, in case of the death of the other, can claim anything from the estate, either under the intestate laws, by dower, curtesy, or survivorship. *Hecht's Estate*, 9 C. C. 564; s. c. 28 W. N. C. 183.

492. Where a husband and wife conveyed land charged with the payment of the legal interest of a certain sum of money, to the grantor and his wife during their joint lives, and to the wife during her life, if she survived her husband, and on the same day the land was reconveyed to the husband, subject to the same charge; and subsequently the land was sold by the sheriff, and some years afterwards the husband and wife were divorced; it was held, that the charge was not divested by the sheriff's sale, that the wife's interest was not divested by her divorce, and that the lien of the charge extended to every part of the land conveyed, and upon a division of the land the lien could not be apportioned without the consent of the parties for whose benefit it was created. *Blank v. Kline*, 155 P. S. 613; affirming s. c. 10 Lanc. 76.

XII. Divorce from bed and board.

493. A wife is entitled to a divorce *a mensa et thoro* for such indignities to her person as render her condition intolerable and life burdensome, and force her to withdraw from his house and home, though they do not endanger her life. *Melvin v. Melvin*, 130 P. S. 6.

494. A divorce *a mensa et thoro* granted a wife does not destroy her right to administer to his estate. *Fyock's Estate*, 135 P. S. 522.

XIII. Alimony.

495. The merits of the main controversy will not be considered on an application for alimony *pendente lite*, except where the evidence is clear that the wife is living in a state of adultery. So, that the husband is in ill health and needs all his income, is no defence to such a rule, but alimony in such a case will not be ordered if the wife be self-supporting. *Schireman v. Schireman*, 7 C. C. 110.

496. Upon a rule for alimony, if an answer be filed denying the alleged adultery, the court will not go into the merits but will grant the application. *Sutton v. Sutton*, 26 W. N. C. 398.

497. Alimony *pendente lite* will be granted to a wife who is the libellant. *Smith v. Smith*, 11 C. C. 465.

498. Where a decree of divorce has been opened and the case referred back to a master, the wife will be granted alimony, counsel fees and expenses upon her affidavit that she had no knowledge of the divorce proceedings. *Quelin v. Quelin*, 11 C. C. 265.

499. That the court of quarter sessions has made an order upon a husband to pay for the support of his wife will not prevent the common pleas from decreeing alimony *pendente lite*; both orders may run concurrently, but when the common pleas has awarded a divorce with or without alimony, the jurisdiction of the quarter sessions is at an end. *Heilbron v. Heilbron*, 158 P. S. 297.

500. Upon dismissing a libel by the husband, the court has no power to require alimony to be paid until the further order of the court; an order for alimony *pendente lite* must be limited to the pendency of the suit, and should terminate with the decree dismissing the libel. *Heilbron v. Heilbron*, 158 P. S. 297.

501. Alimony cannot be awarded on a decree *a vinculo matrimonii* or a sentence of nullity, except where the common law rule has been changed by statute. *Faux v. Faux*, 5 Kulp 354.

502. If the husband be without means, alimony *pendente lite* will be refused. *Phillips v. Phillips*, 5 Kulp 490.

503. Where the wife was respondent and it appeared that the husband had provided a suitable home for her and that she had refused without reasonable cause to leave her parents' house and live with her husband, the court refused an order for alimony *pendente lite*. *O'Hara v. O'Hara*, 12 C. C. 603. This rule was not applied where the wife was seeking a divorce for cruel treatment. *Downing v. Downing*, 7 Kulp 138.

504. Where the wife is living in her husband's house as a member of his family pending the divorce proceedings the court has no authority to make an order for alimony *pendente lite*, but it may allow her a counsel fee. *Frey v. Frey*, 10 Lanc. 215.

505. Alimony *pendente lite* will not be awarded to a wife where it appears that she has been guilty of adultery. *Pratz v. Pratz*, 11 C. C. 252; s. c. 1 Dist. Rep. 699.

506. Alimony *pendente lite* will be refused if it be clearly shown that the wife is living in a state of adultery. *Faux v. Faux*, 5 Kulp 263.

507. A wife is entitled to alimony *pendente lite*, whether she be libellant or respondent, with the possible exception when she is living in open adultery. *Hirst v. Hirst*, 1 Northam. 292.

508. An order for alimony *pendente lite* will be vacated upon evidence being pro-

duced showing a single act of adultery committed by the wife pending the divorce proceedings. *Alexander v. Alexander*, 2 Lack. Jur. 128.

509. A petition for an execution for alimony need not state the amount due; it is sufficient if it states that no alimony has been paid and prays for process to compel its payment. *Elmer v. Elmer*, 150 P. S. 205; reversing s. c. 11 C. C. 623.

510. In a proceeding for divorce brought by the husband, under the act 8 May 1854 (Brightly's Purdon 684), for cruel and barbarous treatment, payment of alimony allowed the wife may be enforced by a *fiery facias* or attachment; there is no act, however, which authorizes the employment of a *ca. sa.* for such purpose. *Elmer v. Elmer*, 150 P. S. 205; reversing s. c. 11 C. C. 623.

511. Where the libellant fails to pay the alimony awarded the respondent, its payment will be enforced by attachment. *Wallen v. Wallen*, 11 C. C. 41.

512. Where a decree for alimony was served by leaving it at the respondent's last known residence with an adult member of his family, and a rule for an attachment was served on the respondent's brother-in-law, being an adult member of his family, and upon a member of the bar having his office with the respondent's counsel, and being closely associated with him; it was *held*, that an attachment would issue against the respondent. *Tobin v. Tobin*, 12 C. C. 374.

XIV. Breach of promise of marriage.

513. A promise of marriage cannot be inferred from acts and expressions indicating intimacy and affection, and taking place while the plaintiff was living with the defendant as his mistress. *Bleiler v. Koons*, 132 P. S. 401.

514. In an action for breach of promise of marriage, what is sufficient evidence of fraud in the procurement of a release to justify its submission to the

jury. *Ettinger v. Jones*, 139 P. S. 218; s. c. 27 W. N. C. 172. See *Newkirk v. Scott*, 4 Del. 449.

515. In an action for breach of promise of marriage, where the affidavit to hold to bail averred that the defendant after obtaining the consent of the plaintiff's parents and taking out a license, refused to have the ceremony performed or to see her or to have anything to do with her, and had written a letter to her to that effect; it was *held*, that the defendant would not be discharged on common bail; it was not necessary to aver that the plaintiff offered to marry the defendant. *Weaver v. Cline*, 12 C. C. 363.

516. In an action for breach of promise of marriage, an affidavit which does not set forth that the plaintiff accepted the defendant's offer to marry is insufficient to hold to bail; so, it is insufficient to use the words "the said defendant" without naming him. *Snedden v. Gunn*, 16 C. C. 47.

ICE.

See MUNICIPAL CORPORATIONS.

1. In an action for the destruction of an unharvested crop of ice, compensation is the measure of damages; that is, the value at the nearest market less the cost of getting it into such market, but including, as a part of the cost, the loss in handling and from shrinkage. *Stauffer v. Miller Soap Co.*, 151 P. S. 330.

2. Where the defendants cut ice in the river so as to obstruct and interfere with a winter way across the river which had been used by the public for more than twenty years; it was *held*, that such unlawful interference with the right of passage was an indictable offence. *Comm'th v. Christie*, 13 C. C. 149.

3. Where the driver of an ice wagon entered security to the company for the prompt return of all moneys collected and the prompt settlement of all shortages, and in the event of a dispute as to the amount of money due, the set-

tlement was to be made by the bookkeeper, and the defendant refused to account for overdue ice bills, which he had been unable to collect, and the bookkeeper settled the account and charged the defendant with the bills; it was *held*, that, as the dispute was in regard to the construction of the contract, its settlement was not committed to the bookkeeper, and, further, that the defendant was not liable for the unpaid bills. *Knickerbocker Ice Co. v. Smith*, 147 P. S. 248.

INCEST.

See CRIMINAL LAW, XXXIV.

INCUMBRANCES.

See COVENANT: EXECUTION, XV.

INDEMNITY.

See GUARANTY.

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See REGISTER OF WILLS.

INDICTMENT.

See CRIMINAL LAW, IX.: LIBEL, VII.

INFANTS.

See PLEADING: PRACTICE.

I. Parent and child.

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III. Infants' estates.

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V. Responsibilities and disabilities of infants.

VI. Actions by and against minors.

VII. Maintenance.

VIII. Cruelty to children.

I. Parent and child.

(a) Custody of children.

1. Upon a *habeas corpus* for the custody of a child the court has no power to make an order on the respondent to take the child into a neighboring state and submit her right to its custody to the courts of that state, and a respondent would not be held guilty of a contempt in disregarding such an order. *Comm'tk v. Sage*, 160 P. S. 399; reversing s. c. 2 Dist. Rep. 553.

2. Upon a *habeas corpus* by a father to secure the custody of a child, where the wife filed an answer averring that the relator was not a fit person to have the custody of the child, and it was not denied that both the parties had previously been domiciled in New Jersey and that the relator continued to reside there, and that under the laws of that state he was the natural guardian of the child; it was *held*, that no consideration of comity justified the court in awarding the child to the relator without inquiring as to his fitness to have its custody. *Comm'tk v. Sage*, 160 P. S. 399; reversing s. c. 2 Dist. Rep. 553.

3. Where the custody of a minor child is in dispute the orphans' court at any time during its minority will make such dis-

position of it as the circumstance of the case demand, having always in view, first and last, the consideration of what will best promote the welfare of the child. *Brown's Estate*, 166 P. S. 249.

4. If a child be of tender years the paramount consideration is its best interest. Its best interest is presumed to be with the mother, but this presumption is rebutted by the fact that it has thrived under the care of the father. *Lacair v. Lacair*, 7 C. C. 97.

5. A child seven years old, born out of wedlock but legitimated by its parents' marriage and received into the home of its mother's parents, was awarded to the custody of its father. *Comm'th v. Bran-yan*, 8 C. C. 80.

6. A guardian's right to the custody of his ward is superior to that of a step-mother, and such right will be enforced on *habeas corpus* unless it would be against the best interest of the child to enforce it. *Comm'th v. Dugan*, 13 C. C. 83.

7. Upon a *habeas corpus* for the custody of a minor child, the court in a proper case and in the exercise of a sound discretion may permit the custody to remain with the child's maternal grandparents where the father and mother are divorced, reserving the right of the father to visit the child. *Comm'th v. Wise*, 3 Dist. Rep. 289.

8. Where a wife deserts her husband without cause, the latter is entitled to the custody of his children. *Comm'th v. Davison*, 4 Dist. Rep. 103.

9. The court will not, upon *habeas corpus*, lend its active aid to one parent to take a child from the custody of the other parent, where it would be against the best interest of the child to do so. *Comm'th v. Higgins*, 7 Kulp 398.

10. A father is entitled to the custody of his minor children, except in cases where such custody would not be for their best interest. *Foltz v. Zimmerman*, 7 Lanc. 391. See act 26 June 1895 (P. L. 316).

11. That a mother is entitled to the custody of her children of tender age,

will yield to the best interests of the child. *Comm'th v. Lacias*, 1 Northam. 273.

12. Where the custody of a child was transferred by the father to its grandfather by agreement; it was held, that such an agreement would be sustained where it appeared that it was manifestly to the child's advantage. *Loutsch's Estate*, 42 P. L. J. 128.

(b) Rights of parents.

13. Where a parent permits a child of tender years to engage in a dangerous occupation, such parent is guilty of negligence *per se* which will prevent him from recovering against the employer for the death of his child. *McCool v. Lucas Coal Co.*, 150 P. S. 638.

14. A mother is not entitled to recover for services rendered by her minor children for their father in his lifetime. *Schaubel's Estate*, 12 Lanc. 166.

15. The right of a parent to recover damages for the death of his infant child is considered in a note to *Sherman v. Johnson*, 2 Atlan. 710.

16. The emancipation of minor children is considered in a note to *Delaware County Nat. Bank v. Headley*, 4 Atlan. 466.

(c) Liability of parents.

17. A parent is liable for trover and conversion committed by his child, where he has knowledge of the act of conversion and continues to enjoy the benefit of it. *Hower v. Ulrich*, 156 P. S. 410.

(d) Adoption.

18. No appeal is authorized from the refusal of a court to set aside a decree of adoption. *Lewis's Appeal*, 10 Atlan. 126.

19. Upon the death of an intestate without issue, an adopted child is entitled, as against the widow, to two-thirds of the personal estate of the decedent. *Rowan's Estate*, 132 P. S. 299; affirming s. c. 6 C. C. 461.

20. A legacy given to an adopted child who stands in place of an heir is subject to the collateral inheritance tax. Effect of legitimation of a bastard child considered. *Comm'th v. Ferguson*, 137 P. S. 595; s. c. 27 W. N. C. 69.

21. The act of 18 February 1871 (P. L. 1872, 1250), authorizing John Ferguson to adopt his illegitimate son as his heir, was held to be an act of adoption, and not one of legitimation. *Ibid*.

22. Where a testator, fearing that his will would be set aside for want of testamentary capacity, proposed to adopt four persons and to make a new will which would probably not be attacked, and he adopted the four persons but did not make any change in his will, and one of the adopted daughters claimed one-fourth of his estate, on the ground that she had consented to the adoption in consideration of a promise to leave it to her by will; it was held, that as the letter upon which the claim was based contained no positive promise, the claim was properly disallowed. *Wright's Estate*, 155 P. S. 64; affirming s. c. 11 C. C. 492.

23. A decree of adoption will be vacated upon the petition of the child's natural and adopted parents, where it appears that such vacation is for the best interest of the child. *In re Gatkowski*, 12 C. C. 191.

(e) Actions for seduction.

24. An action by a father for the seduction of his daughter is barred when six years have elapsed after the seduction was accomplished. *Dunlap v. Linton*, 144 P. S. 335; reversing s. c. 8 Lanc. 65.

II. Guardian and ward.

(a) Appointment and removal of guardians.

25. The orphans' court has jurisdiction to appoint a guardian in but two instances: when the minor resides in the county, and when they have property there. *Taylor's Estate*, 26 W. N. C. 576; s. c. 47 L. I. 466.

26. Where a guardian of the person of a minor was appointed by the proper court at the place of the minor's residence and domicil in another state, and he brought his ward into this state to reside without obtaining the consent of the domiciliary court; it was held, that the orphans' court of the county into which he was brought had jurisdiction to appoint a guardian of his person. *Wilkins's Guardian*, 146 P. S. 585.

27. The orphans' court of the county where the father of a minor resides has jurisdiction to appoint a guardian, and this, although the minor was removed to another county for nurture and education by the father, when the minor was only eight months old. *Wolfe's Estate*, 13 C. C. 179.

28. The jurisdiction of the orphans' court for the appointment of a guardian is determined by the present residence of the infant, which is not necessarily the last legal domicil of his parents, where both parents are dead; it was held, that the orphans' court of the county in which the minor resided with his grandparents had jurisdiction, especially where that was the minor's domicil of origin. *Mintzer's Estate*, 13 C. C. 465; s. c. 2 Dist. Rep. 584.

29. The court will appoint a guardian of a minor's estate on the petition of his grandmother, notwithstanding his father denies that the minor has any estate. *Seff's Appeal*, 9 Atlan. 282.

30. The appointment of a guardian for a minor under fourteen, upon the petition of a grandfather without the mother's knowledge, may be revoked upon the mother's petition. *Corwin's Appeal*, 126 P. S. 326.

31. In an action by a guardian of a minor for rent of premises occupied by the defendant, who was co-heir with the minor of the demised premises, the defendant has no such interest in the minor's estate as will entitle him to object to the validity of the guardians' appointment. *Johnson v. Blair*, 126 P. S. 426.

32. The court will not appoint another

the guardian of the person of a minor, simply because the father of the minor is without means and not engaged in steady employment. *Comly's Petition*, 4 Montg. 70.

33. A decree appointing as guardian the executor of the estate, in which the minors are interested, cannot be collaterally attacked; where an executor was appointed guardian, and, under a decree of court, sold at private sale certain real estate belonging to the minors; it was held, that such minors on coming of age could not bring ejectment, and allege the invalidity of the guardian's appointment. *Kramer v. Mugele*, 153 P. S. 493.

34. An order appointing a guardian, improvidently made, may be revoked before the appointee has qualified. *McCleary's Appeal*, 1 Atlan. 586.

35. The mere removal of a guardian from the county does not warrant his removal from the guardianship. *Nisick's Estate*, 1 Lack. Jur. 136.

36. Where a person had himself appointed guardian for a minor, with full knowledge that a guardian had already been appointed in another county, and he then applied to the orphans' court of the other county to have the first guardian removed, but was not successful in his application, and his appointment was then revoked upon the application of the first guardian, but upon condition that the second guardian's costs in the proceedings in both counties should be paid by the first guardian, the supreme court affirmed the decree, revoking the appointment, but reversed the remainder of the decree which imposed the condition. *Mintzer's Estate*, 163 P. S. 484. See *Mintzer's Estate*, 13 C. C. 465; 2 Dist. Rep. 584.

37. Where an uncle had been appointed guardian of his nephews and nieces, who were without estates, and it appeared that he had a comfortable income and was able and willing to support his wards, the court refused to remove him upon the application of the mother of the minors, who lived in two rooms in a

large city, and supported herself entirely by her own labor, and was in delicate health. *Neely's Estate*, 12 C. C. 519.

(b) Powers of guardians.

38. A guardian may in good faith and under the advice of counsel accept a compromise of his ward's suit. *Lowery's Estate*, 9 C. C. 88.

39. The administrator of a guardian, who has entered up a judgment bond given to the guardian as guardian, has no authority to release the lien of the judgment, in derogation of the interests of the wards. *Brown v. Thompson*, 156 P. S. 297.

(c) Rights of guardians.

40. Upon the death of a minor the rights of his guardian over his estate cease. *Leitner's Estate*, 2 York 31.

41. The domicile of a legitimate unemancipated minor is, if his father be alive, the domicile of the latter, and a fund due the minor will be awarded to the guardian appointed by the orphans' court of the county of his father's domicile. *Cannon's Estate*, 15 C. C. 312.

42. Where money is received for damages to land or from the sale of land in New Jersey, by the guardian of a minor since deceased, it will be remitted to the guardian of the intestate minor in New Jersey to be distributed according to the law of that state. *Hough's Estate*, 3 Dist. Rep. 187.

43. A guardian who has advanced money to pay off liens upon his ward's real estate, and has thereby actually preserved the land for their benefit, is entitled to be reimbursed out of a fund raised by a sale of the real estate more than five years after the advances were made. *Merkel's Estate*, 154 P. S. 285.

44. A guardian who is a co-owner with his wards, and occupies the real estate and charges himself with the rent, will not be allowed a credit for repairs; it is the duty of a tenant to make necessary repairs to realty. *Laney's Estate*, 14 C. C. 4.

(d) Liabilities of guardians.

45. A guardian is not responsible for a sum in the hands of a former guardian unless it was lost by the neglect of the substituted guardian. *Long's Estate*, 7 Lanc. 323.

46. A guardian was held not to be chargeable with alleged excessive fees retained by his predecessor, who had been discharged on his own petition. *Wonders's Estate*, 9 C. C. 271.

47. If the committee of a lunatic guardian, or other trustee, confesses to using the trust funds in his business, resulting in a loss to the estate, the court has no discretion but to attach his person for contempt. *Croop v. Freas*, 8 C. C. 107.

48. A guardian who permits the administrator to take possession of his minor's real estate and go in business with the personalty is chargeable with the value of the personal property with interest, and the income of the real estate, and is entitled to credit for a reasonable allowance for maintenance. *Keenan's Estate*, 6 Kulp 67.

49. Where a guardian, after unavailing efforts for a year to loan out his ward's money, uses the same in his own business, and accounts for the same with full interest, such accounting will be taken as the full measure of liability, in the absence of proof that profits were made, or of malfeasance, negligence or delinquency. *Spath's Estate*, 144 P. S. 383.

50. Where a guardian loaned his ward's money in good faith to a solvent manufacturing company of which the guardian was a member, and solely with the intent to obtain a good rate of interest for the benefit of the ward's estate; it was held, that the ward was not entitled to claim a share of the profits without submitting to a like share of the losses, and where the guardian was charged with a share of the profits earned by his ward's money each year, it was not error to allow him a credit of one-third of such profits as a compensation for his services. *Small's*

Estate, 144 P. S. 293. Where, pending proceedings in the orphans' court, the ward filed a bill in equity against the company for discovery and an account of profits, it was held, that the bill against the members of the company other than the guardian was demurrable for want of equity, and the orphans' court having exclusive jurisdiction of the guardian's accounts, the proceeding pending thereon was a bar to the bill against the guardian. *Rau v. Small*, 144 P. S. 304.

51. Where a guardian has invested his ward's money in interest-bearing securities, prudently and in good faith, he will not be required to turn such securities into money in order to settle with his ward; it is sufficient if he turn over the investments instead of cash. *Falconer's Estate*, 11 C. C. 354.

52. Where a guardian invested the sum of four thousand dollars in a mortgage, which he took in his name as guardian, and a *scire facias* was issued thereon, and a few days afterwards, upon the insolvency of the first guardian, a new guardian was appointed, who refused to receive the mortgage, and the property was purchased by the surety of the first guardian at the foreclosure sale, who tendered a deed to the second guardian, and it further appeared that the investment was made after careful consideration; it was held, that the real estate was the property of the ward, and that the first guardian and his surety could not be held liable for any loss resulting from the investment. *In re Slingluff*, 7 Montg. 118.

53. Where one of several tenants in common is guardian for his co-tenants and he occupies the real estate, and he charges himself in his account with rent, he thereby admits his liability therefor and is liable to be surcharged if he has failed to charge himself with the proper rental. *LANEY'S ESTATE*, 14 C. C. 4.

54. Where a guardian is himself one of the owners of the real estate which he occupies, and the other owners are his wards and the widow, he should not charge himself in his account as guardian

with rent due to the widow. *Laney's Estate*, 14 C. C. 4.

55. Where a ward's real estate has been sold by his guardian, the latter will not be surcharged with any sum above the amount of the purchase money appearing from the return of sale, except upon strong and clear proof of fraud. *Bellas's Estate*, 6 Kulp 189.

56. The attorney for a guardian having collected and embezzled a claim belonging to the ward's estate, gave the guardian a judgment note which proved worthless; *held*, that the guardian should not be surcharged with the amount of the note, not having been guilty of gross negligence and the money never having come into his hands. *Landmesser's Appeal*, 126 P. S. 115; affirming *Landmesser's Estate*, 6 Lanc. 173.

57. A guardian who receives as part of his ward's estate a collectible note, and neglects to secure its payment by judgment or otherwise, is chargeable with the amount thereof. *Webber's Estate*, 133 P. S. 338.

58. A guardian will not be surcharged with a claim on the ground that it was lost by reason of his negligence in not pressing it, unless it appear that there was some reasonable probability that the litigation, if pressed, would bring success. *Heck's Estate*, 11 Montg. 66.

59. Where a ward's stepfather gave a sum of money to the guardian for the benefit of the ward, and within a few days thereafter made a demand for its return, which was in good faith acceded to by the guardian; it was *held*, that the right of the guardian to retain the money under the circumstances was too uncertain to justify a surcharge, after a lapse of nineteen years and the death of the guardian. *Roth's Estate*, 150 P. S. 261; reversing s. c. 5 York 99, 197.

60. Uncut timber descends as real estate, and if the guardian of minor heirs cuts and sells the timber and pays over one-third of the proceeds to the widow, he will be surcharged with the amount thus paid, and the orphans' court has

jurisdiction to compel the mother either to pay back the money to the guardian or enter security for the payment of it at her own death. *Mulholland's Estate*, 154 P. S. 491.

61. Where a guardian negligently paid over a portion of his ward's estate to a person not entitled to receive it, he will be compelled to pay the costs of a proceeding instituted for the purpose of surcharging him. *Mulholland's Estate*, 154 P. S. 491.

(e) Compensation of guardians.

62. A guardian, though he disclaims commissions, will be allowed compensation for special services. *Moore's Estate*, 26 W. N. C. 251; s. c. 47 L. I. 212.

63. A guardian may be deprived of all commissions by reason of his mismanagement of the estate; even in such case, however, an allowance of commissions may be awarded where, by reason of the mental derangement of their mother, his wards required of him more than ordinary care and attention. *Spath's Estate*, 144 P. S. 383.

64. The commissions of a guardian depend upon the size of the estate, the length of the guardianship and the labor and risk incurred; they range from one to three per cent per annum. *Scott's Estate*, 15 C. C. 316.

65. A guardian was allowed six per cent commission where it appeared that he had been put to unusual expense by reason of the filing of unfounded exceptions. *Wonders's Estate*, 6 York 91.

66. Where a guardian was discharged on his own petition, the court refused to surcharge his successor in the trust with an allowance of one hundred and fifty dollars, which the first guardian had allowed himself for his services. *Wonders's Estate*, 6 York 91.

(g) Guardians' bonds.

67. Where the proceeds of land in New Jersey are awarded for distribution to a guardian in New Jersey, the latter will not be required by the orphans'

court in this state to enter security for the faithful performance of his duty. *Hough's Estate*, 3 Dist. Rep. 187.

68. If a guardian admits his insolvency, the court will order him to give counter security to indemnify his sureties. *Minnich's Estate*, 4 Del. 11; s. c. 6 Lanc. 161.

69. Whenever it becomes necessary for a guardian to enter security for the proceeds of real estate, he must individually bear the cost of obtaining such security, and will not be allowed a credit therefor in his account. *Pickering's Estate*, 4 Dist. Rep. 263. See act 24 June 1895 (P. L. 248).

70. The surety upon a guardian's general bond is not liable for the proceeds of real estate sold under an order of court; and this, though he knew at the time he gave the bond that the ward had no personal estate. *Comm'th v. Pray*, 125 P. S. 542. See *Blauser v. Diehl*, 90 Ibid. 350.

71. Where a guardian collects the assets of the decedent's estate, pays the debts and retains the surplusage as guardian, the fact that the administratrix charges herself in her account with such surplus, which she has never received, is not conclusive of her liability; there is no reason why the surplus should be paid over to the administratrix only to be returned to the guardian, and the sureties on the guardian's bonds are liable. *McIntosh's Estate*, 158 P. S. 525.

72. Where a husband had been appointed guardian of his wife and received her moneys after she became of age; it was held, that his surety was not liable on his bond for such moneys so received. *Marcks's Estate*, 2 Lack. Jur. 114.

73. Where a guardian gives a second bond which is approved by the court, the surety thereon is liable, though the record fails to show why such second bond was given. *Comm'th v. Transue*, 2 Northam. 313.

74. The surety of a deceased guardian was held not to be released by an agreement of his successor in office that the son of the deceased guardian should keep the

money until the youngest ward came of age, paying eight per cent interest. *Neel v. Comm'th*, 7 Atlan. 74.

75. A mere forbearance of a subsequent guardian to avail himself of a means of satisfaction, will not release the surety of a former guardian. *Neel's Appeal*, 11 Atlan. 636.

76. Where a guardian's surety became such after the insolvency of the guardian, and of his original surety, and upon the agreement sanctioned by the court, that he was not to be held liable beyond the balance shown by the account then filed; it was held, that such agreement was binding upon the wards although they were minors when it was entered into. *Spath's Estate*, 144 P. S. 383.

77. The surety of a guardian is not relieved from liability by the fact that the guardian, at the time of his appointment, was one of the administrators of the estate of his ward's father. *Doner's Estate*, 156 P. S. 301.

78. In an action on a guardian's bond, a statement is sufficient when it apprises the defendant of the terms of the contract, its nature, and the amount of the plaintiff's claim; and this, though the date recited in the bond differs from the date recited in the statement as the date when the bond was approved. *Comm'th v. Esterly*, 10 C. C. 1.

79. In a suit against sureties on a guardian's bond, it is no defence that the ward, after coming of age and arresting her guardian under an attachment, released him from liability, in the absence of an allegation of payment of the decree. *Cook v. Comm'th*, 11 Atlan. 574.

80. It is no defence by the surety to a guardian's bond that the sums received by the guardian exceeded the amount which it was supposed would come into his hands, nor that he was required to give additional security before other moneys came into his hands. *Hartman v. Comm'th*, 13 Atlan. 780.

81. In a suit on a guardian's bond in case of recovery by the plaintiff, the judgment is for the commonwealth in the

penalty of the bond, and for the plaintiff in the amount of the damages proven; not decided whether interest on the penalty can be recovered where the amount averred to be due is greater than the penalty. *Comm'th v. Julius*, 8 York 89.

82. Where one of two sureties of a guardian has the ward's money in his hands, loaned him by the guardian and held for the protection of himself and his co-surety, and he refuses to apply the same toward the payment of a judgment obtained on the guardian's bond, his co-surety upon payment of one-half the judgment is entitled to subrogation as against him to the amount of one-half the fund in his hands. *Comm'th v. Marsh*, 149 P. S. 239.

(h) Guardians' accounts.

83. Where the orphans' court of the county, where the father of a minor resided, on his petition appointed a guardian for said minor; it was *held*, that such court had jurisdiction to require the guardian's administrator to file an account of said trust; and this, although at the time of the appointment the minor was with a relative in another county for nurture and education. The residence of a minor is with his father and it can acquire no other until *sui juris*. *Reitmeyer v. Wolfe*, 2 Dist. Rep. 810.

84. The statute of limitations cannot be interposed by a guardian to the ward's demand for an account. *Miller's Estate*, 6 Kulp 49.

85. A guardian with no money or property of the ward in his hands will not be compelled to file an account. *Keneagy's Estate*, 7 Lanc. 300.

86. The administrator of a guardian was cited to file the latter's account after his wards had arrived at the age of 23, 26 and 28 years, where it appeared that no distribution had actually been made. *Alexander's Estate*, 8 Lanc. 52.

87. Where a petition to compel a guardian to file an account was filed seventeen years after the ward came of age, the court refused it on the ground of

laches; and this, although the petition averred that she had lived abroad during the time, and that she had just been advised of her legal rights. *Thierfield's Estate*, 11 C. C. 47; s. c. 29 W. N. C. 440.

88. Where a ward files a petition for an account sixteen years after he comes of age, and the answer denies that the guardian owes any money to the ward and no evidence is produced to contradict the answer, the petition will be dismissed. *Evans's Estate*, 11 C. C. 324.

89. A failure of a ward to demand an account for eight years after coming of age is, in the absence of fraud, such laches as will deprive him of his right to an account. *Bauer's Estate*, 12 C. C. 77; 30 W. N. C. 429.

90. Where a guardian paid over to his ward various sums of money, which were expended, not for her education or maintenance, but for family purposes, and no account was filed or demanded until ten years after her majority; it was *held*, that the laches of the ward amounted to a ratification or confirmation of all the guardian had done. *Springer's Estate*, 4 Dist. Rep. 232.

91. Where a guardian has received money of his ward after the latter has come of age, he cannot be cited to account for it in the orphans' court; the only remedy is by a suit at law. *Evans's Estate*, 11 C. C. 324.

92. If a guardian cannot be found and has no known dwelling-place in the county, a citation to him to file an account may be properly served on his sureties. *Hayes's Estate*, 5 Montg. 199.

93. A guardian, who finds what he believes to be errors in his partial settlements, should include them in his final account and ask the court to correct them. He cannot correct them himself. *Kuntz's Estate*, 1 Northam. 252.

94. Where a person is guardian for more than one ward, separate accounts should be filed for each. *Falconer's Estate*, 11 C. C. 354.

95. In stating a final account, it is error for a guardian to begin with the

balance shown by a preceding partial account. *Falconer's Estate*, 11 C. C. 354.

96. Where a transcript of the amount appearing to be due and in the hands of a guardian on his final account is filed in the court of common pleas, such filing does not amount to a waiver of the right of filing exceptions to the account. *Sheffer's Estate*, 1 York 107.

97. Where an account of a first guardian is filed by his administrator and the second guardian allows it to become confirmed absolutely, the latter is liable for any improper credits of allowances which were in the first account. *Packer's Estate*, 6 York 143.

98. A ward, under the act of 13 October 1840 (P. L. 1841, 1), is entitled as a matter of right to a rehearing within five years, if he presents a petition of review alleging errors in the account and setting them forth specifically. *Culp's Estate*, 1 Northam. 327.

99. Where a guardian was the surviving partner of his ward's father and he bought the latter's interest in the business on credit and charged himself as guardian with the price and with legal interest, and his account was confirmed by the orphans' court and the wards accepted their shares and the guardian was discharged; it was *held*, that a petition for a review, filed four years later by a succeeding guardian, could not be entertained without proof of fraud, concealment, misrepresentation or ignorance. *McAvoy's Estate*, 13 C. C. 491.

(4) Settlements between guardian and ward.

100. Where the estate of a minor is trifling, a guardian may well avoid filing an account, in order to save expense to his ward, and the latter will not be allowed to disturb a settlement after the execution of a release and the death of his guardian, unless for clear mistake or fraud. *Roth's Estate*, 150 P. S. 261; reversing s. c. 5 York 99, 197.

101. Where a guardian's settlement with his ward was made in the presence

of a witness and with the books and papers of the guardian before them, and there was no evidence of the withholding of information, and the ward signed a release; it was *held*, that the costs of unsuccessful proceedings to surcharge the guardian should be placed upon the ward. *Roth's Estate*, 150 P. S. 261; reversing s. c. 5 York 99, 197.

102. A settlement between a guardian and ward shortly after the ward comes of age, will not conclude the ward where she has not been informed as to her rights. *Mulholland's Estate*, 154 P. S. 491.

103. Where a guardian makes a settlement with his ward without the intervention of the court, he cannot be compelled afterwards to account unless the ward can point out some mistake or other error in the settlement, or show that he has been defrauded. *Alexander's Estate*, 156 P. S. 368; reversing s. c. 10 Lanc. 153.

III. Infants' estates.

104. In a proceeding under the act 18 April 1853 (Brightly's Purdon 1830), for the sale of an infant's land, the sole object of the inquiry is whether it is to the interest of the minor that the sale shall be made; whether the title be good or bad can only affect the question of adequacy of price. *Burke's Estate*, 15 C. C. 9; s. c. 34 W. N. C. 359.

105. A decree appointing as guardian the executor of the estate in which the minors are interested cannot be collaterally attacked; where an executor was appointed guardian, and, under a decree of court, sold at private sale certain real estate belonging to the minors; it was *held*, that such minors on coming of age could not bring ejection, and allege the invalidity of the guardian's appointment. *Kramer v. Mugele*, 153 P. S. 493.

IV. Rights of infants.

106. The act 12 June 1893 (Brightly's Purdon 1019), providing for the separate confinement and trial of infants under

sixteen, violates the provisions of the constitution that all courts shall be open, and that all laws relating to the courts shall be general and uniform. *Courts for Trial of Infants*, 14 C. C. 254.

V. Responsibilities and disabilities of infants.

107. A deed is not binding upon one who signs it before she reaches her majority. *Behm v. Molly*, 133 P. S. 614.

108. Where a brother of full age, acting for himself and as next friend of his minor sisters, asserts a forfeiture of an oil lease of land owned by them in common, he cannot afterwards recover for himself his share of the monthly damages stipulated in the lease and accruing between the date of the assertion of forfeiture and the institution of the suit; it seems, that if the action of the brother was judicious and for the best interest of the minors, the forfeiture would be sustained against them. *Wilson v. Goldstein*, 152 P. S. 524; reversing s. c. 12 C. C. 337. See *Heinouer v. Jones*, 159 P. S. 228.

109. Where an infant held a policy of insurance on a property, and the defendant held two judgments which were liens on the same property, and the infant after the fire assigned the policy to the defendant, who received the insurance money and applied it in repairing the property, but the money proved insufficient to complete the building, and the defendant then sold it on his own judgment and purchased the property at sheriff's sale; it was held, that the infant upon attaining her majority could recover from the defendant the amount of money received by him from the insurance company. *Murr v. Berkheimer*, 1 York 177.

110. An infant who employs counsel and prosecutes a writ of error after she becomes of full age, cannot, after the affirmance of the judgment, avoid it by showing her previous infancy. *Phillips's Appeal*, 1 Cent. 636.

111. If a minor, with full knowledge of what had been done in his name, for

many years after his majority, ratified it, the constitutionality of a special act authorizing a lease of his coal lands while a minor is immaterial. *Myers v. Kingston Coal Co.*, 126 P. S. 582; *Myers's Appeal*, 16 W. N. C. 137.

112. Where an infant executed a deed during his minority and did not bring ejectment in disaffirmance of the deed for fifteen years after he became of age, it was held, that such delay might be regarded as a ratification. *Dolph v. Hand*, 156 P. S. 91.

113. Where an infant executes a purchase-money mortgage on land conveyed to him by deed, he cannot, after he becomes of age, affirm the deed and at the same time disaffirm the mortgage. *Kennedy v. Baker*, 159 P. S. 146.

114. The holding over by an infant lessee after coming of age is such a ratification as makes him liable for past as well as subsequent rent. *Harris v. Knowles*, 26 W. N. C. 249.

115. Where an administrator paid the money of an infant to a person not her guardian, and after the infant came of age, she took no action for nearly two years, except to write a letter to the person who received the money, in which she said she wanted it, and in the meantime the administrator filed his account and took credit for such payment; it was held, that the infant was entitled to recover from the administrator the amount of money so paid by him; the bare neglect to disaffirm does not of itself amount to a ratification. *Ilias's Estate*, 2 York 17.

VI. Actions by and against minors.

116. Where a judgment was recovered by a minor by her next friend, and pending an appeal the next friend compromised the case without the sanction of the court and against the judgment of the counsel in the case; it was held, that the next friend would be dismissed. *O'Donnell v. Broad*, 11 C. C. 622. See s. c. 149 P. S. 24.

117. An infant must be sued under the

protection of his guardian; if he appear in any other way, the judgment will be reversed. *McDevitt v. Ridgway*, 5 Montg. 119.

118. Upon a *scire facias* to revive a judgment, it is a good defence that the judgment was obtained before a justice on a promissory note signed by the defendant while a minor. *Smith v. Ruth*, 7 York 189.

119. The act 13 June 1836 (Brightly's Purdon 74), providing the method of proceedings in actions against minors, does not apply to a *scire facias sur mortgage*; it applies only to real actions. *Kennedy v. Baker*, 159 P. S. 146.

120. A judgment on a *scire facias sur mortgage*, where the return of the sheriff shows a regular service of the writ as if against an adult, cannot be subsequently attacked in an action of ejectment, by proof *dehors* the record, that the defendant was an infant at the time of the service of the writ. *Kennedy v. Baker*, 159 P. S. 146.

121. In a suit against a father and his minor child, a judgment against the latter is void; and this, notwithstanding a general appearance. *Brown v. Downing*, 137 P. S. 569; s. c. 38 P. L. J. 114.

122. Upon *certiorari* to a justice's judgment, where it appeared that two of the sureties on a note were minors at the time of signing, and judgment was erroneously entered against them, together with the other defendants; it was *held*, that the judgment must be reversed as to all of the defendants, that it could not be reversed as to the minors and affirmed as to the others. *Hoff v. Hoke*, 1 York 207.

See PLEADING: PRACTICE.

VII. Maintenance.

123. Where a guardian claiming credit for maintenance produces no vouchers, and his book appears to be fabricated, the court is justified in allowing him no credits but those admitted by the ward. *Haviland's Appeal*, 8 Atlan. 858.

124. A guardian will be allowed for the

past maintenance of a child over fourteen years of age, it appearing that he was weak and sickly and unable to work. *Wildoner's Appeal*, 9 Atlan. 272; affirming *Davenport's Estate*, 2 Kulp 181.

125. Though a guardian by careless management and neglect will forfeit all right to allowance for support and maintenance of his ward while a member of his own household, yet he will be allowed advances made by him for his ward's support in the family of his mother, before the receipt by the guardian of any of his ward's estate. *Albert's Appeal*, 128 P. S. 613.

126. Where a minor has a separate estate, a grandmother, if in humble circumstances, will be allowed a periodical sum for the past support of the minor in the absence of evidence that she took and maintained the minor *in loco parentis*. *Lafferty's Estate*, 147 P. S. 283.

127. An action cannot be brought in the court of common pleas against a guardian to charge the estate of his ward for board and clothing necessary for the ward's maintenance; the jurisdiction of the orphans' court is exclusive. *Johnstone v. Fritz*, 159 P. S. 378.

128. In an action against a parent to recover for the support and maintenance of his infant child, a statement is fatally defective which fails to show any contract, or that the support and maintenance of the child were reasonably worth the amount claimed. *McLaughlin v. McLaughlin*, 159 P. S. 489.

129. In the act 18 April 1853, sec. 9 (Brightly's Purdon 1834), permitting an allowance for maintenance and education, notwithstanding a trust for accumulation; it was *held*, that the words "no other means for maintenance or education" must be construed as "no other adequate means." *Kinike's Estate*, 10 C. C. 522; s. c. 29 W. N. C. 163.

130. The orphans' court will not authorize the payment of an allowance directly to a minor; the ward's estate must be expended by the guardian. *Allison's Estate*, 11 C. C. 18.

131. The orphans' court will not control the discretion of executors as to the amount of income to be used for the maintenance of a minor, where the testator directs that such amount shall be subject to the judgment of the executors. *Allison's Estate*, 11 C. C. 18.

132. Where a minor is maintained and cared for by her grandfather, and her surviving parent is unable to provide for her, an allowance will be granted to the grandfather out of the minor's estate for her past and future maintenance. *Wall's Estate*, 13 C. C. 413.

133. A guardian will be allowed for boarding the ward while the latter is attending school; her assistance in the household during such a time is not an equivalent for boarding; so, he will be allowed a charge for trouble and expense during sickness and funeral and cleaning house. *Scott's Estate*, 15 C. C. 316.

134. A legacy to a minor being contingent on his arrival at the age of twenty-one years, an allowance for maintenance will not be made thereout. *Robinson's Estate*, 4 Del. 1; s. c. 6 Lanc. 153.

135. The ward being a near relative, and the guardian having kept no account of expenditures in her maintenance, he will not be allowed for her support. *Miller's Estate*, 6 Kulp 63.

136. If minor children have a guardian, administrators will not be allowed credit in their account for their maintenance. *Keenan's Estate*, 6 Kulp 73.

137. Where a child from ten to fourteen years of age was maintained by its mother, who was its guardian, the court allowed the guardian five dollars a month for such maintenance; but where the ward married at eighteen years of age and remained with her mother, it was held, that the husband and not the wife's estate was liable for her board and nursing in the absence of a contract to the contrary. *Bellas's Estate*, 6 Kulp 189.

138. A guardian who is satisfied that an allowance for maintenance is not being properly expended, should remove his ward from the custody he is in, and

apply for the order of allowance to be rescinded. He cannot permit the child to remain where he is, and simply refuse to pay the allowance. *Norris's Estate*, 46 L. I. 270.

139. An allowance of \$1400 was awarded to a mother for past expenditures, and \$2000 per year allowed for the support of a child between one and two years of age. *Jones's Estate*, 46 L. I. 497.

140. Upon a bequest to grandchildren "at their respective arrival at the age of twenty-one years," with a devise over in case they do not attain that age, the legatees are entitled, under an order of court, to the interest for their education and maintenance. *Fox's Estate*, 6 Montg. 14.

141. Where the father obtained an order on the guardian of his child to pay him the income for its maintenance and education, and it appeared that he had appropriated a large portion to his own use without expending it for the benefit of the ward, the court revoked the order and directed the guardian to pay the necessary bills for maintenance, and ordered the father to repay the guardian the amount which he had appropriated to his own use. *In re Leichthamer*, 7 Montg. 165.

142. In the settlement of a guardian's account the ward is not bound by a judgment against the guardian for his maintenance. He may contest it both as to fairness and amount. The orphans' court has exclusive jurisdiction as to allowances. *Kumberger's Estate*, 37 P. L. J. 383.

143. If the principal of an estate must be encroached upon for the expenses of maintenance, a guardian will not be charged interest on a sum withheld from investment to meet such emergency. *Moore's Estate*, 26 W. N. C. 251; s. c. 47 L. I. 212.

VIII. Cruelty to children.

144. Under the act 11 June 1879 (Brightly's Purdon 1018), wilful neglect of children is a want of ordinary care

which is without justifiable excuse, and such as arises from an evil intent to injure them or culpable indifference to their welfare. *Comm'th v. Stewart*, 12 C. C. 151.

145. It is sufficient to aver in an indictment for unlawfully abandoning and neglecting children, under the act 11 June 1879 (Brightly's Purdon 1018), that the defendant was guilty of unlawful abandonment and neglect; it is not necessary to state that such abandonment and neglect was wilful. *Comm'th v. Stewart*, 12 C. C. 151.

INJUNCTION.

See COPYRIGHT: TRADE-MARKS:
WASTE: WAYS.

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- V. Injunction bonds.
- VI. Dissolution.

I. General principles.

1. An injunction will not be granted where the plaintiff's right to the relief sought is not clear, but is questioned and denied upon every point advanced. *Picar v. Bovolak*, 7 Kulp 241.

2. An injunction will not be granted to prevent possible and prospective injury, except in cases where it is clear that there exists no adequate remedy at law, nor except in a clear case of the invasion of a private or a public right; to doubt is to refuse. *Wilkes-Barre Gas Co. v. Wilkes-Barre*, 6 Kulp 431.

3. Where the legal title to real estate and the right of possession thereunder is involved, the defendant is entitled to a trial by jury, and a court of equity has no jurisdiction by injunction to try the question according to the course of procedure in chancery. *Pennsylvania Canal Co. v. Middletown & Harrisburg Turnpike Co.*, 11 C. C. 582.

4. Where a question of boundary is in dispute, the defendant will not be enjoined until such question is determined by a judgment at law. *Hartman v. Moul*, 1 York 111. See *Moul v. Hartman*, 104 P. S. 43.

5. To a bill for an injunction a wrongdoer cannot set up benefits to prevent relief. *Pennsylvania Railroad Co.'s Appeal*, 115 P. S. 514.

6. An injunction is binding on all who know of it, and any one who is present, aiding and abetting an act which is in violation of an injunction, or who permits such an act done in his presence and without remonstrance, is himself guilty of actual breach of the injunction and will be attached for contempt. *Shiffer v. Youngstown Bridge Co.*, 2 Lack. Jur. 288.

7. The payment of money will not be restrained by injunction, except where such payment would be in violation of a trust. *Williams v. Grand Central State Co.*, 1 Northam. 70.

8. The right to an office in a corporation, where one is in possession, will not be tried in an application for an injunction. *Nolde's Appeal*, 15 Atlan. 777; affirming *Nolde v. Madlem*, 4 Lanc. 347.

9. Equity will not restrain by injunction the advertisement of an injunction restraining the use of a trade-mark. *Lord v. Lord*, 25 W. N. C. 436.

See TRADE-MARKS.

II. Preliminary and special injunctions.

10. The new equity rules adopted by the supreme court 15 January 1895 have all the force and effect of a positive enactment; where a bill for an injunction was not endorsed in accordance with the new rules, and a preliminary injunction was granted on *ex parte* affidavits, the order granting the injunction was reversed by the supreme court. *Cassidy v. Knapp*, 167 P. S. 305; s. c. 36 W. N. C. 197.

11. If an injunction bill be not sworn to and there be no affidavit, a preliminary injunction should not be allowed. *Wilcox's Appeal*, 12 Atlan. 578.

12. If counsel testifies that there has not been time to print the bill, the plaintiff has twenty days in which to file and serve printed copies, and the court may award an interlocutory injunction without service of a copy. *Landmesser v. Liem*, 5 Kulp 417.

13. Where, upon a motion for a preliminary injunction, an answer has been filed and injunction affidavits, but there has been no replication, and the case has not been set down for a hearing on bill and answer, it is premature, where there are facts in dispute, to decide the case as on final hearing, and to grant the permanent relief sought for. *Gross v. Wieand*, 151 P. S. 639; reversing s. c. 2 Northam. 397.

14. If all the facts set out in the bill are denied in the answer, and in depositions taken in support thereof, a preliminary injunction should, on motion of the defendants, be dissolved. *New Era Life Association's Appeal*, 2 Atlan. 59.

15. A preliminary injunction should not be granted where the equities of the bill are fully denied by the defendant's affidavit, read on the hearing. *McCartney v. Cassidy*, 141 P. S. 453.

16. Upon filing a responsive answer denying the allegations of the bill, a preliminary injunction will be dissolved. *McVey v. Brendal*, 7 Lanc. 399; s. c. 5

Ibid. 350; reversed on another point in 144 P. S. 235.

17. Where every substantial averment of a bill for an injunction and receivership is denied by a responsive answer which is not overcome or met by further proof, it is error to continue a preliminary injunction or to appoint a receiver. *Crombie v. Order of Solon*, 157 P. S. 588. See *Order of Solon v. Folsom*, 161 P. S. 225.

18. A preliminary injunction will not be granted where every allegation of the bill is denied by the defendant. *Wagner v. Poley*, 4 Del. 172.

19. A preliminary injunction will be dissolved when the affidavits absolutely deny all the facts upon which the plaintiff's equity rests. *Kelly v. Philadelphia & Reading Railroad Co.*, 5 Montg. 29.

20. In an action by a railroad company to enjoin the erection of a building within the company's right of way, where the plaintiff's title was a legal one and was disputed by the defendant; it was held to be error to award a preliminary injunction until the disputed right should be tried at law. *Delaware, L. & W. R. R. Co. v. Newton Coal Mining Co.*, 137 P. S. 314.

21. A decree awarding a preliminary injunction will be reversed where it appears that the affidavits in support of the bill were contradictory. *Mullen v. McKinney*, 138 P. S. 69.

22. A preliminary injunction will not be granted where the plaintiff's right is not clear, but is questioned on every ground on which he puts it. *Patterson's Appeal*, 129 P. S. 109.

23. A preliminary injunction will not be awarded where the equities of the plaintiff are questioned on every ground upon which he puts them. *Norristown Junction R. R. Co. v. Citizens' Pass. Ry. Co.*, 9 Montg. 103.

24. A preliminary injunction will not be granted where there is a doubt as to the plaintiff's right, or where the injury which would result from granting the injunction would be greater than that

which would result from refusing it. *Lehigh & Wilkes-Barre Coal Co. v. Delaware & Hudson Canal Co.*, 11 C. C. 185.

25. An interlocutory injunction will not be granted where the plaintiff's right is doubtful, and the granting will be productive of as great injury as a refusal. *Andrews v. Stefansky*, 5 Kulp 339.

26. A preliminary injunction will not be granted where the conflicting rights between the parties as to the title to a wall is involved in much doubt. *Hay v. Immell*, 7 York 110.

27. The city of Harrisburg was enjoined by preliminary injunction from interfering with the plaintiff in extending its tracks in crossing a bridge over the tracks of a railroad, upon the plaintiff filing a bond to indemnify the city against charges which it might be compelled to bear by reason of the plaintiff's occupancy of the bridge. *Harrisburg City Pass. Ry. Co. v. Harrisburg*, 149 P. S. 465.

28. The court refused to disturb a preliminary injunction against the laying of a railroad track on Delaware avenue in the city of Philadelphia, or to consider the questions involved, until final hearing. *Pennsylvania R. R. Co. v. Philadelphia Belt-Line R. R. Co.*, 149 P. S. 218; affirming s. c. 10 C. C. 625.

29. A railroad company will not be restrained by preliminary injunction from the further operation and management of a leased railroad, where every ground upon which the plaintiffs base their right is denied by the defendants. *Gummere v. Lehigh Valley R. R. Co.*, 12 C. C. 106.

30. Under the act 19 February 1849, sec. 13 (Brightly's Purdon 1797), a railroad company has the right to change the site of a public road to avoid a grade crossing, and it will not be restrained from so doing by preliminary injunction. *Abingdon Township v. North Pennsylvania R. R. Co.*, 12 C. C. 118.

31. Upon a bill alleging the building of a railroad with crossings at grade and a taking of a highway longitudinally, a preliminary injunction will be refused if the defendants deny the allegations of

the bill. *Lower Merion Township v. Philadelphia & Reading Railroad Co.*, 5 Montg. 163.

32. A preliminary injunction cannot be used to take property from one person and put it in the possession of another. *O'Brien v. Wilson*, 10 Montg. 169.

33. A preliminary injunction will not be granted to take property out of the possession of the defendant and to put it in the hands of the plaintiff; nor where it would do the plaintiff no good but would work injury to the defendant. It will only be granted in a clear case and where no doubt exists as to the claim and remedy, and irreparable injury is an indispensable prerequisite. *Gummere v. Lehigh Valley R. R. Co.*, 12 C. C. 106.

34. A preliminary injunction which was dissolved on the ground that it could only be preventive and that the injury had been done, was reinstated by the supreme court, as the circumstances attending the defendant's act strongly suggested a race against the law. *Cooke v. Boynton*, 135 P. S. 102; s. c. 26 W. N. C. 135.

III. Mandatory injunctions.

35. Where four brothers purchased a burial lot and erected a monument thereon at their joint expense, and on each side of the monument inscribed the name of one of the brothers and set apart the space opposite each name for such brothers' family; it was held, that no one of the brothers could permit the interment in his portion of the lot, without the consent of the other owners, of any person not a member of the family; and where the executors of the widow of one of the brothers cut off the raised letters on one face of the monument, it was held, that a court of equity would, by a mandatory injunction, require an entirely new monument to be erected at the expense of the widow's estate. *Lewis v. Walker*, 165 P. S. 30.

36. Where a natural gas company contracted to supply a glass works with gas

for fuel; it was *held*, on a bill alleging that the glass works had been constructed for the use of natural gas only, and that the gas company had turned off the gas, it was not error to refuse an interlocutory mandatory order to continue the supply. *Thompson Glass Co. v. Fayette Fuel Gas Co.*, 137 P. S. 317.

37. Where a natural gas company was enjoined by a preliminary injunction from shutting off the gas from plaintiff's works, and the gas having been shut off before the service of the injunction, the court made a mandatory order that the plaintiff's use of the gas be restored to him; it was *held*, on a motion to dissolve, that the answer and affidavit raised a doubt as to the propriety of continuing the mandatory order, and the lack of an adequate remedy at law not being clear, the court dissolved the injunction and mandatory order without prejudice to a motion for their subsequent renewal. *Black Lick Mfg. Co. v. Saltsburg Gas Co.*, 139 P. S. 448.

38. A mandatory injunction will be granted against a natural gas company to compel it to turn on its gas to plaintiff's factory, which it had cut off, until the case can be heard on its merits. *Whiteman v. Fayette Fuel Gas Company*, 139 P. S. 492; s. c. 27 W. N. C. 205.

39. Equity will not interfere by way of mandatory injunction to restrain the maintenance of a structure upon an adjoining lot in violation of restrictive conditions in a deed, when there has been long-continued delay in asserting the right and a remedy exists at law. *Orne v. Fridenberg*, 143 P. S. 487.

40. Where the defendant had on his own land a spring from which flowed a small surface stream onto the plaintiff's land, and the defendant dug into the bank and opened up the spring at a higher level and carried the stream to one side to a watering trough, and upon a bill for mandatory injunction a decree was made that the defendant convey the surplus water from his watering trough in a covered pipe to the plaintiff's land,

if the plaintiff elect to receive the water in that way, and if not, then that the defendant be not required to so conduct it; it was *held*, that such decree was not error, nor was it error to refuse to require the stream to be restored to its original and natural channel. *Hopper v. Hopper*, 146 P. S. 365.

41. Where land was subject to a covenant that no manufactory, workshop, steam-engine house, smithshop or other building for offensive purposes or occupation, or building of any kind to be used for any other purpose other than as and for a genteel cottage or dwelling-house, stable or coach house, should ever be built upon the land, and the lessees of defendant in September 1887 built on the land a boat-house, club-house and a carpenter shop for repairing boats, and notice to remove the same was not given until January 1889, the court refused a mandatory injunction; a mandatory injunction will not be issued where complainant's rights are not clear. *Gatzmer v. St. Vincent School Society*, 147 P. S. 313.

42. A steel company will not be compelled by mandatory injunction, at the suit of a city, to remove slag and cinders deposited in a navigable river, where the evidence is conflicting whether such deposit did or did not cause a flooding of the streets. *Scranton v. Scranton Steel Co.*, 154 P. S. 171.

43. A mandatory injunction to issue stock to the plaintiff was refused where the only reference to the issuing of the stock was found in the prayer of the bill. *Williams v. Grand Central Slate Co.*, 1 Northam. 70.

44. A court of equity will not, by injunction, compel the removal of a defectively constructed party wall. *Mulligan v. Fitzpatrick*, 10 C. C. 179; s. c. 28 W. N. C. 151.

See INJUNCTION IV. (o).

IV. When an injunction will be granted.

(a) Against municipal corporations.

45. A borough and its officers were restrained by a preliminary injunction from interfering with the plaintiff railroad company laying a second track upon land acquired by plaintiff's lessor from the commonwealth, but which had been permissively used as a passageway by the public for more than twenty-one years. *Pennsylvania R. R. Co. v. Freeport*, 138 P. S. 91.

46. The supreme court will not take original jurisdiction of a bill to restrain a municipal corporation from doing an act contrary to law, where the allegation as to the injurious result of delay is vague, and it does not appear that the question could not have been brought before the supreme court by appeal at as early a day as a motion for an injunction could there be heard. *Clark v. Washington*, 145 P. S. 566. See s. c. 11 C. C. 433. See *De Walt v. Bartley*, 146 P. S. 525.

47. The city of Harrisburg was enjoined by preliminary injunction from interfering with the plaintiff in extending its tracks in crossing a bridge over the tracks of a railroad, upon the plaintiff filing a bond to indemnify the city against charges which it might be compelled to bear by reason of the plaintiff's occupancy of the bridge. *Harrisburg City Pass. Ry. Co. v. Harrisburg*, 149 P. S. 465.

48. A borough will not be restrained by preliminary injunction from interfering with the construction of a street railway, where the consent of the borough to the construction is conditional and it is doubtful whether the company has accepted the conditions, and it is also alleged by the defendant that the resolutions and ordinances giving the consent were never signed by the burgess, or advertised or posted as required by law. *Athens, Sayre & Waverly Electric Street Ry. v. Sayre Borough*, 156 P. S. 23.

49. The supreme court will assume jurisdiction over a bill filed by a citizen of a

municipal corporation to restrain the municipality from issuing bonds authorized by ordinance and a special election, where it is alleged in the bill that such issue will involve an increase of indebtedness beyond the limits provided by law. *Bruce v. Pittsburgh*, 161 P. S. 517.

50. Where a city is attempting to build a quarantine station outside of its limits, the courts of the county in which the proposed station is to be established cannot issue an injunction against such city, but if the proposed station amounts to a nuisance, the persons engaged in erecting it may be enjoined. *Chester v. Philadelphia*, 15 C. C. 217.

51. Where an alley was laid out in 1873, equidistant from two named streets, bringing complainant's buildings within the lines of the alley, but the draft located the building on the north side of the alley, and the surveyor testified that he had been directed to so make the draft as to conform to the lines of the then existing alley previously dedicated, which would not affect the buildings, and after the report had been confirmed the buildings were destroyed by fire, and before rebuilding the borough surveyor gave the complainant the old lines as the new ones, and she re-erected the buildings on the old foundations; it was held, that ten years afterwards the borough authorities would be enjoined from removing the buildings. *Elliott v. Evans*, 8 Montg. 217.

52. Equity will not, in the absence of fraud, interfere by injunction with the discretionary power of councils in deciding as to the advisability of constructing sewers, the size of the same, or the apportionment of their cost. *Mann v. Easton*, 2 Northam. 177.

(b) Against public officers.

53. The supreme court has no original jurisdiction of a bill to restrain county officers from carrying into execution the ballot act of 19 June 1891; the county would not be a proper party to such a bill. *De Walt v. Bartley*, 146 P. S. 525.

54. Where the complainants were elected as judge and inspectors for the ensuing general election at a Republican primary election, but the returns were not made to the division officers on the same evening as required by the party rules, and the party rules also provided that a contest should be heard and decided on the second night after the election; it was *held*, that the irregularity as to return was not fatal to the election; and where other officers were elected three months afterwards, it was *held*, that they would be enjoined by preliminary injunction from interfering with the complainants in the exercise of their offices. *Gray v. Tooms*, 13 C. C. 625.

55. A court of equity will not enjoin the holding of an election for a public office at the suit of a taxpayer unless the public interests involved are of the most serious character, and a failure to act promptly would be attended with the gravest injury to the public. *Birely v. Roney*, 4 Dist. Rep. 71. See *Comm'th v. Warwick*, 4 Dist. Rep. 601.

56. An injunction will issue to prevent the burgess of a borough acting as president of councils without any color of right; but where a person is a *de facto* member of councils the proceedings should be by *quo warranto*. *Carline v. Shallenberger*, 13 C. C. 145. See *Comm'th v. Kempsmith*, 13 C. C. 667; and see act 23 May 1893 (Brightly's Purdon 248).

57. Specifications for public supplies must not be so restrictive as to exclude other manufacturers from competition, or the court will restrain the execution of the contract at the suit of a taxpayer. *Breen v. McCallin*, 6 C. C. 658.

58. A city contractor will not be enjoined from proceeding with a paving contract at the suit of a gas company seeking to lay its trenches, who have delayed their work for an unreasonable time. *Wilkes-Barre Gas Co. v. Hendler*, 7 Lanc. 42.

59. School directors interested in a piece of property may, at the suit of a taxpayer, be enjoined from voting in favor of its purchase by the district; and

this, though the purchase is being made in good faith and at a fair price. *Witmer's Appeal*, 15 Atlan. 428.

60. Equity will not interfere by injunction with the selection of a site for a school building; that is wholly within the power and discretion of the controllers or directors. *Witherop v. Titusville School Board*, 7 C. C. 451.

61. Equity will restrain by injunction a board of school directors from increasing its indebtedness beyond two per cent of the assessed valuation, if not made in compliance with the act of 20 April 1874 (Brightly's Purdon 1396). *Witherop v. Titusville School Board*, 7 C. C. 451.

62. Equity will restrain by injunction a board of school directors from declaring in an illegal manner the seats of certain members vacant. *Butts v. Howley*, 5 Kulp 338.

63. An injunction will not be granted against a school board upon a bill by a taxpayer alleging that the board is about to elect unlawfully one of its members secretary at a salary; it is only when the board has actually elected such a secretary that the question can be raised either by *quo warranto* against the secretary elect, or by an injunction to restrain payment of the salary. *Comm'th v. Guthrie*, 8 Kulp 24.

64. Where the principal of a state normal school was dismissed from office for immoral conduct, but without notice or hearing; it was *held*, that such a proceeding was irregular and unjust; but the supreme court sustained an injunction to restrain the discharged principal from assuming to exercise the office, on the ground that greater harm would result to the school and to the public service from disturbing the injunction than from sustaining it; but the injunction was sustained with a saving of all rights to the appellant to proceed at law for the collection of his salary for the remainder of the year, and the costs were put upon the winning party. *Edinboro Normal School v. Cooper*, 150 P. S. 78.

65. School teachers will not be en-

joined from remaining in possession of their schools where the question as to the time of their employment is disputed and in doubt. *Butler Township School District v. Dougherty*, 13 C. C. 233.

66. The decision of the commissioners appointed under the act of 15 June 1887 (P. L. 408), acting in conjunction with the survivors, as to the proper site on the battle-field of Gettysburg for a monument to a Pennsylvania command, is not subject to revision and reversal by the Gettysburg Battle-field Memorial Association. Equity will enjoin the refusal to permit the erection. *Reed v. Gettysburg Battle-field Memorial Association*, 129 P. S. 329.

(c) Against corporations.

67. A court of equity has jurisdiction to entertain a bill by a corporation to restrain another corporation from wrongfully using the plaintiff's name, and when such a bill has been dismissed, the supreme court, in reversing the decree, may enter a decree finally disposing of the whole matter. *Fort Pitt Building & Loan Ass'n v. Model Plan Building & Loan Ass'n*, 159 P. S. 308.

68. The managers of a joint stock company will be restrained by a preliminary injunction from selling the entire business and property of the association without the consent of all the shareholders. *Carter v. Producers' & Refiners' Oil Co.*, 164 P. S. 463: affirming s. c. 41 P. L. J. 380.

69. Equity will not enjoin a corporation and inquire whether the ten per cent has been paid in and the charter regularly obtained. *Boardman v. Keystone Standard Watch Co.*, 8 Lanc. 25.

70. Where a bill is pending between one claiming to have transferred to him certain shares of stock in a corporation and the individual owners thereof, and the plaintiff has made out a *prima facie* case, the directors of the company will be restrained from using its funds to defend the suit where the company as a corporation are in no way interested in the pro-

ceedings. *Norristown Traction Co. v. Shannon*, 7 Montg. 86.

71. A coal and iron company was properly enjoined by preliminary injunction from entering upon and laying its tracks upon the lot of a gas and water company acquired by the latter under the right of eminent domain and in necessary use for the purposes of its business. *Scranton Gas & Water Co. v. Northern Coal & Iron Co.*, 145 P. S. 21.

72. Where the defendant's mine took fire and it was necessary to flood it, the court refused to restrain the defendant by preliminary injunction from further flooding its mine upon the allegation that the barrier of coal between the defendant's mine and plaintiff's mine, which was fifty feet thick, was not strong enough to stand the proposed increased pressure of water, which allegation, however, was denied by defendant's affidavits. *Lehigh & Wilkes-Barre Coal Co. v. Delaware & Hudson Canal Co.*, 11 C. C. 185.

73. Equity has jurisdiction to restrain the sinking of an oil well where the lease under which the right is claimed does not grant a conveyance in fee, but merely an incorporeal hereditament. *Carnegie Natural Gas Co. v. Philadelphia Company*, 158 P. S. 317.

74. An exclusive privilege granted a natural gas company for a limited time will be enforced by injunction. *Meadville Fuel Gas Co.'s Appeal*, 4 Atlan. 733; affirming *Meadville Natural Gas Co. v. Meadville Fuel Gas Co.*, 1 C. C. 488.

75. An owner of coal *in situ* who has been released from the obligation of surface support is entitled to an injunction restraining a natural gas company from entering upon the surface to conduct a pipe-line until payment of, or security for, compensation for the easement of support; not, however, if the corporation agrees to be bound by the release, and to accept the risk of subsidence. *Penn Gas Coal Co. v. Versailles Gas Co.*, 131 P. S. 522.

76. Equity will enjoin an illegal interference with flowing gas wells used to supply the public. *Citizens' Natural Gas*

Co. v. Shenango Natural Gas Co., 138 P. S. 22; s. c. 38 P. L. J. 252; affirming s. c. 7 C. C. 277; s. c. 24 W. N. C. 573.

77. Where a natural gas company, in consideration of privileges granted, agreed to furnish gas to the public buildings and churches of the borough free of cost, and it was provided that if similar privileges be granted to another company, the burden should be decreased, and subsequently similar privileges were granted to another company and defendant agreed to furnish the school-house and one church with gas if the second company would furnish the other public buildings and churches; it was *held*, that the contract was valid and that the defendant would be enjoined from cutting off the supply of gas from the school-house. *Sewickley Borough School District v. Ohio Valley Gas Co.*, 154 P. S. 539.

78. Where a natural gas company agreed to supply gas to the plaintiffs, who, in consideration of their guarantying the debts of the company, were charged a lower rate than was charged to the public, and in consequence of the failure of supply, the rates for gas were raised but the plaintiffs refused to pay the increased rates, the court refused to grant a preliminary injunction restraining the company from cutting off the plaintiffs' supply of gas. *Brown v. Equitable Gas Co.*, 155 P. S. 359.

79. Where a landowner granted a natural gas company a right of way through his land, and by a subsequent agreement granted a greater width for the right of way upon the company agreeing to lay its pipes two feet below the surface; it was *held*, that the latter agreement was not an independent collateral one, and the company would be enjoined from maintaining its pipes upon the surface, and that it was not in a position to allege the inconvenience to the public which would be caused by stopping the flow of gas to make the change. *Carothers v. Philadelphia Company*, 40 P. L. J. 191.

80. An electric light company will be enjoined from locating its poles on the

side of a country road until a bond be given for the payment of such damages as an abutting landowner may sustain by their location. *Haverford Electric Light Co. v. Hart*, 13 C. C. 369.

81. A preliminary injunction will not be granted to enjoin a water company from permitting the use of its water for the purposes of street cleaning, when the facts are disputed and the construction of the company's charter is not free from doubt, and where the injunction if granted would produce more serious inconvenience and discomfort to a larger part of the community than any shown to be suffered by the plaintiff. *Fisher v. York Water Co.*, 1 York 83.

82. The act 29 April 1874, as amended by the act 16 May 1839 (Brightly's Purdon 514), confers, it seems, upon water companies the right of eminent domain, under which land may be taken within or without the district which they have been chartered to supply with water. A water company will not be restrained by preliminary injunction from constructing its works without such limits, where it appears that otherwise it could not carry out the purposes of its incorporation. *Keller v. Riverton Water Co.*, 161 P. S. 422.

(d) Railroad and street railway companies.

83. Upon a question of eminent domain the court will not, by injunction, turn one railroad out of possession and put another in. *Scranton & Forest City Railroad Co. v. Delaware & Hudson Canal Co.*, 1 Lack. Jur. 113.

84. The court will not restrain, by preliminary injunction, a railroad company from condemning land if it appears by the evidence produced that the road is being built for public trade and travel, though denied by the plaintiff. *Dobson v. Pennsylvania Schuylkill Valley Railroad Co.*, 6 Montg. 109; *Rudolph v. Pennsylvania Schuylkill Valley Railroad Co.*, Ibid. 114.

85. A railroad company will not be enjoined from maintaining its tracks

upon a highway in the absence of an averment that they were laid without authority of law. *Kemble v. Philadelphia, Germantown & Norristown Railroad Co.*, 140 P. S. 14; affirming s. c. 46 L. I. 444.

86. A railroad company will be enjoined from changing the site of a public road unless some reasonable necessity be shown. *Moreland Township v. Pennsylvania Railroad Co.*, 6 Montg. 165. See *Moreland Township v. Pennsylvania Railroad Co.*, Ibid. 167.

87. A railroad company which proposes to occupy a public street in such a way as to force the public to use the track for a distance of two hundred feet, will be restrained from doing so until it makes proper provision for the convenience of the public by locating or constructing another street in place of the street taken. *Stroudsburg Borough v. Wilkes-Barre & Eastern R. R. Co.*, 12 C. C. 395.

88. If a railroad company make a *bona fide* claim to the property in dispute, the court will not, by preliminary injunction, prevent the construction of sidings upon the land. *Potts v. Philadelphia & Reading Railroad Co.*, 7 Montg. 13.

89. A railroad company will not be enjoined from building a siding in a navigable stream where the purpose of such construction appears to be a reasonable exercise of the company's franchise. *Schofield v. Pennsylvania Schuylkill Valley R. R. Co.*, 8 Montg. 125.

90. A railroad company will not be enjoined by preliminary injunction from constructing a siding into a fair grounds across the proposed line of the plaintiff's road, where the plaintiff's road is not yet constructed or even graded. *Baltimore & Harrisburg R. R. Co. v. Pennsylvania R. R. Co.*, 6 York 105.

91. Where the plaintiff railroad company located a branch extending across the defendant's railroad to two manufacturing establishments, and the plaintiff filed a bill to restrain the defendants from obstructing the construction of the grade crossing, the supreme court refused to interfere with a decree refusing a pre-

liminary injunction but allowing the plaintiff, on filing a bond, to secure the defendant company from loss, to construct a temporary crossing to be used only for construction purposes. *Pennsylvania Schuylkill Valley R. R. Co. v. Philadelphia & Reading R. R. Co.*, 151 P. S. 402.

92. One railroad company will not be enjoined from taking a portion of the land of another railroad company for use in the proper exercise of its corporate and public powers and duties, upon a bill which does not allege a necessity on the part of the plaintiff for the occupancy of the land and in the absence of such necessity. *Pennsylvania Schuylkill Valley R. R. Co. v. Schuylkill Navigation Co.*, 167 P. S. 576.

93. Where a railroad company was granted by city ordinance a right of way upon a public street, south of the centre line thereof, and the remaining part of the street was wide enough for free and convenient access to the properties on the north side; it was *held*, that an owner of property on the north side was not entitled to enjoin the railroad company from proceedings under the ordinance. *Beck v. Erie Terminal R. R. Co.*, 11 C. C. 363.

94. The right of a petitioner for a lateral railroad to locate may be contested by a landowner upon a bill for injunction; and this, though statutory proceedings for condemnation are pending in another court in the same county. But such an injunction will be refused where it is not apparent that the proposed road will disturb the operation or endanger the safety of other mines, as prohibited by the act 5 July 1883 (Brightly's Purdon 1821). *Youghiogeny River Coal Co. v. Robertson*, 12 C. C. 1.

95. A preliminary injunction will not be granted unless the plaintiff's rights are clear; a railroad company will not be restrained at the suit of a municipality from building a station on land claimed to be a street, where it is doubtful whether the city owns the fee in the land, and it is also doubtful whether the land will ever

be used as a street. *Scranton v. Delaware & Hudson Canal Co.*, 12 C. C. 283.

96. One railroad company will not be restrained by preliminary injunction from tearing up switches and track occupied and used by both the plaintiffs and defendants, upon the bare allegation that the plaintiffs fear that the defendants are about to do such acts; there must be an allegation of facts or circumstances which, *prima facie*, justify such fear. *Wind Gap & D. Railroad Co. v. Pennsylvania S. & N. E. Railroad Co.*, 1 Northam. 179. See s. c. Ibid. 181. Affirmed by the Supreme Court, MSS.

97. If a plaintiff railroad show a *prima facie* title to use a portion of the track used by another railroad company, and less harm will be done by granting than refusing an injunction, the latter company will be enjoined by preliminary injunction from tearing up the track and interfering with plaintiff's switches. *Wind Gap & D. Railroad Co. v. Pennsylvania, S. & N. E. Railroad Co.*, 1 Northam. 181. See s. c. Ibid. 179; affirmed by the Supreme Court, MSS.

98. If it appear that it be not reasonably practical for the plaintiff company to cross the defendant's tracks otherwise than at grade, an injunction should issue restraining defendant company from interfering with plaintiff's crossing. *Moosic Mountain Railroad Co.'s Appeal*, 13 Atlan. 915; reversing *Moosic Mountain Railroad Co. v. Delaware, L. & W. Railroad Co.*, 4 C. P. 189.

99. The supreme court reinstated an injunction restraining the defendant railroad company from constructing its railroad across that of the plaintiff at grade. *Reynoldsville & F. C. Railroad Co. v. Bufalo, R. & P. Railroad Co.*, 134 P. S. 541.

100. Upon a bill alleging the building of a railroad with crossings at grade and a taking of a highway longitudinally, a preliminary injunction will be refused if the defendants deny the allegations of the bill. *Lower Merion Township v. Philadelphia & Reading Railroad Co.*, 5 Montg. 163.

101. A railroad company will be enjoined from occupying the road-bed of a turnpike company for the abutments of an overhead bridge unless it is not reasonably practicable to build it otherwise. *Chestnut Hill & Spring House Turnpike Co. v. Pennsylvania R. R. Co.*, 6 Montg. 121.

102. The court will not, by preliminary injunction, enjoin a railroad company from crossing overhead a turnpike road on the ground of insufficient headway, if the weight of the evidence shows the headway to be ample. *Chestnut Hill & Spring House Turnpike Co. v. Pennsylvania Railroad Co.*, 6 Montg. 105. See s. c. Ibid. 121.

103. The owner of a dwelling-house fronting on a street unlawfully occupied by a railroad company, is so specially injured by the nuisance that he can maintain a bill for an injunction without proving the amount of damage. *Pennsylvania Railroad Co.'s Appeal*, 115 P. S. 514.

104. A railroad company will not be enjoined by preliminary injunction from taking a portion of a city lot, where it appears that the railroad will not pass through a dwelling-house on the lot, or destroy or interfere with its use or the use of any outbuilding, or interfere with the access to the house or outbuildings, and that the strip proposed to be taken will be cut entirely off one side of the lot. *Stahl v. Pennsylvania R. R. Company*, 155 P. S. 309; affirming s. c. 12 C. C. 375.

105. The dissolution of a preliminary injunction restraining the plaintiff railroad company from entering upon the lands of another company is no bar to a bill to enjoin the plaintiff in the first proceeding. *Scranton & Forest City Railroad Co. v. Delaware & Hudson Canal Co.*, 1 Lack. Jur. 113.

106. A railroad company will not be enjoined from taking land which it has already appropriated two years prior to the filing of the bill; the act of location is an appropriation. *Peiffer v. Harris-*

burg, Portsmouth, Mt. Joy & Lancaster R. R. Co., 12 Lanc. 265.

107. A passenger railway company incorporated to use horse power only, will not be restrained by preliminary injunction from converting the road into an electric railway, with the consent of the municipal authorities. *Fritz v. Erie City Pass. Ry. Co.*, 155 P. S. 472.

108. Where a street railway company is enjoined from operating its road in a township because it cannot secure the consent of an abutting owner, a charter under the general railroad law gives no authority to maintain the same road under the name of a steam railroad, and an attempt to so maintain it will be restrained by injunction. *Pennsylvania R. R. Co. v. Bridgeport R. R. Co.*, 11 Montg. 73.

109. Upon a bill filed by a landowner to restrain an electric railway company from constructing and operating its railway over land in a township and within the appropriation of a turnpike company until compensation should be paid or secured; it was held, that an order dissolving a preliminary injunction was properly made. *Heilman v. Lebanon & Annville Street Ry. Co.*, 145 P. S. 23; affirming s. c. 10 C. C. 241.

110. The evidence showing that a "T" rail was suitable for the purposes of a street passenger railway company, and that it did not impose a greater burden on the city in repairing than a flat rail, the city authorities should be enjoined from tearing up the same. *Easton Pass. Railway Co. v. Easton*, 133 P. S. 505; s. c. 25 W. N. C. 493; reversing s. c. 7 C. C. 577. See *Harrisburg City Pass. Railroad Co. v. Harrisburg*, 7 C. C. 584, 593.

111. Under the act 19 June 1871 (Brightly's Purdon 780), a street railway company has a standing as a complainant in a bill in equity to restrain another company from unlawfully laying tracks in a street already occupied by the complainant. *Germantown Pass. Ry. Co. v. Citizens' Pass. Ry. Co.*, 151 P. S. 138; affirming s. c. 9 C. C. 638.

112. Where a bill charges that a street railway company has constructed an embankment in front of the plaintiff's premises and obstructed the approach to his house, and prays an injunction to restrain the operation of the road, and that the embankment be removed and for general relief, the bill should not be dismissed on demurrer merely because it discloses delay on the part of the plaintiff in seeking relief. *Westhaeffer v. Lebanon & Annville Street Ry. Co.*, 163 P. S. 54; reversing s. c. 3 Dist. Rep. 56.

113. Upon a bill for an injunction to restrain a railroad company from interfering with the tram road of the plaintiff, the court refused the preliminary injunction prayed for, and granted an injunction restraining the plaintiffs from operating their road beneath the road bed of the defendant until the plaintiffs had established their right to do so either at law or upon the final hearing of the injunction suit. *Lane v. Ridgway & Clearfield R. R. Co.*, 9 C. C. 386.

114. A passenger railway company, restricted in their use of public streets to those upon which no track is laid or authorized to be laid, will be restrained by injunction from exceeding their charter rights. An ordinance conferring the right to such excepted streets is void. *Coalville Pass. Railroad Co. v. Wilkes-Barre Southside Railway Co.*, 5 Kulp 340.

115. Upon an application by a steam railroad company to enjoin a trolley company from crossing the railroad tracks at grade, where the defendant agrees to stop its cars before crossing the tracks, and to have its conductors go forward before attempting to cross, the injunction will be refused. *Pennsylvania R. R. Co. v. Suburban Rapid Transit Co.*, 11 C. C. 591.

116. A railroad company will not be restrained by preliminary injunction from interfering with a street railway company constructing a crossing over the railroad, where the lawful corporate existence of the street railway company is attacked, and its authority to build its railroad

is denied and the facts are in controversy. *Lebanon & Myerstown Street Ry. Co. v. Philadelphia & Reading R. R. Co.*, 2 Dist. Rep. 835.

117. Where a bridge spans a stream which is a boundary line between a city and a county, the city will be restrained by the court of the adjoining county from interfering with the laying of the tracks of a passenger railway company upon the portion of the bridge belonging to the adjoining county, where it appears that the consent to the laying of the railway has been given by the supervisors of the township and the commissioners of the county, and the officers of the city have been made parties defendant to the bill. *Delaware County and Philadelphia Electric Railway Co. v. Philadelphia*, 164 P. S. 457.

118. A bridge erected for public travel by a corporation is a highway within the act 14 May 1889 (Brightly's Purdon 1823), authorizing the formation of street car companies, and a court of equity will restrain a bridge company from interfering with the preparation and use of the bridge by the railway company for the operation of its cars over and across the same. *Pittsburgh & West End Pass. Ry. Co. v. Point Bridge Co.*, 165 P. S. 37; affirming s. c. 39 P. L. J. 367.

119. A court of equity will not enjoin the operation of a narrow gauge railroad where the defendants are constructing the road under a grant to search for, dig and carry away minerals, and where the whole controversy turns upon the construction of the deed containing such grant; that is a legal question which should be determined in a court of law. *Booher v. Browning*, 169 P. S. 18.

See RAILROADS.

STREET RAILWAYS.

(c) Proceedings at law.

120. An injunction to stay proceedings at law should go against the party and not against the sheriff or other officer who is already under the mandate

of one court, nor against an assignee for creditors who is accountable to another court. *Artman v. Giles*, 155 P. S. 409.

121. If a defendant has had his day in court and neglected to make his defence, that is the end of the contention. He cannot afterwards restrain execution by bill in equity. *Maher's Appeal*, 2 Cent. 846.

122. Equity will not enjoin the enforcement of a judgment where the defendant has had his day in court. *Waldo v. Denton*, 135 P. S. 181.

123. The discharge of a rule to open judgment is no bar to proceedings to restrain execution, unless the same issues are presented. *Nelson v. Guffey*, 131 P. S. 273; reversing s. c. 37 P. L. J. 65.

124. A bill to enjoin the collection of a judgment is barred by the pendency of proceedings to open the judgment in the courts of another county. *Smith v. Kammerer*, 152 P. S. 98.

125. The plaintiff will be restrained by injunction from proceeding to execution, upon the complaint of one who has purchased the judgment from him by parol. *Jamison v. Dech*, 1 Northam. 98.

126. A joint stock company having given a mortgage to secure an indebtedness, and then made an assignment for creditors, the court refused to restrain the sale of the property under the mortgage, at the suit of the assignee. *Fisher's Appeal*, 14 Atlan. 225; s. c. 12 Cent. 678.

127. A court of equity will not enjoin the collection of a mortgage or judgment given to cover past and future gambling transactions. *Smith v. Kammerer*, 152 P. S. 98.

128. A court of equity will not enjoin execution upon a judgment on a *scire facias sur municipal lien*, after the discharge of a rule to set aside, based on the same facts. *Felts v. Wilkes-Barre*, 6 Kulp 79. See *Wilkes-Barre v. Felts*, 134 P. S. 529; affirming *Wilkes-Barre v. Ricketts*, 5 Kulp 429.

129. Equity will enjoin the sale of a building under a mechanics' lien filed against the building itself and not

merely against the defendant's interest therein as lessee or tenant. *Mitchell v. Forve*, 5 Kulp 501.

130. Where a bill was filed by the lessees of an oil lease to have the lease cancelled and to restrain the lessors from proceeding further in an action at law to recover royalties under said lease, on the ground of the fact that two thousand tons gross could not be mined advantageously per year, and the master found that there was plenty of ore to answer the contract, and that though poor in quality, it was not wholly unfit to be worked and could not be pronounced to be so unmerchantable as to be a substance different from that contracted for, the court refused to cancel the lease or to issue an injunction. *Kraber's Appeal*, 2 York 55.

131. Equity will not enjoin an action for a continuing trespass until the true boundary lines be established by an action of ejectment. *Hogue v. Matlack*, 8 C. C. 657.

132. Equity will not enjoin an action at law brought to enforce the final award of an arbitrator, where there is a second award of the same arbitrator; it will not decree which award is binding, nor will it enjoin other suits upon the same subject. *Hamilton v. Hart*, 1 Mona. 535. See s. c. 109 P. S. 629; 125 Ibid. 142.

133. Pending proceedings at law to settle the question of title to land, an injunction will be continued where the action of one of the parties threatens serious and irreparable harm to the property in dispute. *Kasian v. Stefansky*, 6 Kulp 445.

134. The court refused to enjoin a wife from proceeding against the land of her husband, in the hands of his vendee, by *venditioni exponas*, though she had joined with her husband in the deed of the premises. *Trullinger v. Charles*, 129 P. S. 289.

135. Equity will enjoin a creditor in a clear case from selling real estate standing in the name of a married woman upon an execution against her husband. *Perry v. Lee*, 6 Kulp 315.

136. Equity will not at the suit of a wife enjoin her husband's creditors from selling on execution real estate in her name, where the answer sets up that the conveyance to her was in fraud of his creditors. *Mahle v. Kurtz*, 9 C. C. 280; s. c. 6 Kulp 157.

137. Equity will not restrain the sale of a wife's real estate for her husband's debts unless a clear title to the wife is made out; where the creditor files an answer disputing her title and produces evidence against it, he has a right to sell whatever right he believes the husband has in the property. *Marks v. Hess*, 9 Lanc. 145.

138. Equity will not, as a general rule, interpose and prevent a sale of a defendant's interest in land under an execution against him. *Small's Appeal*, 9 Atlan. 337.

139. The court of a county to which a judgment is transferred having full power to set aside a *testatum fieri facias* improperly issued thereon, it is error for the court of the county to which the writ is directed to enjoin the plaintiff from procuring its enforcement. *Nelson v. Guffey*, 131 P. S. 273; reversing s. c. 37 P. L. J. 65.

140. Neither simple contract creditors nor attaching creditors, under the act 17 March 1869 (Brightly's Purdon 71), have a standing in equity to restrain a judgment creditor from proceeding by due course of law to obtain satisfaction of his judgment. *Artman v. Giles*, 155 P. S. 409. See *Kelly v. Herb*, 157 P. S. 41; *Meyers v. Rauch*, 4 Northam. 339; s. c. 6 Del. 106.

141. Equity will not restrain the issuing of an execution and decree satisfaction of a disputed judgment. The defendant has an adequate legal remedy either by demanding an issue or by defending a *scire facias* to revive; and this, though the plaintiff be a non-resident. *Albert v. March*, 7 C. C. 502.

142. Equity will not enjoin a judgment creditor from seizing and selling in satisfaction of his debt any real estate in which his debtor has or is believed to

have an interest. *Trexler v. Duby*, 16 C. C. 141.

143. A sale of real estate under execution will not be enjoined where there is a doubt as to the ownership of the property levied on, but the creditor will be permitted to proceed with the levy and sale so that the title may be settled in an action of ejectment. *Grissinger v. Booth*, 12 Lanc. 259.

144. An assignment for creditors here, passes title to personal property in another state, and a creditor who has subsequently issued a foreign attachment in another state will be enjoined from levying an execution thereon upon the assignor's property there. *MacDonald v. Furbush*, 26 W. N. C. 120.

145. The court will restrain by injunction the levy upon the property of a corporation in actual use, apart from its franchises. *Boyd's Appeal*, 15 Atlan. 736; affirming *Fire Insurance Patrol v. Boyd*, 44 L. I. 252.

146. Equity will not restrain the sale or attachment of corporate property upon execution issued upon a judgment bond given by a corporation to its directors to secure them on their indorsements, the company not being insolvent when the bond was given, and there being no evidence of collusion or fraudulent intent. *Neal's Appeal*, 129 P. S. 64.

147. A sale under a judgment confessed by an insolvent corporation will not be restrained on the ground that a sale of the company's property can be more advantageously conducted in the interests of all the creditors by receivers. *Fairpoint Mfg. Co. v. Philadelphia Optical & Watch Co.*, 161 P. S. 17; *Lowry v. Philadelphia Optical & Watch Co.*, 161 P. S. 123.

148. Though the legal title of a judgment be in the name of the *cestui que trust*, equity will, on the application of the trustee, restrain the collection by execution of the judgment by the *cestui que trust*. *Reeser's Appeal*, 5 Atlan. 445.

149. One of several tenants in common cannot purchase a mortgage upon the land

and set it up against his co-tenants for the purpose of depriving them of their interests; a sheriff's sale on such a mortgage will be restrained by injunction. *Fisher v. Hartman*, 165 P. S. 16.

150. A sale on execution under a confessed judgment will not be restrained by injunction except upon the clearest right and to avert irreparable injury, nor will a receiver for property so levied on be appointed except under the same circumstances. *Philadelphia v. Dobson*, 10 C. C. 34.

151. Equity will not restrain the execution of a judgment by reason of a defence which is available in a court of law, where no special ground exists growing out of fraud or accident. *Burke v. Gibson*, 6 Kulp 310.

152. Where personal property was bequeathed to an executor and his creditor levied upon it before he had filed an account, the orphans' court, upon the allegation of the executor that the debts of the decedent had not been paid, issued an injunction restraining the sheriff from selling the property until a final account by the executor showing that the debts had all been paid and that the executor was entitled to the property as legatee. *Turner's Estate*, 7 Kulp 481. See s. c. 167 P. S. 609.

153. Equity will enjoin the sale under a *fieri facias* of manure made upon a farm and necessary to preserve its fertility, to the prejudice of a prior mortgage. *Bergey v. Kline*, 4 Montg. 160.

154. Creditors who have not reduced their claims to judgments have no standing to restrain, by injunction, the distribution of a sheriff's sale on the ground that the judgment under which the sale was made was fraudulent and collusive. *Kelly v. Herb*, 157 P. S. 41.

(G) Collection of taxes.

155. If an assessment for city taxes in a city of the third class be made at a valuation in excess of the last triennial assessment for state and county purposes, the collection of the tax on the excess

will be enjoined. *Kemble v. Titusville*, 135 P. S. 141.

156. After the determination of an appeal in the common pleas, under the act of 19 April 1889 (Brightly's Purdon 1984), from an assessment of taxable property, equity will not enjoin the collection of the tax as adjusted by the decision. *Hamlin v. Peck*, 135 P. S. 493.

157. Where a bill was filed to restrain the collection of local taxes upon unproductive mountain land owned by a water company, and held to protect the purity of the water, but unoccupied by any of its improvements, a preliminary injunction was refused. *Roaring Creek Water Co. v. Girtton*, 142 P. S. 92.

158. The collection of a tax on coal shutes belonging to a corporation will be restrained by preliminary injunction where the plaintiff's affidavits aver that the shutes are absolutely indispensable for the transfer of coal from the land to canal boats, and are an essential part of the company's works for that purpose. *Lehigh Coal & Navigation Co. v. Miller*, 155 P. S. 542.

159. A borough will be restrained by injunction from assessing and collecting a school tax upon the land of one of its citizens situated in an adjoining township, but annexed to land belonging to the same person lying within the borough limits. *Arthur v. Polk Borough School District*, 164 P. S. 410.

160. Supervisors must give taxpayers a full opportunity to work out their road taxes, but it is in the discretion of the supervisors to direct as to when and where they shall work them out; where supervisors refuse to permit taxpayers to work out their taxes, they will be restrained by injunction from collecting them in money, and from incurring debts to an amount which, in the aggregate, will exceed the amount which will be received in cash from taxpayers electing not to work out their taxes and from other sources. *Coxe v. Sweeny*, 10 C. C. 289.

161. A bill in equity is the proper remedy to restrain the collection of a

local tax improperly assessed against a public corporation. *St. Mary's Gas Co. v. Elk County*, 168 P. S. 401; affirming s. c. 15 C. C. 411.

162. Equity will restrain the collection of a tax assessed against a property not the subject of taxation, or where the complainant's name has been placed upon the tax-book without authority of law. *Ridgway v. Bridgeport*, 5 Montg. 73.

(h) Trespass.

163. An injunction lies to restrain continuing trespasses which, by reason of the persistency with which they are repeated, threaten to become of a permanent character; lessees of coal lands under the plaintiff were enjoined from carrying coal from adjoining lands through and over the plaintiff's lands, and from depositing thereon dirt and debris from mines in adjoining lands, and draining water from the said mines upon the plaintiff's land. *Walters v. McElroy*, 151 P. S. 549.

164. Upon a bill to restrain a continuing trespass, an account of damages previously sustained follows as an incident and to avoid multiplicity of suits. *Walters v. McElroy*, 151 P. S. 549.

165. Equity has no jurisdiction to enjoin the trespass on mining rights; the disputed legal title must first be settled at law. *Duncan v. Hollidaysburg & G. Iron Works*, 136 P. S. 478; s. c. 26 W. N. C. 479.

166. Equity has jurisdiction to enjoin the successor in title of a lessor in an oil-mining lease from mining for oil on part of the demised premises, at the suit of the assignee of the lessee. *Duffield v. Hue*, 136 P. S. 602; s. c. 26 W. N. C. 387.

167. Where a lessor in a mining lease re-enters in the assertion of a disputed claim of forfeiture, which claim is disputed, the lessor will be restrained by preliminary injunction from continued interference with the premises. *Poterie Gas Co. v. Poterie*, 153 P. S. 10. In such a case a preliminary injunction will not

be awarded against the lessee. *Poterie v. Poterie Gas Co*, 153 P. S. 13.

168. Where a court of equity has jurisdiction of a person, it may issue an injunction to prevent his trespassing on lands in another county. *Jennings v. Beale*, 158 P. S. 283.

169. Where the plaintiff in an injunction bill claims an exclusive right to mine coal in certain lands, and avers that the defendant is taking it out and shipping it in such quantities that the mines will soon be exhausted, equity has jurisdiction to restrain such a continuous trespass. *Jennings v. Beale*, 158 P. S. 283.

170. Where a bill to restrain the trespass upon real estate is filed, and the deed under which the plaintiff claims is recited in the chain of title and is admitted in the pleadings, and the only question is whether it confers a right upon the plaintiff to mine coal, no such question of title arises as will deprive a court of equity of jurisdiction. *Jennings v. Beale*, 158 P. S. 283.

171. A bill for an injunction will not lie for the same injury for which a recovery in damages was sought in a previous action in trespass brought by the plaintiff against the defendant. *Bierer v. Hurst*, 162 P. S. 1.

172. Where an owner of land desiring to build entirely on his own lot had his lines surveyed by the district surveyor and directed his builder to keep within the lines, and after the building was up, it was found that a portion of the foundation below the surface extended over the adjoining property one and three-eighths inches; it was held, that the wall was not a party wall, and that the owner of the adjoining property could treat it as a permanent trespass or could compel the removal of the offending foundation by rebuilding from the defendant's side. *Pile v. Pedrick*, 167 P. S. 296; s. c. 36 W. N. C. 220.

173. A preliminary injunction will not be awarded to restrain a trespass where the affidavit presented raises substantial

doubt, not only as to the legal right of the plaintiff, but also as to the injury which may ensue. *Raub Coal Co. v. Waddell*, 7 Kulp 282.

174. Where the defendant was the lessee of the ground and cellar floors of a building, the upper floors of which were occupied by other tenants, and the meters for the measurements of gas supplied to the upper tenants were located in the defendant's cellar, the court refused to restrain him by injunction, at the suit of the gas company, from removing the meters of the upper tenants and interfering with the inspection of the same by its agents, where the evidence showed that it would not be impracticable nor unusual to locate their meters on the upper floors. *Wilkes-Barre Gas Co. v. Turner*, 7 Kulp 399.

175. A preliminary injunction was refused upon a bill alleging that the defendant threatened to destroy certain water pipes of the plaintiff, where the defendant in his answer denied any such threats and such denial was as broad as the charge. *Bray v. Blessing*, 7 Montg. 97.

176. A court of equity will not restrain a trespasser at the instance of a plaintiff who is himself a trespasser. *Shaffer v. Brown*, 3 Northam. 44.

177. Where a tree is on a line between two adjoining properties, a court of equity will enjoin its destruction at the instance of one of the owners. *Comfort v. Everhardt*, 35 W. N. C. 364.

178. Where the question between the parties is one of title to real estate, equity has no jurisdiction to grant relief by injunction against an alleged trespass; in such a case the rights of the parties can only be settled in an action of trespass or ejectment. *Smucker v. Pennsylvania R. Co.*, 5 York 37.

179. Where the plaintiff has a full and adequate remedy at law for a trespass which consists in the negligent exercise by the defendant of an undoubted right, he cannot maintain a bill for an injunction. *Caldwell v. East Broad Top R. R. & Coal Co.*, 169 P. S. 99.

(4) Nuisance.

180. Though equity will enjoin a private nuisance where the damage is imminent and irreprovable, yet the right must be clear, and the facts upon which it rests uncontested. *Mowday v. Moore*, 133 P. S. 598; s. c. 25 W. N. C. 529. See s. c. 4 Montg. 186; *Mirkil v. Morgan*, 134 P. S. 144; s. c. 25 W. N. C. 532.

181. The court, at the instance of the attorney-general, enjoined, by preliminary injunction, the playing of a game of base ball on Sunday. *Comm'th v. Rothrock*, 2 Northam. 249.

182. Equity will not enforce the ordinances of a municipal corporation restraining a certain act, by injunction, unless such act is shown to be a nuisance *per se*. *Woodington v. Bates*, 7 Montg. 173.

183. The erection of a wooden building not constituting a nuisance, will not be restrained by injunction though such erection be prohibited by city ordinance. *Lancaster v. Shaub*, 7 Lanc. 340.

184. Equity will restrain the erection of a wooden building contrary to the provisions of a borough ordinance. *Honedale v. Weaver*, 2 Dist. Rep. 344.

185. In a proper case, equity will restrain by injunction the erection of a frame building in violation of a city ordinance within the fire limits of a city. *Wilkes-Barre v. Frauenthal*, 6 Kulp 444.

186. The court properly refused a preliminary injunction on a bill to enjoin the lessees of a theatre from making loud and distressing noises in the moving of stage properties at late hours of the night. *Penrose v. Nixon*, 140 P. S. 45.

187. Equity will not enjoin the maintenance of a slaughter-house because of the mere fact that such business is annoying to another, or renders his property less desirable or less valuable. *Woodington v. Bates*, 7 Montg. 173.

188. The court refused a preliminary injunction enjoining the business of grinding dry bones free from putrid and decaying flesh; giving the de-

fendants the opportunity of adopting such precautionary measures as would prevent annoyances to the neighborhood. *Mitchell v. Evans*, 5 Kulp 485.

189. A bone-boiling establishment will be enjoined where the evidence shows that it is in a populous neighborhood, and that the gases which it gives off cause nausea, vomiting and loss of appetite, and renders the plaintiff's house unfit as a place of residence and depreciates its market value. *Evans v. Reading Chemical Fertilizing Co.*, 160 P. S. 209.

190. A dealer in bone, manure, phosphate and other fertilizers will be enjoined from storing the same in large quantities upon his premises, where they emit offensive odors and render uncomfortable and almost uninhabitable the dwelling-houses and homes in the surrounding neighborhood and greatly reduce their value. *Weiser's Appeal*, 3 York 103.

191. Where a manufacturing business is being conducted in a neighborhood devoted exclusively to manufacturing purposes, it will not be restrained by injunction for mere discomfort and annoyance without substantial injury to property or business of another manufacturer. *Straus v. Barnett*, 140 P. S. 111.

192. Where it was alleged that cinders, dust and soot were discharged in large volumes from the top of defendant's chimney, and penetrated the plaintiff's windows and settled upon his roof and at times blocked his rain gutter, an injunction was refused where there was no complaint that the alleged nuisance was injurious to health or offensive to the smell, and every material fact upon which the plaintiff rested his right was flatly contradicted and denied. *Post v. Young*, 7 Kulp 102.

193. Where a carpet-cleaning establishment and stable is maintained upon a city street devoted to private residences, and renders the dwelling of an adjoining owner uncomfortable, it will be enjoined

as a nuisance. *Rodenhausen v. Craven*, 141 P. S. 546.

194. The erection of a stone storage-house for blasting powder in the outskirts of a borough will not be enjoined on the application of the borough, where it appears that such powder is not highly explosive, and that another building for storing the same kind of powder is maintained in the built-up portions of the borough by other parties without objection. *Daw v. Enterprise Powder Mfg. Co.*, 160 P. S. 479.

195. The operation of a steam laundry in the second floor of a building will not be restrained because of annoyance caused by vibration and noise to the occupants of the first floor, where the evidence fails to show that the latter were interfered with or injured in their business, or that either they or their employees were injured in health. *Miller v. Schindle*, 15 C. C. 341.

196. An oil-producer who brings salt water to the surface with his oil, will not be enjoined from discharging the water into a river, at the instance of a water company which takes its supply from the river for the purpose of supplying a borough with water. *Union Water Co. v. Enterprise Oil Co.*, 38 P. L. J. 159; following *Pennsylvania Coal Co. v. Sanderson*, 113 P. S. 126.

197. If the testimony be conflicting as to whether a mill-dam maintained for its water power for over a half century, and about which a city has grown up, has become a public nuisance, a bill to abate will be dismissed, without prejudice to the right to proceed by indictment or action at law. *Newcastle v. Raney*, 130 P. S. 546; reversing s. c. 6 C. C. 87. See s. c. *sub nom. Newcastle v. McClain*, 25 W. N. C. 246.

198. Equity will enjoin the continuous pollution of a pure stream of water running through a farm, whereby the water is rendered unfit for cattle to drink, especially where such pollution is caused by the introduction of something which will make the water, when overflowing

the banks, destructive to pasturage and growing trees; such a pollution is a substantial injury, both to the owner of the land as well as to the tenant, and the former may maintain a bill to restrain it. *Getting v. Union Improvement Co.*, 7 Kulp 493.

199. The court refused to continue a preliminary injunction against a butcher, it not appearing that the water from his refrigerator was continuing to be discharged into plaintiff's coal vault; the defendant denying that he was in the habit of keeping cattle in his yard; his smoke-house appearing to be used but once a week, and his chopping-machine being run but once a week and never between 6 P.M. and 8 A.M. *Correll v. Snyder*, 2 Northam. 98.

200. Where a city is attempting to build a quarantine station outside its limits, the courts of the county in which the proposed station is to be established cannot issue an injunction against such city; but if the proposed station amounts to a nuisance, the persons engaged in erecting it may be enjoined. *Chester v. Philadelphia*, 15 C. C. 217.

(k) Streets and bridges.

201. Upon a bill filed by the attorney-general to restrain the maintenance of an obstruction upon a public highway, where the defendant averred that the erection was not an obstruction, that it had been in existence for eighteen years, and that he had been acquitted upon an indictment for its maintenance; it was held, that the laches of the commonwealth, coupled with the acquittal, justified a chancellor in refusing the injunction. *Comm'th v. Croushore*, 145 P. S. 157.

202. A railroad company which has condemned land for depots, stations, etc., has a base fee therein, and has sufficient title to maintain a bill for the unlawful obstruction of an adjoining highway. *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 P. S. 18.

203. Where different floors of a building are rented to different tenants, the

tenant of the ground floor has no more ownership of the sidewalk than the tenants of the other floors, and he cannot maintain a bill to enjoin the tenant of the floor above from maintaining a showcase at the entrance on the sidewalk, which does not obstruct the passageway into or out of the building, and is not injurious or inconvenient to any one. *Cunningham v. Entrekin*, 15 C. C. 183; s. c. 34 W. N. C. 353.

204. The county commissioners are the proper parties to maintain a bill for an injunction to restrain the illegal occupancy or obstruction of a county bridge. *Venango County Commissioners v. Oil City Street Ry. Co.*, 3 Dist. Rep. 546.

205. A nuisance in a highway can only be restrained by an abutting owner where the nuisance is in that portion of the highway fronting his land; for a nuisance not specially injurious to his property, redress can only be had at the suit of public authorities. *Collins v. Northeastern Elevated R. R. Co.*, 32 W. N. C. 379.

206. A municipal corporation will not be enjoined from preventing a natural gas company from digging up its pipes and breaking connections with its wells, upon evidence of explosions and accidents being caused thereby. *Butler Borough's Appeal*, 1 Atlan. 604.

207. In the construction of a contract to use natural gas on the streets of a borough, the court refused to enjoin the use of open lamps. The word "lamps" in such a contract must be construed according to its popular understanding in regions where natural gas is used. *Saltsburg Gas Co. v. Saltsburg*, 138 P. S. 250; s. c. 38 P. L. J. 148.

208. A borough council which has power to build sewers and drains, has power to grant permission to a citizen to lay a drain pipe in the street to lead off the surface or refuse water from his building; such a drain is not a nuisance *per se*, and an injunction for its removal cannot be granted until after the right has been established in an action at law,

where the evidence is conflicting as to whether it is a nuisance in fact. *Wood v. McGrath*, 150 P. S. 451.

209. If the immediate opening of a street, so that a sewer may be constructed in it, be required for the preservation of the public health, the execution of the work will not be enjoined until a bond for the damages is filed. *Bromley v. Philadelphia*, 8 C. C. 600; s. c. 47 L. I. 318.

210. Equity will restrain the widening of a borough street by the taking, without proceedings, a strip of ground not within the corporate limits as originally established, but which lies along a turnpike and was brought into the borough by a later act extending its limits. *Curwensville Borough's Appeal*, 129 P. S. 74.

211. Where an individual complains of an encroachment on a public highway, and he has himself been guilty of the same act at the same place, equity will not interfere by injunction in his behalf. *Schofield v. Pennsylvania Schuylkill Valley R. R. Co.*, 8 Montg. 125.

212. A turnpike company will not be enjoined from maintaining a toll-gate on a borough street on the ground of an unwarranted relocation, unless the evidence be clear and free from doubt, and there has been no laches on the part of the borough. *Dunmore Borough's Appeal*, 1 Mona. 567; s. c. 17 Atlan. 34.

213. Equity will enjoin the unauthorized appropriation of a public road by a turnpike company, though irreparable damage will not result therefrom to any one. *Groff's Appeal*, 128 P. S. 621. See *Groff v. Bird-in-hand Turnpike Co.*, 144 P. S. 150.

214. A toll-gate is not such a nuisance in itself as will justify the municipal authorities in removing it in a summary and violent manner, and where it has been legally located in the limits of a city, the municipal authorities will be enjoined from removing it. *Conestoga & Big Spring Valley Turnpike Road Co. v. Lancaster*, 151 P. S. 543; reversing s. c. 9 Lanc. 233.

215. Equity will enjoin the erection of hay scales upon a public highway. *Huddleston v. Killbuck Township*, 7 Atlan. 210.

216. A borough will not be restrained from removing a stone wall which is built upon and is an obstruction to a street, merely because its removal will injure private property. *Walsh v. Olyphant*, 7 C. C. 124.

217. Equity will enjoin the erection of a permanent building in a public street, to be used as a market-house; and this, though the space proposed to be built upon has long been used as a market and is so occupied by temporary structures. *Harrisburg's Appeal*, 10 Atlan. 787.

218. A second story bay-window projecting into the street will not be enjoined on the master's finding that it causes no appreciable injury to the plaintiff. *Livingston v. Wolf*, 136 P. S. 519; s. c. 27 W. N. C. 5.

See INJUNCTION, IV. (b).

(l) Easements.

219. Equity will enjoin the obstruction of an easement, but where no steps have actually been taken towards the obstruction, and the defendant denies the allegation that he intends and threatens to obstruct it, an injunction will not be allowed. *Heiser v. Lied*, 11 Lanc. 265.

220. Equity will assume jurisdiction where the complaint charges injuries and threatened injuries from an unlawful interference with a watercourse. *Bolton v. Swartz*, 4 Montg. 198.

221. The violation of a building restriction in a deed may not be restrained where there has been a change of surroundings in the neighborhood, in the character of the improvements, and in the purposes to which they are applied. *Orne v. Fridenberg*, 143 P. S. 487.

222. Equity will not interfere by way of mandatory injunction to restrain the maintenance of structures upon an adjoining lot in violation of restrictive conditions in a deed, where there has been long-continued delay in asserting the

right and a remedy exists at law. *Orne v. Fridenberg*, 143 P. S. 487.

223. Where a person violates a building restriction and persists in building a prohibited structure after warning that proceedings will be taken against him, the court will enter a decree requiring him to take it down and abate it. *Meigs v. Milligan*, 4 Dist. Rep. 405.

224. Equity will enjoin the infringement of what is commonly known in the city of Scranton as the ten-foot reservation by the erection of a barn upon such ten-foot strip. *Fisher v. Jordan*, 1 Lack. L. N. 127.

225. An alley-way being opened by the grantor in accordance with a covenant in a deed, he and his subsequent grantees of the alley-way will be enjoined from encroaching thereon. *Snyder's Appeal*, 8 Atlan. 26.

226. A court of equity will enjoin a defendant from building over an alley; where the plaintiff's right is clear, it is not necessary that it should first have been settled at law. *Miller v. Lynch*, 149 P. S. 460.

227. The construction of a log slide on a private way over the land of another will be restrained by injunction. *Proctor v. Campbell*, 6 C. C. 531.

228. The grant of a right of way conveys but a right to pass and repass. Equity will not enjoin the building by the grantor, of an open iron bridge across an alley more than nineteen feet above the surface. *Patterson v. Philadelphia & Reading Railroad Co.*, 8 C. C. 186.

229. Equity will not enjoin a defendant from interfering with an alleged right of way of the plaintiff over the defendant's property where the facts are disputed and the right is not clear; the plaintiff must first establish his right at law. *Lieber v. Bray*, 7 Montg. 98.

(m) Breach of contract.

230. A court of equity has jurisdiction by injunction to enforce a covenant that a thing should not be done. *Rockafellow v. Hanover Coal Co.*, 12 C. C. 241.

231. A court of equity will not by injunction restrain a lessor from forfeiting a mining lease. It cannot be forfeited without cause, and for good cause the defendant has the right to insist upon its being at an end. *Grassy Island Coal Co. v. Hillside Coal & Iron Co.*, 1 Lack. Jur. 297.

232. Where a lease contains an express covenant restricting the use of the surface privileges and inside workings to the purpose of mining, and preparing the coal demised, and no other coal, the lessor will be enjoined from using the surface privileges, and inside coal space for removing coal from other land. *Rockafellow v. Hanover Coal Co.*, 12 C. C. 241. See *Lillibridge v. Lackawanna Coal Co.*, 143 P. S. 293.

233. Upon a conveyance of a town lot, both parties being forbidden to drill for oil, a preliminary injunction will not issue against the grantee, where it appears that the grantor himself had put down one or two producing wells on other property adjoining the land conveyed to the defendant. *Acheson v. Stevenson*, 130 P. S. 633.

234. Where the plaintiff conveyed a town lot adjoining other lands belonging to him to the defendant, without "the right to drill or mine for petroleum, carbon oil or natural gas, which right is not intended to be conveyed but is forbidden to both parties hereto," and the grantee afterwards drilled a producing well; it was held, that the plaintiff was entitled to an injunction restraining operations for oil on the lot conveyed, but he was not entitled to an account as for damages measured by the amount of oil obtained by the defendant in his operations. *Acheson v. Stevenson*, 146 P. S. 228.

235. Under a contract not to engage in the business of photography in a certain borough, the defendant was enjoined from conducting or maintaining a photograph gallery within the borough, and it was decreed that he should pay damages and costs. *Stofflet v. Stofflet*, 160 P. S. 529; reversing s. c. 3 Lack. Jur. 343.

236. Where the defendant, a physician, sold his practice to another physician, and verbally stipulated that at the end of a certain time he would cease practising, and the vendee sold the practice to the plaintiff, who was also a physician, and the defendant again began to practise, and the defendant and plaintiff entered into an agreement in writing, whereby in consideration of two hundred dollars the defendant agreed that he would not practise in the locality for a period of ten years, that he would use his influence in favor of plaintiff, that he would not manufacture or put on sale any medical preparation during the ten years, and for the true performance of the covenants he bound himself in the penal sum of four hundred dollars, and before the expiration of the ten years the defendant resumed his practice; it was held, that the penal sum was a penalty and not liquidated damages, that it was not intended that defendant should have the privilege of practice on the payment of four hundred dollars, and that plaintiff was entitled to an injunction for the specific performance of the contract. *Wilkinson v. Colley*, 164 P. S. 35; reversing s. c. 6 Kulp 401.

237. Where a person has covenanted or agreed to render personal services of a particular kind, for a definite period, exclusively to another, for a valuable consideration, equity will enjoin against a breach of such engagement, where the plaintiff will suffer a loss for which he can have no adequate remedy at law. *Philadelphia Ball Club v. Hallman*, 8 C. C. 57; *Kansas City Ball Club v. Pickett*, 47 L. I. 212; contra, *Harrisburg Ball Club v. Athletic Association*, 8 C. C. 337.

238. An agreement to play base ball for the plaintiff for a period, which might, at the plaintiff's option, equal the term of the player's life, with power in the plaintiff to discharge on ten days' notice without cause, is so unfair and wanting in mutuality that equity will not enforce it by injunction. *Philadelphia Ball Club v. Hallman*, 8 C. C. 57. See *Harrisburg Ball Club v. Athletic Association*, Ibid. 337.

239. An employee who, in consideration of an increase in his wages, agrees not to reveal the secrets of his master's trade, will be restrained by injunction from using such secrets for his own private use or revealing them to others. *Fralich v. Despar*, 165 P. S. 24.

240. Where it appears upon the face of a contract that it may be terminated upon certain notice, the supreme court will, on appeal, modify an injunction, against a threatened breach, so as to correspond with the provisions of the contract. *Martinsburg Bank v. Central Pennsylvania Telephone & Supply Co.*, 150 P. S. 36.

(n) Transfer of property.

241. The members of a charitable organization, such as a voluntary fire company, having no title to or interest in its property, cannot maintain a bill for an injunction to prevent the distribution of such property. *Hoffman v. Hartman*, 7 Lanc. 137.

242. A court of equity having jurisdiction of an executory contract for the sale of real estate, may issue an injunction to keep the property *in statu quo*. *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, 7 C. C. 277; s. c. 24 W. N. C. 573; affirmed in 138 P. S. 22; s. c. 38 P. L. J. 252.

243. If a vendee of real estate agrees to insure and assign the policy to the vendor, the vendee, upon drawing the insurance money before title passes, will be restrained from using or applying it to any other purpose than the payment or security of the money to the vendor. *Norristown Land & Improvement Co. v. Thomas*, 5 Montg. 123.

244. The court will grant a provisional injunction at the suit of a partner restraining interference with partnership assets, notwithstanding the partnership accounts be irregular and vague and the evidence concerning them somewhat obscure. *Slobig's Appeal*, 3 Cent. 406. See *Baker v. Slobig*, 5 C. C. 382.

245. Upon a bill by the minority of the members of a joint stock company for the

manufacture and sale of steel, equity will enjoin a change in the location of the works. *Jennings's Appeal*, 16 Atlan. 19.

246. An owner of real estate cannot be enjoined from the sale or lease of his lands unless it appear on the face of the deed that the lands are to be used for an unlawful purpose. *Chester v. Philadelphia*, 15 C. C. 217.

(o) Owners of real property.

247. Upon the petition of an occupant of land who claims to own it, the court will restrain an adverse claimant from building a house thereon. *Wyoming National Bank v. Avery*, 7 C. C. 255.

248. Where a landlord claiming a forfeiture of a coal lease obtains possession by artifice and a show of force, equity will at the suit of the tenant enjoin him from continuing such possession. *Frisbie Coal Co. v. Brennan*, 1 Lack. Jur. 417.

249. Where a person asserts ownership to a property which is in the occupancy of another, and attempts to assert his title by force and violence, equity will by injunction restrain the parties until they appeal to the proper tribunal for the adjudication and determination of the suit, or until the final hearing on the bill. *Snyder v. Hemingway*, 3 Lack. Jur. 369.

250. Where the plaintiffs agreed to erect a building for the defendants, who were on its completion to give a purchase-money mortgage as payment, which mortgage was to cover property sold to the defendant by one of the plaintiffs, and the defendants had paid for the ground and on completion of the building threatened to take possession, the court granted an injunction to restrain them from so doing. *Bate v. Keystone Surgical Supply Mfg. Co.*, 3 Lack. Jur. 391.

251. A landowner will not be enjoined from permitting natural gas to escape on his premises and go to waste, where no other injury is done to his neighbors than that which would result from the depletion of the gas basin in which his

own and his neighbor's land are situated. *Hague v. Wheeler*, 157 P. S. 324.

252. Where the plaintiffs complained that the defendants, who were opposite riparian owners, had filled slag and refuse into the bed of the creek and shifted the channel so that in time of freshets it tore away the plaintiffs' walls, and the defendants denied that they were filling beyond their own line, and the evidence failed to establish clearly the exact location of the lines in dispute; it was *held*, upon final hearing, that an injunction would not be granted, but the parties would be referred to a suit at law to establish their rights. *Bolton v. Swartz*, 7 Montg. 77.

253. A defendant was enjoined by preliminary injunction from removing iron stays from a brick bake-oven entirely on the plaintiff's ground and constructing brick walls thereon; and this, though the answer denied that the stays and walls of the bake-oven were on the plaintiff's ground, or that such removal would damage the plaintiff. *Gunzenhauser v. Stephens*, 11 Lanc. 57.

254. Equity will not enjoin the owner of a party wall from taking it down and rebuilding it, whenever it no longer subserves its purpose, or when necessary because of improvements. *Barnes v. Loch*, 4 Montg. 149.

255. The first builder who has erected a party wall and used iron rods and bolts to secure the same, which project on his neighbor's property, will not be restrained by injunction from maintaining such rods and bolts where the adjoining owner has been tardy in asserting his rights. *Walsh v. Luburg*, 10 C. C. 641.

(P) Church disputes.

256. A bill lies for an injunction against removing a church from one location to another and the destruction of the original house of worship, upon the allegations that subscriptions were made and received for the erection of the building at the original location, and for the purpose of building there a memorial to certain persons. *Cushman v. Church of the Good*

Shepherd, 162 P. S. 280; reversing s. c. 14 C. C. 26.

257. Where the court had granted a preliminary injunction restraining the pastor representing a faction in a church from officiating as pastor, and it subsequently appeared that there was an agreement between the two factions that the pastor representing each faction should officiate on alternate Sundays, the preliminary injunction was amended by the court to conform to such agreement. *Fairville Church v. Brunner*, 10 Lanc. 129.

258. Where the pastor of a congregation had been suspended by the church courts, and he with others then withdrew from membership and organized into a different ecclesiastical congregation, but continued to hold and use the church property and retained possession of its corporate seal; it was *held*, that equity had jurisdiction to enjoin such use and to compel the delivery of such corporate seal. *East End Reformed Presbyterian Congregation v. Milligan*, 40 P. L. J. 7.

(Q) Labor troubles.

259. The Cigarmakers' International Union not being a trader in any sense, it was *held*, that it could have no distinctive trade-mark; it was further *held*, that equity would not relieve by enjoining the making and use of counterfeit copies of their label, the purpose of which was to do harm to non-union men by covering them with opprobrium and preventing a sale of their work. *McVey v. Brendal*, 144 P. S. 235; reversing s. c. 7 Lanc. 399. See act 21 May 1895, (P. L. 95).

260. Discharged employees, members of a trades-union, will be restrained by injunction from gathering about their former employer's place of business, and from following the workmen whom he has employed, and from gathering about the boarding-houses of such workmen, and from interfering with them by threats, menaces, intimidation, ridicule and annoyance on account of their working for the plaintiffs. *Murdock v. Walker*, 152 P. S. 595.

261. The striking employees of the plaintiff will be restrained by injunction from refusing to permit other persons to work for the plaintiff, where it appears that they are endeavoring to accomplish their purpose by threats, menaces, intimidation and opprobrious epithets addressed to the plaintiff's officers and workmen, and by gathering in crowds at plaintiff's place of business and at the boarding-houses of their workmen, and by following the workmen to and from their work, stopping them on the highways and holding them up to the ridicule and contempt of the by-standers. *Wick China Co. v. Brown*, 164 P. S. 449.

262. The court refused to restrain by injunction the members of the builders' exchange at the suit of certain building contractors and journeymen bricklayers and apprentices, alleging a confederation and combination between the defendants to prevent the complainants from carrying on their trade and business by refusing to sell and by persuading others not to sell to the plaintiffs. *Sweeny v. Torrence*, 11 C. C. 497.

263. An organization of workmen to secure the payment of higher wages is not an unlawful one; such an organization has the right to seek by fair persuasion the accomplishment of its purpose, but when by words and acts, their numbers, their manners, their movements and by annoyance and intimidation, the members undertake to practically compel other workmen to cease work, they are guilty of acts which constitute a nuisance and they will be enjoined. *McCandless v. O'Brien*, 38 P. L. J. 435; s. c. 8 Lanc. 254.

See TRADES-UNIONS.

V. Injunction bonds.

264. One railroad company seeking to enjoin another from the construction of a crossing, under the act of 19 June 1871 (Brightly's Purdon 780), should give bond, under the act of 6 May 1844 (Brightly's Purdon 784), to indemnify the defendant

for all damages sustained by reason of such injunction. *Wheeling & Pittsburg Railroad Co.'s Appeal*, 1 Cent. 580.

265. Where the plaintiff was restrained by injunction from the completion of a building and the injunction was subsequently dissolved; it was held, in an action on the injunction bond, that a statement which stated that the workmen were scattered, that a severe storm came on before the roof was on and delayed the building, that the walls were soaked, that the mortar froze in the joints, and the brickwork had to be repointed, and that the plaintiff's loss in the damage to the building and delay in its construction was at least five hundred dollars, and his total loss, including the injury and delay to his business in the failure to have the building ready for his occupancy, was one thousand dollars, was held to be sufficiently specific as to damages. *Hazzard v. Preston*, 12 C. C. 372.

266. As to what damages may be recovered in a suit on an injunction bond, see note to *Sensenig v. Parry*, 5 Atlan. 12.

VI. Dissolution.

267. Upon the hearing of a motion to dissolve a special injunction, *ex parte* affidavits are admissible in evidence in contradiction of the answer. *Baltimore & Harrisburg Ry. Co. v. Hanover & McSherrystown Street Ry. Co.*, 13 C. C. 291.

268. The principle that when an answer is filed denying all the facts and equities on which relief is based, an injunction must be dissolved, is no longer of universal application. *Baltimore & Harrisburg Ry. Co. v. Hanover & McSherrystown Street Ry. Co.*, 13 C. C. 291.

269. A preliminary injunction was dissolved on motion where the bond contained only one surety and the bill was written and there was no certificate of want of time to print the bill. *Duke Street*, 11 Lanc. 58.

270. Upon dissolving a preliminary injunction restraining a natural gas company from laying pipes under a sidewalk,

the court may impose a condition that the company enter a bond to secure the landowner for the direct injury caused by the disturbed condition of the street and the consequential injury to the land. *McDevitt's Appeal*, 7 Atlan. 588; *McDevitt v. People's Natural Gas Co.*, 160 P. S. 367.

271. If the defendant takes such action as cures the defect on which the injunction depended, the injunction should be dissolved; in such case the supreme court upon appeal will dissolve it at the costs of the appellee. *Meadville's Appeal*, 3 Cent. 532.

INNKEEPERS.

See BOARD: EXCISE.

- I. Right to eject guest.
- II. Board.
- III. Liability for stolen goods.
- IV. Civil responsibility for sale of liquor.

I. Right to eject guest.

1. Where a guest in a hotel becomes troublesome and annoying to the other guests of the house by reason of intoxication, the proprietor may rightfully put him out of the house, using no unnecessary force or violence; but where the trouble and disturbances are due to his sickness, he must be treated with the consideration due to a sick man, and if he is removed, such removal must be in a manner due to his condition. *McHugh v. Schlosser*, 159 P. S. 480.

II. Board.

2. An innkeeper has a lien upon the goods brought there by a lodger, whether they actually belong to the latter or not. *Singer Mfg. Co. v. Flennigan*, 7 C. C. 45.

3. The act 8 May 1876 (Brightly's Purdon 2077) does not give a new process for the commencement of an action; an attachment cannot issue as an original

process to collect a debt for boarding. *Carden v. Scott*, 1 Kulp 196; *McGinley v. McDonough*, 3 Lanc. 202; *Thatcher v. Beam*, 14 C. C. 109; *McCarty v. Dougherty*, 16 C. C. 86; *Dillon v. Treverton*, 16 C. C. 89. Contra, *Smith v. Dingus*, 12 C. C. 299; *Thomas v. Glasgow*, 13 C. C. 167.

4. Under the act 8 May 1876 (Brightly's Purdon 2077), allowing wages to be attached for four weeks' board, a judgment for board cannot be split up and two separate executions issued for four weeks' board. *Hawk v. Rock*, 14 C. C. 490.

5. Where a judgment for board has been regularly obtained under the act 8 May 1876 (Brightly's Purdon 2077), and wages have been regularly attached under such judgment, the defendant is not entitled to claim his exemption, under the act 4 April 1889 (Brightly's Purdon 834). *Weisman v. Weisman*, 133 P. S. 89; *McCarty v. Dougherty*, 16 C. C. 86; s. c. 1 Mag. & Con. 39; *Dillon v. Treverton*, 16 C. C. 89.

6. Where an attachment is issued against wages with a summons in a suit for board, the exemption may be claimed against such attachment, but the act 4 April 1889 (Brightly's Purdon 834) takes away the right of exemption when judgment has first been obtained, and an attachment execution is then issued on the judgment. *Thomas v. Glasgow*, 13 C. C. 167.

See ASSUMPSIT, VI.

BOARD.

III. Liability for stolen goods.

7. An innkeeper is bound to pay for goods stolen in his house from a guest unless stolen by the servant or companion of the guest; but the negligence of the guest contributing to the loss is always a defence. *Shultz v. Wall*, 134 P. S. 262; s. c. 26 W. N. C. 51.

8. Although the act of 7 May 1855 (Brightly's Purdon 1023) is explicit as to where notices of a safe must be posted in

a hotel, yet, if the guest have actual notice of the existence of the safe, his omission to avail himself of it is evidence of his own negligence. *Ibid*.

IV. Civil responsibility for sale of liquor.

9. The act of 12 April 1875, sec. 7 (Brightly's Purdon 1232), allowing a husband, wife, etc., of a person habituated to intoxicating liquors to recover damages for their sale, is a general restraint on the sale of liquors, regardless of license or manner of licensing. The court should assess the damages. The act applies to Allegheny county. *Mardorf v. Hemp*, 5 Cent. 720.

10. Under the act of 8 May 1854 (Brightly's Purdon 1231), if the jury find that the defendant furnished the plaintiff's deceased husband with liquors while intoxicated, with knowledge that he was a man of intemperate habits, he is responsible for the resulting injury; and this, though others furnished him liquors on the same occasion. *Taylor v. Wright*, 126 P. S. 617.

11. A father cannot recover from an innkeeper money expended by him for medical attendance to his adult son, injured in consequence of a sale of intoxicating liquors to the son when drunk. *Veon v. Creaton*, 138 P. S. 48; s. c. 27 W. N. C. 57; 38 P. L. J. 154.

See EXCISE.

INQUIRY OF DAMAGES.

See PRACTICE, XX.

INQUISITION.

See CORONER: EXECUTION, IX: LUNACY.

INSANITY.

See CRIMINAL LAW, III.: EVIDENCE, L.:
FRAUD: LUNACY: WILLS.

INSOLVENCY.

See ASSIGNMENT: BANKRUPTCY: BANKS:
BUILDING ASSOCIATIONS: CONFLICT OF
LAWS: CORPORATION, XV.

- III. Insolvent bonds.
- VII. Discharge.
- VIII. Fraudulent insolvency.
- X. Insolvent criminals.

III. Insolvent bonds.

1. The court cannot relieve an insolvent from the forfeiture of his bond caused by his failure to appear and present his petition for a discharge. *Koehler's Insolvency*, 5 Kulp 525.

2. The court has no discretionary power in the absence of an order extending the time, to relieve an insolvent from the forfeiture of his bond caused by his failure to appear and present his petition for a discharge at the next term of court. *Spare's Insolvency*, 7 Kulp 525.

3. In a suit on an insolvent bond it is a sufficient affidavit of defence which avers the presentation of a petition, the dismissal thereof and the surrender of the insolvent to the keeper of the county prison. *Betz v. Greenwaldt*, 8 Atlan. 852.

4. In an action on an insolvent's bond which has been accepted by the obligee, it is no defence that the schedule annexed to the petition does not set forth the nature and character of the debts. *Greenwaldt v. Kraus*, 148 P. S. 517.

5. Where a petitioner fails to appear on the day fixed for the hearing until after twelve o'clock, but subsequently coming into court, he finds the court has adjourned, and he then proceeds to the county prison and surrenders himself to the keeper, the condition of his bond has been complied with and there can be no recovery against his surety. *Greenwaldt v. Kraus*, 148 P. S. 517.

VII. Discharge.

6. The act 16 June 1836, sec. 17 (Brightly's Purdon 1029), presents no obstacle to a discharge where the damages found do

not exceed one hundred dollars. *Dimmick's Case*, 13 C. C. 590.

7. The inspectors of the Philadelphia County Prison are not liable for the escape of an insolvent debtor. *Saunders v. Smith*, 132 P. S. 180; s. c. 25 W. N. C. 286; reversing s. c. 46 L. I. 26. So, the keeper of the prison was held not to be liable where an insolvent having been refused his discharge went to the prison and informed the keeper of the fact and surrendered himself, and the keeper refused to receive and detain him, when he went away, it appearing that the keeper had no record, writ or paper of any kind which bore authenticity upon its face, to justify the insolvent's detention. *Saunders v. Perkins*, 140 P. S. 102.

8. Where a defendant is committed to jail upon a *capias ad satisfaciendum* issued on a judgment for a penalty for selling liquor on Sunday, in violation of the act 26 February 1855 (Brightly's Purdon 1230), he can only be released under the insolvent laws. *Comm'th v. McAleese*, 12 C. C. 147.

9. A sale of goods by an assignor, after his assignment for the benefit of creditors and an appropriation of the proceeds, is not such actual force as, under the act of 16 June 1836, sec. 17 (Brightly's Purdon 1029), will prevent his discharge in insolvency without sixty days' confinement. *Clarke's Estate*, 7 C. C. 295.

10. Where a physician was arrested on a *capias* upon a judgment for damages for the negligent use of an electric battery; it was held not to be such a case of actual force, under the act 16 June 1836, sec. 17 (Brightly's Purdon 1029), as would prevent his discharge without undergoing sixty days' imprisonment. *Drumm v. MacTaggart*, 11 Lanc. 102.

11. Where a verdict was obtained against the defendant for compensatory damages for negligently colliding with the plaintiff's team and killing his horse; it was held, that defendant would be discharged as an insolvent without imprisonment where it did not appear that his

conduct was reckless and wilful; the words "actual force" in the act 16 June 1836, sec. 17 (Brightly's Purdon 1029), mean force or violence wilfully and wantonly directed against the plaintiff or his property, such as would amount to an actual breach of the peace. *Graeff's Case*, 12 C. C. 443. See *Dimmick's Case*, 13 C. C. 590.

12. An appeal and *certiorari* from an order dismissing the petition of an alleged insolvent for a discharge under the insolvent law does not bring up the opinion of the court, especially when no exception was sealed; whether the petitioner was a fraudulent debtor is a question of fact, and the evidence not being brought up with the writ, the finding of the court below will be presumed to have been upon sufficient evidence. *Owen's Case*, 140 P. S. 565: affirming s. c. 8 C. C. 458.

VIII. Fraudulent insolvency.

13. If actual fraud be alleged, but does not appear on the record, the proceedings should be suspended and the defendant held for trial in the criminal court. Actual fraud cannot be inferred from the forms of pleading in trover and conversion. *Clarke's Estate*, 7 C. C. 295.

14. Upon the question whether a purchaser was insolvent when he made a purchase, evidence is admissible of his declarations as to his prior insolvency after his goods were levied upon. *Perlman v. Sartorius*, 162 P. S. 320.

15. Under the act 31 March 1860, sec. 133 (Brightly's Purdon 1033), which provides for the discharge of a defendant from imprisonment if an indictment shall not be presented to the grand jury at the next sessions, the common pleas have no authority to discharge generally, but only from imprisonment; the act does not apply where it does not appear that the defendant has been imprisoned. *Wentzel's Appeal*, 160 P. S. 252.

X. Insolvent criminals.

16. A prosecutor who has been sentenced to pay the costs, may be discharged without payment or imprisonment upon filing a petition and bond to take the benefit of the insolvent laws. *Kishbaugh's Petition*, 26 W. N. C. 268.

17. A person in confinement for costs is entitled to his discharge after thirty days' imprisonment; and this, without any further proceedings. *Comm'th v. Lewis*, 1 Lack. Jur. 213. See *Comm'th v. Ross*, *Ibid.* 217.

18. Where the defendant in a criminal case has been acquitted but the jury has imposed the costs upon him, he cannot be discharged under the insolvent laws without having undergone an imprisonment. *Comm'th v. Rhoads*, 11 C. C. 42.

19. A sentence to pay costs only, or a fine less than fifteen dollars and costs, is discharged absolutely by thirty days' imprisonment if the prisoner has been a resident of the state for six months; where the fine is less than fifteen dollars, payment of the fine without payment of the costs will not entitle the prisoner to a discharge until after thirty days' imprisonment; if the fine be more than fifteen dollars, or if the prisoner has not been a resident of this commonwealth for six months, there can be no discharge until after three months' imprisonment, except upon payment. *Conley's Petition*, 5 Del. 402.

20. Where a person has been sentenced to pay a fine and costs, he is not entitled on payment of the fine to make application for his discharge until he shall have been in actual confinement pursuant to such sentence for a period of not less than three months. *Smith's Case*, 7 York 112; s. c. 5 Del. 398. See *Conley's Petition*, 5 Del. 402.

21. Where a prisoner is sentenced to pay a fine exceeding fifteen dollars and also to undergo imprisonment, he will not be discharged until he has undergone an imprisonment of three months in addition to the term imposed by the sentence. *Johnson's Case*, 13 C. C. 170.

22. A criminal confined for fine, costs and allowance to prosecutrix in fornication and bastardy, is entitled to his discharge after an actual confinement for three months, and filing his petition and bond to take the benefit of the insolvent laws under the act of 24 January 1849, sec. 6 (*Brightly's Purdon* 1034). But that act, as to Schuylkill county, was repealed by the act of 22 March 1850 (P. L. 231). *Fahey's Case*, 8 C. C. 457. But he must satisfy the court that he has brought himself within the provisions of the insolvent laws, and that there is no fraud. *Owen's Case*, 140 P. S. 565; affirming s. c. 8 C. C. 458.

23. After three months' imprisonment a defendant convicted of fornication and bastardy may obtain his discharge under the insolvent laws, without complying with any part of the sentence. *Comm'th v. Cook*, 4 Cent. 710.

24. A defendant who has been in prison three months for desertion of his wife may be required to give his own bond before he will be discharged. *Comm'th v. James*, 47 L. I. 434.

25. Right of discharge and practice under the act of 6 May 1887 (*Brightly's Purdon* 1034), relating to the discharge of prisoners without proceedings under the insolvent laws. The county commissioners must decide whether any particular case calls for their action. *Comm'th v. Ross*, 1 Lack. Jur. 217; s. c. 7 Lanc. 342.

26. Under the act 6 May 1887 (*Brightly's Purdon* 1034), the county commissioners, with the assent of the quarter sessions or a judge in vacation, may discharge a person who has been sentenced to pay costs only, without any actual imprisonment and without proceeding under the insolvent laws, provided the prisoner has been a resident of the commonwealth for six months; this act, however, is not mandatory, but the commissioners may refuse to discharge if they believe the petitioner is able to pay. *Conley's Petition*, 5 Del. 402.

INSPECTION.

27. Where an oil dealer in Philadelphia county was branding his packages with the name of the oil inspector of McKean county, the supreme court sustained a preliminary injunction enjoining him from selling oil not inspected by the oil inspector of Philadelphia county, and from using the name of the McKean county inspector. *Young v. Emery*, 155 P. S. 273.

INSURANCE.

See AGENCY: CORPORATION, XV.: DECEDENTS' ESTATES: TAXES: WAIVER.

- I. Insurance companies.
- II. Fire insurance.
 - (a) Contract of fire insurance.
 - (b) Insurable interest.
 - (c) Of the policy.
 - (1) Validity and construction of policy.
 - (2) Cancellation.
 - (3) Payment of premiums.
 - (4) Covenant of ownership.
 - (5) Against encumbrances.
 - (6) Against foreclosure.
 - (7) Transfer of title or occupancy.
 - (8) Non-occupancy.
 - (9) Other insurance.
 - (10) Increased risk.
 - (d) Description.
 - (e) Assignment of policy.
 - (g) Notice of loss.
 - (h) Proofs of loss.
 - (i) Liability for loss.
 - (k) Payment of loss.
 - (l) Actions on policies.
 - (m) Subrogation.
 - (n) Liability of insurance agents.
- III. Life insurance.
 - (a) Insurable interest.
 - (1) What is an insurable interest?
 - (2) Wagering policies.

(3) Money paid to beneficiaries without insurable interest.

- (b) Of the application.
- (c) Construction of policy.
- (d) Age of the insured.
- (e) Use of intoxicating liquors.
- (g) Suicide.
- (h) Covenant against unlawful acts.
- (i) Previous rejection.
- (k) Premiums.
- (l) Assignment of policy.
- (m) Notice and proof of loss.
- (n) Liability for loss.
- (o) Payment of loss.
- (p) Actions on policies.

IV. Insurance against accident.

V. Insurance against storm.

VI. Live-stock insurance.

VII. Fidelity and casualty insurance.

VIII. Mutual insurance companies.

- (a) Of the contract of insurance.
- (b) Forfeiture.
- (c) Assessments.
- (d) Actions for assessments.
- (e) Suits against the company.

IX. Foreign insurance companies.

I. Insurance companies.

1. Under the act 1 May 1876, sec. 18 (*Brightly's Purdon* 1042), a fire or marine insurance company may lawfully invest in the bonds of a solvent street railway company. *Accident Company Investments*, 16 C. C. 312.

2. An accident insurance company has a right to invest its capital as to it seems most judicious; there is no legislative authority providing the manner in which the capital of such a company shall be invested. *Accident Company Investments*, 16 C. C. 312.

See CORPORATION.

II. Fire insurance.

(a) Contract of fire insurance.

3. Where an applicant for insurance conceals his belief that an attempt had been made to set fire to his house, and

his fear of a repetition, he cannot recover on the policy, but where he explains that what he first supposed was a malicious attempt to burn his house he subsequently believed to be merely a prank of some boys, his explanation is for the jury. *Curry v. Sun Fire Office*, 155 P. S. 467.

4. Where a written application is not required, the company cannot subsequently object, that the applicant did not state in writing the amount and character of the lien and encumbrances on his property. *Curry v. Sun Fire Office*, 155 P. S. 467.

5. Where the agent of an insurance company upon a parol contract of insurance promised to bind insurance and to receive premium and deliver the policy when plaintiff's agent would call for it, and the agent of the insurance company discovering that insurance on the property was prohibited in his instructions, attempted to place the risk with other companies and failed, and two weeks subsequent to the first interview the property was destroyed by fire; it was *held* to be for the jury to determine whether there was a complete contract of insurance. *Consolidated Manufacturing Co. v. West Chester Fire Ins. Co.*, 13 C. C. 321.

6. A clause in a fire policy that any broker procuring the insurance shall be considered the agent of the insured, does not include an agent authorized by the company to take the policy. *Kister v. Lebanon Mutual Insurance Co.*, 128 P. S. 553.

7. An insurance company cannot escape the consequences of the fraud or mistake of its agent by inserting in the policy a stipulation, that such agent shall be deemed the agent of the insured, without putting the insured on his guard in advance of the negotiations. *Meyers v. Lebanon Mutual Ins. Co.*, 156 P. S. 420.

8. The subjects of fire insurance, authority of agent to vary terms in policy, and proofs of loss, are considered in notes to *Universal Fire Insurance Co. v. Block*, 1 Atlan. 527; and *Lebanon Mutual Insurance Co. v. Erb*, 4 Ibid. 13.

See AGENCY.

(b) Insurable interest.

9. A direct pecuniary interest in a building, such as will be damaged by the building's destruction, is an insurable interest. *Mutual Fire Insurance Co. of Annville v. Wagner*, 1 Cent. 223.

10. A turnpike company has no insurable interest in a bridge on the route of its turnpike. But the insurance company should refund the dues and assessments paid. *New Holland Turnpike Co. v. Farmers' Insurance Co.*, 7 Lanc. 319. See *New Holland Turnpike Co. v. Farmers' Insurance Co.*, 144 P. S. 541.

11. Where a pipe-line company, though not the absolute owner of the oil insured, was bound by its contract to protect its customers against the loss of it by fire; it was *held*, that the company, to the extent of the value of the oil, had an insurable interest therein. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 P. S. 346.

12. Where a policy of fire insurance described the property as merchandise, "their own or held by them in trust"; it was *held*, that the policy covered merchandise held by a storage company subject to storage liens; the fact that the company held the property upon the stipulation that it would not be responsible for loss or damage by fire, did not prevent it from insuring the property to the extent of its lien for storage. *Pittsburgh Storage Co. v. Scottish Union and National Ins. Co.*, 168 P. S. 522.

13. The mere holding of a judgment by a vendor of real estate against his vendee to secure part of the purchase money does not confer an insurable interest; but where the agent of the insurance company advised a holder of a policy, when about selling the property, to retain the policy, and that he would still have an insurable interest; it was *held*, that the company was estopped from denying its liability in an action upon the policy. *Light v. Countrymen's Mutual Insurance Co.*, 169 P. S. 310; s. c. 36 W. N. C. 454.

(c) Of the policy.

(1) Validity and construction of policy.

14. The act 16 April 1891 (Brightly's Purdon 1047), providing that the insurance commissioner shall prepare a uniform blank of fire insurance policies, and forbidding the use of any other, is unconstitutional as an unauthorized delegation of legislative power. *O'Neil v. American Fire Ins. Co.*, 166 P. S. 72; reversing s. c. 3 Dist. Rep. 778; 4 Northam. 318.

15. A policy of fire insurance being the renewal of another policy, the company is bound by the promise of its agent to make it like the first one, and the insured is not bound by a covenant therein, but not contained in the first policy. *Burson v. Fire Ass'n*, 136 P. S. 267; s. c. 26 W. N. C. 408.

16. The insured is not bound by erroneous answers appearing in the application, where the latter has been drawn by the company's agent, who did not write the answers correctly as given him by the insured. *Commercial Union Assurance Co. v. Elliott*, 12 Cent. 668; s. c. 13 Atlan. 970.

17. In an action upon a fire policy, evidence is admissible to show that the company's agent wrote down other answers than those given by the insured, and that the latter signed the policy in ignorance of that fact. *Kister v. Lebanon Mutual Insurance Co.*, 128 P. S. 553.

18. Where an agent, in filling out an application, omits a material portion of an answer of an applicant who signs the paper without reading it over, the applicant may show, in a suit upon the policy, what his real answer was. *Meyers v. Lebanon Mutual Ins. Co.*, 156 P. S. 420.

19. Under the act of 11 May 1881 (Brightly's Purdon 1046), it is too late upon the trial to offer to attach the plaintiff's application to the policy. *Imperial Insurance Co. v. Dunham*, 3 Atlan. 579.

20. If the insured permit the application (not attached to the policy as required by the act of 11 May 1881, Brightly's Purdon 1046) to be read in

evidence without objection, she will be held to have waived her right of objection and to be bound by its contents. *Heffron v. Kittanning Insurance Co.*, 132 P. S. 580; affirming s. c. 1 Lack. Jur. 235.

21. If the application be not annexed to a policy of insurance, it has no force whatever and cannot be made the basis of an affidavit of defence. The act of 11 May 1881 (Brightly's Purdon 1046) applies to insurance on property outside of this state. *Hebb v. Kittanning Insurance Co.*, 138 P. S. 174; s. c. 27 W. N. C. 97; 38 P. L. J. 153.

22. In an action on a fire policy, where the application and by-laws are not attached to the policy as required by the act 11 May 1881 (Brightly's Purdon 1046), the insurance company cannot claim that the policy is invalidated because the insured did not comply with the terms and conditions set forth in the constitution and by-laws, or pay the legal assessments. *Haverstick v. Penn Township Mutual Fire Ass'n*, 156 P. S. 333.

23. The act 11 May 1881 (Brightly's Purdon 1046), requiring an application for insurance to be attached to the policy, is limited to writings; it does not apply to any oral application. *Lenox v. Greenwich Ins. Co.*, 165 P. S. 575.

24. If the interpretation of a paper as of an application for insurance be made the basis of defence, a copy must be attached to the affidavit of defence. *Hebb v. Kittanning Insurance Co.*, 138 P. S. 174; s. c. 27 W. N. C. 97; 38 P. L. J. 153.

25. A policy of insurance in case of doubt should be construed against the company. *Allemania Insurance Co. v. Pittsburgh Exposition Co.*, 11 Atlan. 572; *Philadelphia Tool Co. v. British America Assurance Co.*, 132 P. S. 236; s. c. 25 W. N. C. 370.

26. Whenever there is any serious doubt as to the meaning of a contract of insurance, it must be construed most strongly in favor of the assured. *Haeffer v. March*, 1 York 29.

27. A policy of fire insurance will not

be reformed by a court of equity on the ground of the insured's ignorance of its stipulations, simply because of his failure to read it, in the absence of proof that he was misled into believing that the contents of the policy was different from what they actually were. *Okes v. Fire Ins. Co.*, 12 C. C. 341.

28. The act 4 February 1870 (Brightly's Purdon 514, 1059), prohibiting the issuing of fire policies by others than corporations, is not in violation of sec. 1 of the Bill of Rights of the constitution, but is a valid exercise of the police power of the state. *Comm'th v. Vrooman*, 164 P. S. 306; reversing s. c. 15 C. C. 92; 51 L. I. 152. See *Lloyd's Association*, 15 C. C. 586.

(2) Cancellation.

29. A policy cannot be cancelled by an insurance company without notice, of such intention being communicated to the insured before the fire. *Scott v. Sun Fire Office*, 133 P. S. 322.

30. A by-law in a fire policy that it shall be optional with the board to cancel or not, as they may determine, unless the property is actually sold, was held to be in conflict with the stipulation in the standard policy required by the act 16 April 1891 (Brightly's Purdon 1047), and to be illegal and void and against public policy. *Comm'th v. Susquehanna Mutual Fire Ins. Co.*, 14 C. C. 438. The act of 1891 has since been declared unconstitutional, *supra* pl. 14.

(3) Payment of premiums.

31. If an insurance company, by its usual course of dealing, treats its agent as its debtor for premiums on policies delivered to him, payment to the agent is payment to the company. *Pennsylvania Insurance Co. v. Carter*, 11 Atlan. 102.

32. The payment of the fire premium to a broker not being valid until received by the company, it was held, that a charge by the agent of the company against the broker was a sufficient receipt. *Scott v. Sun Fire Office*, 133 P. S. 322.

33. Where there has been an estab-

lished course of dealing between an insurance agent and a policy holder to extend credits for premiums, such agent may waive the provision in the policy, making an actual payment of premium a condition of its validity; and this, notwithstanding a prohibition in the policy, of any waivers by agents. *Long v. North British Insurance Co.*, 137 P. S. 335.

34. Where a fire policy provided that it should be void unless the premiums were paid to the secretary or an agent duly appointed in writing; it was held, that where the company itself either expressly or impliedly had, in fact, appointed an agent to deliver a policy and collect the premiums, the receipt of the money by such agent was the receipt by the company and operated as a waiver of the condition. *Arthurholt v. Susquehanna Mutual Fire Ins. Co.*, 159 P. S. 1.

(4) Covenant of ownership.

35. If a policy be issued without an application, it covers the leasehold interest of the insured, and a condition in the policy as to sole ownership is inapplicable. *Philadelphia Tool Co. v. British America Assurance Co.*, 132 P. S. 236; s. c. 25 W. N. C. 370.

36. The covenant of unconditional ownership of the insured goods is not broken by the fact that the insured has bailed them for a certain rent, the title not to pass until the last dollar of the purchase money is paid. *Burson v. Fire Ass'n*, 136 P. S. 267; s. c. 26 W. N. C. 408.

37. Where the defence was set up that the plaintiff was not the sole and unconditional owner, and the testimony was conflicting but tended to show that by an amicable agreement with his co-heirs, plaintiff had become the sole owner of that portion of the land on which the house was erected, a finding for plaintiff on the question of fact was sustained. *Whitmore v. Dwelling-House Ins. Co.*, 148 P. S. 405; affirming s. c. 2 Lack. Jur. 45.

38. Where a fire policy on personal property contains a clause avoiding the policy if the interest of the insured be

not truly stated therein, there can be no recovery by a wife for the loss of the goods where they are insured in the name of the husband without notice to the company of her ownership. *Diffenbaugh v. Union Fire Ins. Co.*, 150 P. S. 270.

39. Where a life tenant describes her interest as a life lease and the agent issues the policy on the full value of the fee, the company cannot set up as a defence the mistake of the agent in describing the interest of the assured. *Welsh v. London Assurance Corporation*, 151 P. S. 607.

40. Where a fire policy provided that it should be void if the interest of the insured was not truly stated therein, and it appeared that the title to the property was in the plaintiff and his wife jointly; it was held to be proper to direct a verdict for the insurance company. *Schroeble v. Humboldt Fire Ins. Co.* 158 P. S. 459.

41. A condition in a fire policy that it shall be void if the interest of the insured be other than an unconditional and sole ownership, relates to the ownership at the date of the issue of the policy and not at the date of the fire. *Collins v. London Assurance Corporation*, 165 P. S. 298.

42. Under a covenant as to sole ownership, a policy of fire insurance will not be avoided by an executory contract of sale and a receipt of a portion of the purchase money if, at the time of the loss, the title remains in the person insured. *Walter v. Sun Fire Office*, 165 P. S. 381.

43. The covenant of ownership is considered in a note to *Elliott v. Agricultural Insurance Co.*, 3 Atlan. 172.

(5) Against encumbrances.

44. A policy providing that it shall be void, if the property be sold, conveyed, encumbered, or mortgaged, is not rendered invalid by the existence of liens against the property when the policy was issued, about which no questions were asked and no statements made. *Dwelling-House Insurance Co. v. Hoffman*, 125 P. S. 626.

45. A covenant against future encumbrances is not violated by the revival of an existing judgment, or the entry of an outstanding judgment bond included in plaintiff's statement, nor even by the entry of a new judgment if thereby there be no increase in the total amount of encumbrances. *Kister v. Lebanon Mutual Insurance Co.*, 128 P. S. 553.

46. A policy is avoided by a false answer as to the encumbrances upon the building. *Heffron v. Kittanning Insurance Co.*, 132 P. S. 580; affirming s. c. 1 Lack. Jur. 235.

47. If the insured informed the agent as to liens against the property and the policy be subsequently issued which failed to note them, it will be presumed the company waived the condition in the policy as to lien. *Gould v. Dwelling-House Insurance Co.*, 134 P. S. 570; s. c. 26 W. N. C. 168.

48. A policy is not rendered void by the entry of new liens if the total amount of the liens entered do not exceed the total sum of the liens given by the insured to the company's agent. *Ibid.*

49. A waiver of the condition in the policy against encumbrances may be inferred from the appointment of appraisers after the fire and an adjustment of the loss, the negotiations lasting nearly five months; and this, though the policy contained a condition that nothing less than a specific agreement, clearly expressed and endorsed on the policy, should be construed as a waiver of any of its conditions. *McFarland v. Kittanning Insurance Co.*, 134 P. S. 590; s. c. 26 W. N. C. 174. See *Gould v. Dwelling-House Insurance Co.*, 134 P. S. 570; s. c. 26 W. N. C. 168.

50. A condition not to encumber property without the consent of the company endorsed on the policy, is not broken by the fact that judgments were entered up against the assured where the total amount of encumbrance was no greater than when the insurance was affected. *Weiss v. American Fire Ins. Co.*, 148 P. S. 349.

51. Where a fire policy upon a house and personal property provided that it should become void if the property became encumbered beyond fifteen hundred dollars, and it became so encumbered before the fire, and it provided further that no officer or agent of the company should have power to waive any stipulation unless such waiver was written upon or attached to the policy, and after the loss the insured agreed to deduct a portion of his loss on the personal property, and the adjuster with full knowledge of the amount of the encumbrance agreed to compromise and settle the loss; it was *held*, that the company was liable, and that the action was properly brought upon the agreement between the adjuster and insured. *McGonigle v. Agricultural Ins. Co.*, 167 P. S. 364.

52. Where a policy provided that it should be void if the property "be or become encumbered by a mortgage, trust deed, judgment or otherwise"; it was *held*, that a charge upon the land created by a will was an encumbrance within the meaning of such a clause. *Renninger v. Dwelling-House Insurance Company*, 168 P. S. 350.

(6) Against foreclosure.

53. A condition that the policy shall be avoided if a foreclosure suit be begun is not broken by the issue of a *scire facias sur mortgage*. *Weiss v. American Fire Ins. Co.*, 148 P. S. 349.

54. A condition in a fire policy that it should be void if, with the knowledge of the insured, foreclosure proceedings be commenced by virtue of any mortgage or trust deed, was *held* not to be broken where it appeared that a mortgage was given by a husband and wife, and five years afterwards a judgment was given by them and a third person to secure the same debt, and the land was sold on an execution under the judgment. *Collins v. London Assurance Corporation*, 165 P. S. 298.

55. Under a condition in a fire policy that it should be void if the ownership

was changed, it was *held*, that a destruction of the property by fire after a sheriff's sale, but before the acknowledgment of the deed, did not prevent a recovery. *Collins v. London Assurance Corporation*, 165 P. S. 298.

(7) Transfer of title or occupancy.

56. The approval by an agent of a transfer of the property validates the policy, though it contains a clause of forfeiture on transfer. *Imperial Insurance Co. v. Dunham*, 3 Atlan. 579.

57. Under the clause as to change of occupancy, the insured being but a tenant, it is no defence that the owner partitioned off a portion of the building and rented it for a barber-shop. *McKee v. Susquehanna Mut. Fire Insurance Co.*, 135 P. S. 544; s. c. 26 W. N. C. 263.

(8) Non-occupancy.

58. Where a fire policy provided that if the premises should be vacated without the consent of the company, the policy should cease and determine; it was *held*, that the unavoidable absence of the insured from the building for the period of one day after her tenant had left it, was not a vacation within the meaning of the policy; some cessation of occupancy is necessarily incident to a change of tenants, and a reasonable time must be allowed to make such change. *Doud v. Citizens' Ins. Co.*, 141 P. S. 47.

59. Where the policy provided that it should be void if the building became vacant or unoccupied or not in use, and the tenant's term ended on April 1st, but he completed his removal on March 27th, and the premises were leased to a new tenant from April 1st, but were destroyed by fire on March 28th; it was *held*, that the non-occupancy did not avoid the policy. *Roe v. Dwelling-House Ins. Co.*, 149 P. S. 94.

60. Where a fire policy provided that it should be void if the factory ceased to be operated for more than ten consecutive days, and it appeared that at the time of the renewal of the policy the machinery

was not in operation, but the premises were actually occupied by the foreman, who was engaged in putting together and making sale of engines and other articles, and after being occupied in this way for several months a fire occurred; it was *held*, that the factory had not ceased to be operated within the meaning of the policy. *Bole v. New Hampshire Fire Ins. Co.*, 159 P. S. 53.

61. Where a fire policy contains a provision that the company shall not be liable if the premises become vacated without immediate notice to the company and consent endorsed thereon, the words "immediate notice" must be construed to mean notice within a reasonable time, in view of the circumstances and condition of the party; after a vacancy followed by notice in a reasonable time, the policy remains in force until consent is refused by the company. *Strunk v. Firemen's Insurance Co.*, 160 P. S. 345.

62. Where a fire policy contained a condition that it should be void if the buildings became vacant or unoccupied, and it was shown that the premises had been abandoned by the tenant from August 4 to September 11, when the fire occurred; it was *held*, that this was sufficient to relieve the company from liability. *Mooney v. Glens Falls Ins. Co.*, 6 Del. 150.

(9) Other insurance.

63. A covenant against insurance in other companies is not violated by subsequent insurances which do not legally cover the same property, though there be some mingling of the goods. *Boatmen's Fire & Marine Insurance Co. v. Hocking*, 8 Atlan. 417.

64. The violation of a covenant that the aggregate insurance shall not exceed two-thirds of the cash value of the premises avoids the policy. *Bahner v. Stone Valley Mutual Fire Insurance Co.*, 127 P. S. 464.

65. A waiver of a condition against over insurance cannot be established by statements made out by adjusters whose

authority to act for the defendant company is not shown. *Everett v. London & Lancashire Ins. Co.*, 142 P. S. 332.

66. Double insurance takes place when the assured makes two or more insurances upon the same subject, the same risk and the same interest; if there be no stipulation to the contrary, the insurers are liable *pro rata*. Where, however, two policies insure the same property but one of them covers other property also, a case of double insurance is not presented. *Clarke v. Western Assurance Co.*, 146 P. S. 561.

67. A condition in a fire policy that it shall be void unless written notice of additional insurance be furnished to the secretary of the company is a reasonable regulation; notice to a director in such case is not notice to the company. *Bard v. Penn Mutual Fire Ins. Co.*, 153 P. S. 257. See *Hook v. Mutual Ins. Co.*, 160 P. S. 229.

68. A waiver of a covenant against additional insurance is not established by evidence that the treasurer of the company, who was also a director, had knowledge of the additional insurance, and that the company thereafter accepted the payment of an assessment, in the absence of evidence that the treasurer was a general agent of the company, or was authorized to receive notice of additional insurance or waive compliance. *Hook v. Mutual Ins. Co.*, 160 P. S. 229.

69. Where a fire policy provided that it should be void if other insurance should be placed upon the property, and it was in evidence that six months after the policy was issued, the owner's wife, without his knowledge, took out a policy in another company; it was *held*, that if the plaintiff notified the company as soon as he learned of the additional insurance and disclaimed the other policy and insisted upon standing by his own he could recover, but that a charge to that effect could not be sustained under the evidence in this particular case. *McKelvy v. German American Ins. Co.*, 161 P. S. 279.

70. Where the question was whether

a fire insurance company had approved additional insurance, and it appeared that the policy provided for the written consent of the company, approved at a regular meeting of the board of directors, and it appeared that the plaintiff told the secretary that he intended to take out additional insurance, and was told to meet the board of directors and have it fixed, that when he reached the office of the company the meeting of the board had adjourned and only three of the six directors were present, but of this he had no knowledge, that one of the directors handed the policy to the president, who said he knew all about it, and directed the director to write the necessary consent on the policy, and this was done but the president did not sign it and there was no formal action by the directors; it was *held*, that the company was estopped from denying its approval of the additional insurance. *Stauffer v. Penn Mutual Fire Ins. Ass'n*, 164 P. S. 199.

71. A stipulation in a fire policy that if the insured shall insure in any other company the policy shall be considered "sunk," renders the policy absolutely void without any action on the part of the company, when other insurance is effected. *Marshall v. Insurance Co. of North America*, 10 C. C. 87; s. c. 28 W. N. C. 283.

72. A clause against double insurance was *held* not to be avoided by a previous insurance upon the plaintiff's horses, where such previous insurance was not authorized by the charter of the company which issued the policy; the word "goods" in the charter was *held* not to include horses. *Knapp v. North Wales Mutual Live-Stock Ins. Co.*, 11 Montg. 119.

(10) Increased risk.

73. Under the clause as to increased risk, if the change in a railroad increased the danger of the building as to fire, and the insured knew that fact or ought to have known it, and gave no notice, he cannot recover. *Lebanon Mutual Insurance Co. v. Hankinson*, 3 Atlan. 672.

74. A fire policy will not be forfeited

by acts in violation thereof, where it appears that the acts complained of would rather diminish than increase the danger of fire. *Allemania Fire Insurance Co. v. White*, 11 Atlan. 96.

75. A clause prohibiting the keeping of fireworks on the premises refers to the building insured; the building being in exposition grounds, the policy is not avoided by the storage of fireworks in a stable some 25 or 30 feet distant. *Allemania Fire Insurance Co. v. Pittsburgh Exposition Society*, 11 Atlan. 572.

76. Whether a change from water-power to steam increased the hazard was a question for the jury. *Manheim Mutual Fire Insurance Co. v. Thompson*, 1 Cent. 332.

77. The character of a building as a dwelling-house is not necessarily changed because the basement was let to six Italians, who occupied it and boarded themselves. *Heffron v. Kittanning Insurance Co.*, 132 P. S. 580; affirming s. c. 1 Lack. Jur. 235.

78. Where a policy of fire insurance was endorsed that it should cover *pro rata* the goods insured in both places during a contemplated removal, and after such removal, then in the last named location only; it was *held*, that such indorsement gave the insured a privilege of removal of which they need not avail themselves unless they chose; that they were not bound to suspend business during the work of removal, and the indorsement did not limit the policy to articles in the place from which the goods were to be removed at the time of its date; that it was the duty of the assured when they began to remove to proceed with reasonable diligence, but that reasonable time must be estimated from the beginning of the removal and not from the date of indorsement. *Sharpless v. Hartford Fire Ins. Co.*, 140 P. S. 437; reversing s. c. 8 C. C. 387.

79. Where a fire policy provided that the premises should not be occupied for any purpose other than storage, and after the canning season was over a fire was built in the furnace under the engine of

the canning house to blow out the water from the boiler and pipes, and on the same evening the premises were destroyed by fire; it was *held*, that the policy was not rendered void by building the fire. *Krug v. German Fire Ins. Co.*, 147 P. S. 272.

80. A condition in a fire policy requiring written notice of privilege to make alterations may be waived by acquiescence and collection of premiums. *Stauffer v. Manheim Mutual Fire Ins. Co.*, 150 P. S. 531.

81. A condition in a fire policy that if the hazard be increased, the policy shall be void, is intended to protect the property from further hazard by reason of change in structure, methods of heating, addition of outbuildings, etc.; such a condition has no relation to a judgment upon the property or to an execution upon a judgment. *Collins v. London Assurance Corporation*, 165 P. S. 298.

82. Under a warranty clause against erroneous representations, it was *held*, that only such misrepresentations as materially affected the risk would avoid a policy. *Haeffer v. March*, 1 York 29.

83. The use of an inflammable material necessary for carrying on a factory will not prevent a recovery on a policy on the machinery, although the use of said material be expressly forbidden in the policy. *Fraim v. National Fire Ins. Co.*, 170 P. S. 151. *Fraim v. Manchester Fire Ins. Co.*, 170 P. S. 166.

(d) Description.

84. Where a pipe-line company was insured against loss or damage by fire "on oil while contained in" a certain tank in a specified position on leased lands, and a flood carried the tank away from its location to another point on the leased land, where the oil therein was destroyed by fire; it was *held*, that the description of the tank's location could only be construed as a warranty of location when the insurance was effected, and that the tank should not be voluntarily removed by the insured, and not an absolute warranty that it would thereafter remain in the

same location. *Western & Atlantic Pipe Lines v. Home Insurance Co.*, 145 P. S. 346.

85. Where a fire insurance company set up as a sole defence that the tank containing the oil which was destroyed had been removed from its location by a visitation of Providence; it was *held* to be estopped from setting up on the trial the defence that the oil was not the property of the insured. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 P. S. 346.

86. Where a policy of fire insurance was upon a two-story brick dwelling-house with slate roof, and its additions adjoining and communicating, including foundations, porches, verandas, etc.; it was *held*, that the description embraced a frame addition which not only enjoined but also communicated with the brick building. *Carpenter v. Allemania Fire Ins. Co.*, 156 P. S. 37.

87. A fire insurance company cannot avoid a fire policy because of the fraud or mistake of its agent in describing the building insured as a dwelling instead of a boarding-house, where it appears that the plaintiff fully and accurately described the property to the agent as a boarding-house, and it was seen and examined by the agent, and the misdescription was his act alone; in such a case it was *held*, that the fraud or mistake of the agent might be proved by parol evidence; and this, though the policy provided that the description of the property should be a part of the contract and a warranty by the insured. *Dowling v. Merchants' Insurance Co.*, 168 P. S. 234.

88. Where the insured asserted in his application that the building alone cost thirteen thousand dollars, and the evidence showed that the house was worth at the time of the fire not more than six thousand dollars; it was *held*, that the plaintiff was entitled to recover in the absence of evidence that its original cost was not as stated. *Meyers v. Lebanon Mut. Ins. Co.*, 156 P. S. 420.

(e) Assignment of policy.

89. An insurance company which assents to an irregular assignment of a policy to a mortgagee is bound thereby. *Wachter v. Phoenix Assurance Co.*, 132 P. S. 428; affirming s. c. 46 L. I. 148.

90. The ratification of the assignment of a policy endorsed thereon is equivalent to a prior consent. *Gould v. Dwelling-House Insurance Co.*, 134 P. S. 570; s. c. 26 W. N. C. 168.

91. Where the charter of a fire insurance company provided that the assent of the company to an assignment of a policy must be endorsed thereon; it was held, that the company was not estopped from setting up such a provision by the fact that the assignee notified the secretary of the assignment and said, "as long as this policy lays in the office before it expires, will it be all right if anything occurs," to which the secretary replied, "yes"; and this, although the company retained the deposit made when the insurance was effected, but the assignee had actual knowledge of the requirement and made no effort to comply with it. *Hensler v. Fire Ins. Co.*, 3 Northam. 318.

(g) Notice of loss.

92. If the policy provide for immediate notice of loss, but fixes no time, a reasonable time is to be allowed therefor. The act of 27 June 1883 (Brightly's Purdon 1051) does not exact the notice within ten, or proofs within twenty, days of the fire. If the facts and circumstances are not clearly established and the evidence is conflicting, the question of reasonable time is for the jury. *Springfield Fire & Marine Insurance Co. v. Brown*, 128 P. S. 392.

93. Notice of the fire is conclusively proved by the fact that the adjuster was sent to the place under instructions from the agent of the company and was there a week after the fire occurred. *Welsh v. London Assurance Corporation*, 151 P. S. 607.

94. A by-law of a mutual insurance company requiring that when a loss

occurs written notice of the exact time of the loss shall be furnished to the company will be enforced. *Haas v. Line Lexington Mutual Fire Ins. Co.*, 8 Montg. 180.

(h) Proofs of loss.

95. A submission of the amount of loss to appraisers is a waiver of the clause in the policy requiring proofs of loss to be furnished. *Allemania Fire Insurance Co. v. Pittsburgh Exposition Co.*, 11 Atlan. 572.

96. In a suit for rent, where the lessee was not to be liable if the premises were destroyed by fire not caused by his negligence, the plaintiff's proofs of loss are evidence for the limited purpose of showing his admission that the fire was not caused by negligence. *Philadelphia Trust S. D. & Ins. Co. v. Purves*, 12 Cent. 659; s. c. 13 Atlan. 936.

97. If proofs of loss be furnished in time, a waiver of objections to the same may be inferred from mere silence or from subsequent offers of compromise. *Gould v. Dwelling-House Insurance Co.*, 134 P. S. 570; s. c. 26 W. N. C. 168; *Whetmore v. Dwelling-House Ins. Co.*, 148 P. S. 405.

98. A quibble over the proofs of loss was said to be unbecoming, where the defendants had reinsured the risk and used the same proofs of loss in making their own claim. *McKee v. Susquehanna Mut. Fire Insurance Co.*, 135 P. S. 544; s. c. 26 W. N. C. 263.

99. If proofs of loss be kept an unreasonable length of time without objection, it is for the jury to say whether it is not a waiver of any informality or deficiency in them. *Davis Shoe Co. v. Kittanning Insurance Co.*, 138 P. S. 73; s. c. 27 W. N. C. 108; 38 P. L. J. 151.

100. In adjusting a loss, a fire insurance company has no right to demand a certificate of the officer in charge of the fire department. *Davis Shoe Co. v. Kittanning Insurance Co.*, 138 P. S. 73; s. c. 38 P. L. J. 151.

101. Where a fire policy gave the company the right to elect, within thirty days

after the completion of the proofs of loss, whether to rebuild or pay the loss, and the proofs were returned for correction to the assured, who, after some delay, made the correction asked for without objection; it was *held*, that he was estopped from saying that they were complete as originally supplied. *Kelly v. Sun Fire Office*, 141 P. S. 10.

102. A stipulation for the procurement of a certificate of the nearest magistrate, that he believes, after examination, that a loss has been sustained without fraud, is obligatory upon the assured. *Kelly v. Sun Fire Office*, 141 P. S. 10.

103. Where an insurance company, after receipt of proofs of loss, adjusted and compromised the claim therefor and promised to pay a certain sum in liquidation of it; it was *held*, in an action to recover the sum promised, that the company could not set up as a defence the breach by the insured of conditions contained in the policy. The proofs of loss were admissible for the purpose of showing that the company had notice of what property was lost and the amount claimed therefor. *Wagner v. Dwelling-House Ins. Co.*, 143 P. S. 338.

104. Where proofs of loss were to be furnished within thirty days and the agent of the company denied all liability under the policy, and the adjuster, failing to settle, said he would be back in a short time, and thirty-nine days after the fire the proofs were furnished and retained for eighty-six days without objection; it was *held*, that no advantage could be taken by the company of the failure to furnish proofs within thirty days. *Weiss v. American Fire Ins. Co.*, 148 P. S. 349.

105. Where there has been a total loss of the building and the company has been notified immediately, no further notice or technical proof of loss is necessary. *Roe v. Dwelling-House Ins. Co.*, 149 P. S. 94.

106. A denial of all liability on other grounds than the want of the technical proofs is a waiver of such technical

proofs. *Roe v. Dwelling-House Ins. Co.*, 149 P. S. 94.

107. An insurance company may waive a condition requiring proof of loss by notifying the insured in a case of total loss that the insurance would be paid in full. *Stauffer v. Manheim Mutual Fire Ins. Co.*, 150 P. S. 531.

108. Where the insured does what he intends as a compliance with the requirements of his policy respecting proofs of loss, the company should promptly notify him of any objections thereto; mere silence may so mislead him as to be sufficient evidence of waiver by estoppel. *Welsh v. London Assurance Corporation*, 151 P. S. 607.

109. Under the act 27 June 1883 (Brightly's Purdon 1051), proofs of loss may be served upon the local agent of a fire insurance company who has countersigned the policy. *Welsh v. London Assurance Corporation*, 151 P. S. 607.

110. In an action on a fire policy, where the only defence in the pleadings is that the loss occurred after the expiration of the policy, the defendant will not be permitted at the trial to prove that no proof of loss was made by the plaintiff, where a rule of court provides that no evidence will be heard as to facts not alleged in the papers on file. *Latimore v. Dwelling-House Ins. Co.*, 153 P. S. 324.

111. Where a fire insurance company appoints an adjuster and his adjustment is received by the company without objection, it is sufficient evidence to submit to the jury as to whether the company had waived a provision in the policy requiring proofs of loss to be furnished within fifteen days. *Fritz v. Lebanon Mutual Ins. Co.*, 154 P. S. 384.

112. A fire insurance company which retains without objection, proofs of loss for over a month, will be presumed to have waived defects. *Carpenter v. Allemania Fire Ins. Co.*, 156 P. S. 37.

113. Where a fire policy provided that the insured should produce as often as required all books, etc., for examination; it was *held*, that where the insured was

called upon to produce duplicate bills of articles contained in his statement of loss and was unable to produce such duplicates, the burden was upon him to show that he at least made a reasonable effort to do so and was unsuccessful; where it appeared from his own evidence that he made no effort to comply with the demand of the company, it was *held*, that he could not recover on his policy. *Langan v. Royal Ins. Co.*, 162 P. S. 357.

114. Where there is a total loss of which the company has been immediately notified, no further technical proof of loss is necessary; in such a case, where the secretary, also acting as general manager and adjuster, goes promptly to the ground and has appraisers appointed and promises immediate payment upon the finding of the appraisers, the company cannot subsequently set up the failure of the assured to make proof of loss as a defence; in such a case a waiver of a condition against encumbrances may also be inferred. *McGonigle v. Susquehanna Mutual Fire Ins. Co.*, 168 P. S. 1.

115. Where proofs of loss were required to be made within sixty days, and the company's agent was notified by telegraph on the day of the fire, and afterwards inspected the premises and stated to the plaintiff that the building was a total loss, and that he should make out a statement as to the value of the contents and hold it until called for, and the plaintiff mailed a proof of loss to the agent twenty-two days after the fire, and about three months after the fire sent a proof of loss directly to the company, which was returned two months afterwards; it was *held*, that the evidence was sufficient to justify a finding that a proof had been furnished within the time fixed by the policy, and that the company had waived all irregularities. *Douling v. Merchants' Insurance Co.*, 168 P. S. 234.

116. Where a married woman obtained insurance upon a stock of goods, and the policy did not state her sex or her Christian name, her agent representing "Mr. F." as a successful business man, and the

company believed that it was insuring the property of a man of business; it was *held*, that there was such fraud as would justify the company in disaffirming the contract even after a loss, where the fraud was not discovered until after the fire; it was further *held*, that the company was not estopped from setting up the defence by the fact that, pending the negotiations, the wife made out proofs of loss and sent them to the central office, and received a reply, addressed "R. F., Madam," and calling her attention to a defect in the proof, but not admitting liability; such reply did not justify the court in submitting the question of waiver to the jury. *Freedman v. Fire Association*, 168 P. S. 249; s. c. 36 W. N. C. 353.

117. Where, after a fire, the defendant denied the existence of any contract of insurance from the beginning, and defence was made on that ground; it was *held*, that the right to proofs of loss was waived. *Consolidated Manufacturing Co. v. West Chester Fire Ins. Co.*, 13 C. C. 321.

118. In an action upon a fire policy, the statement of loss made out by the insured under oath as required by the policy is not evidence as to the extent or amount of the loss. *Smith v. Insurance Co.*, 2 York 43.

(4) Liability for loss.

119. A clause exempting the company from liability for loss occasioned by "explosions of any kind," does not relieve it from liability where the fire resulted from the explosion of a kerosene lamp in the building. *Heffron v. Kittanning Insurance Co.*, 132 P. S. 580; affirming s. c. 1 Lack. Jur. 235.

120. A fire policy does not render the company liable for damage caused by the smoke and soot of a lamp, whose flame accidentally flared up above the lamp chimney to a height of between two and three feet, causing damages to the stock of the insured. *Samuels v. Continental Ins. Co.*, 2 Dist. Rep. 397.

121. The refusal of a fire insurance com-

pany to pay the loss on a specified ground estops it from asserting other ground relieving it from liability, of which it had full knowledge, where the insured has incurred expense, and brought suit in the belief that the only objection was that stated. *McCormick v. Royal Ins. Co.*, 163 P. S. 184.

122. An agreement to indemnify a lessee for any loss accruing by reason of having to pay rent for such times as the building may be untenable by reason of fire, is discharged by an agreement of the insured to pay rent after a re-entry to rebuild. Such a re-entry suspends the payment of the rent and subsequent payments thereof by the tenant were voluntary. *Heller v. Royal Insurance Co.*, 133 P. S. 152; s. c. 25 W. N. C. 481. See *Heller v. Royal Ins. Co.*, 151 P. S. 101.

123. Where premises are destroyed by fire, and the tenant agrees with his landlord that he may enter and rebuild, and that such rebuilding shall not constitute an eviction or rescission of the lease, such agreement will not, in the absence of evidence of fraud, relieve an insurance company from its liability to indemnify the tenant for any loss by reason of the payment of rent while the premises are untenable. *Heller v. Royal Ins. Co.*, 151 P. S. 101. See *Heller v. Royal Insurance Co.*, 4 Dist. Rep. 433.

124. Where an authorized insurance agent employs another as a sub-agent to solicit insurance, the acts of the sub-agent operate as if done by the agent himself. *McGonigle v. Susquehanna Mutual Fire Ins. Co.*, 168 P. S. 1.

(k) Payment of loss.

125. If real estate upon which a decedent held a policy of fire insurance be destroyed by fire after his death, the insurance money is an asset of the estate with which the administrator is chargeable; the right of the heirs thereto is subordinate to that of the creditors. *Nichol's Appeal*, 128 P. S. 428.

126. Where a policy is issued to a life tenant for the full value of the fee, and the full premium is paid and there is uncontradicted evidence that the life tenant intended to insure the property for herself and the remaindermen, she may recover the full amount of the policy as trustee for the remaindermen. *Welsh v. London Assurance Corporation*, 151 P. S. 607.

127. A lessee of land who has an option to purchase the demised premises has an equitable estate in the land, and when he exercises his option, he is to be considered as the owner *ab initio*; where such a lessee insured the building for the protection of his landlord, the policy to be "payable to him as his interest may appear," and before the expiration of the lease the buildings were burned, and after the fire the lessee exercised his option; it was *held*, that the lessee's title reverted back to the date of the lease, and that he was entitled to the insurance money. *People's Street Ry. Co. v. Spencer*, 156 P. S. 85.

128. Where an agent or consignee has his principal's property in his possession, and is responsible for it and has a special interest in it to the amount of his commission, he may insure it in his own name, and in case of loss he may recover the full amount of his policy, holding all beyond his own interest in trust for his principal. *Roberts v. Firemen's Insurance Co.*, 165 P. S. 55.

129. Where a fire insurance on a frame building belonging to a tenant was effected by a landlord as agent for his tenant; it was *held*, that the proceeds belonged to the tenant. *Hatfield's Estate*, 12 C. C. 251.

130. Where a mortgagee held a fire policy as a collateral security, but the proceeds of the sale of the land was sufficient to satisfy the debt; it was *held*, upon a distribution of the assigned estate of the mortgagor, that a fund derived from the policy in payment of a fire loss was distributable as personalty among all the creditors, and that subsequent lien creditors

had no standing to demand a preference. *Hatfield's Estate*, 12 C. C. 251.

131. If the entire insurance exceeds the entire loss all the policies should be treated as one, and the loss apportioned as the total amount of the insurance stands to the total loss. *Sollars v. Line Lexington Mut. Fire Insurance Co.*, 4 Del. 257.

(I) Actions on policies.

132. A condition that suit on a fire policy must be brought within six months may be waived by the conduct of the company and its officers. The question of waiver was left as a question of fact to the jury. *Bonnert v. Pennsylvania Insurance Co.*, 129 P. S. 558.

133. A provision that no action shall be brought on a policy after the expiration of twelve months is binding, though the delay was caused by the reversal of a previous suit on the ground that it was prematurely brought. *Hocking v. Howard Insurance Co.*, 130 P. S. 170. See s. c. 115 P. S. 415.

134. A condition in a policy of fire insurance limiting action within twelve months was held not to be waived by the fact that in a former suit on the same policy, which was reversed on the ground that the suit was prematurely brought within sixty days after the submission of proofs, the sufficiency of the proofs was not established until the decision of the cause, and the second action was brought within a year of the decision. *Ibid.*

135. A stipulation that an action on a fire policy shall be brought within twelve months will not be construed as requiring that an alias summons must be issued within a like period after the date of the original summons. *Everett v. Niagara Ins. Co.*, 142 P. S. 322.

136. A stipulation in a fire policy that no action shall be sustained thereon unless commenced within twelve months, is valid and will be enforced. *Everett v. Niagara Ins. Co.*, 142 P. S. 322. To constitute a waiver of such a condition, there must be some act of the company dispens-

ing with it, done during the running of the limitation; letters written by the company to its agent but not made known to the plaintiff are not evidence of a waiver. *Everett v. London & Lancashire Ins. Co.*, 142 P. S. 332.

137. In a suit upon a fire insurance policy, brought after the period limited in the policy, waiver will not be inferred because the limitation was not set up in the affidavit of defence and the president afterwards proposed to settle. *National Insurance Co. v. Brown*, 128 P. S. 386.

138. Where an insurance company denies *in toto* its liability for the loss, it is not entitled to the benefit of a provision in the policy giving sixty days for the adjustment and payment of the loss, and the insured may recover interest from the company from the date of the loss. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 P. S. 346.

139. Debt lies on a policy of fire insurance, though it contains an option to rebuild or replace the building within a certain time. *Heffron v. Kittanning Insurance Co.*, 132 P. S. 580; affirming s. c. 1 Lack. Jur. 235.

140. The act 24 April 1857 (amended by the act 13 May 1889, Brightly's Purdon 1059) does not authorize an attachment execution against an insurance company to be issued from a county other than that in which it has its corporate residence and principal place of business. *Shipton v. Fees*, 10 C. C. 583.

141. Under the act 13 May 1889 (Brightly's Purdon 1059), the record of a justice, in an action against a fire insurance company, is insufficient where it shows that the writ was returned as served on the defendant company by leaving a copy of the writ with its agent, without further description of the agent. *Eberman v. American Insurance Co.*, 164 P. S. 515.

142. Sufficiency of a statement in a suit upon a policy of fire insurance. *Miller v. German-American Fire Insurance Co.*, 26 W. N. C. 204.

143. Actions on policies of insurance are within the affidavit of defence law. *Gauler v. Solicitors' Loan & Trust Co.*, 9 C. C. 634; s. c. 28 W. N. C. 208.

144. Where an action is brought upon a fire policy in the name of a mortgagee, who holds it as collateral, such action must be treated as though the issue was joined between the insured and the insurer. *Haas v. Line Lexington Mutual Fire Ins. Co.*, 8 Montg. 180.

145. Where the agents of a fire insurance company refused payment, giving a specified reason, this does not estop the company from setting up other reasons upon the trial. *Welsh v. London Assurance Corporation*, 151 P. S. 607.

146. Where a fire insurance company gave notice of its election to rebuild, and the assured, denying its right to do so, brought suit to recover the loss; it was *held*, that the company was not bound, pending the suit, to proceed to rebuild, but might stand upon its right to rebuild as a matter of defence. *Kelly v. Sun Fire Office*, 141 P. S. 10.

(m) Subrogation.

147. Where the plaintiff and defendant agreed that the former should grow and cure tobacco on defendant's land and divide the same, upon the defendant receiving the whole of the fire insurance money thereon, the plaintiff can compel him to account for his proportion. *Humes v. Dottermus*, 13 Atlan. 78; s. c. 11 Cent. 709.

148. Where a fire insurance company, under stress of suit, paid a fire loss which resulted from the alleged negligence of a natural gas company, by which an explosion occurred and set on fire the property of the assured, and the assured, for a consideration not named, released the gas company from all claims of every kind arising out of the explosion, with the provision that the release would not affect claims for loss occasioned by fire, and which claim the assured should be entitled to receive in addition to the sum paid by the gas company; it was *held*,

that such release was no bar to an action by the insurance company to recover the amount of the fire damages from the defendant, and parol evidence was inadmissible to show that the intention of the parties was to bar a recovery for damages by fire as well as by explosion; it was further *held*, that the insurance company could maintain a suit in the name of the assured without an assignment of the claim or formal order of subrogation. *Fidelity Title & Trust Co. v. People's Natural Gas Co.*, 150 P. S. 8.

149. Under the subrogation clause in the standard policy of fire insurance provided by the act 16 April 1891, sec. 2 (Brightly's Purdon 1047), the right of the insurance company to subrogation is on the footing of a legal right; where the property destroyed by fire was insured under the standard policy and the owner signed a subrogation receipt, and, joining with the insurance company, brought suit against the person whose negligence caused the fire; it was *held*, that the amount recovered must be considered as *prima facie* representing the whole loss, and that the insured was entitled to only the amount of the judgment in excess of what he recovered from the insurance company. *Stoughton v. Manufacturers' Natural Gas Co.*, 165 P. S. 428. See s. c. 159 P. S. 64.

150. If a vendee of real estate agrees to insure and assign the policy to the vendor, the vendee, upon drawing the insurance money before title passes, will be restrained from using or applying it to any other purpose than the payment or security of the money to the vendor. *Norristown Land & Improvement Co. v. Thomas*, 5 Montg. 123.

151. Where the defendant's property was destroyed by fire by the sparks of a locomotive, and he collected from the plaintiff a portion of a fire policy on the property, and after the money was paid to him the defendant collected a large amount from the railroad company, for the damage caused by the fire, and it appeared that the defendant had re-

quested the plaintiff to join in the litigation against the railroad company, but plaintiff had refused to do so and assured the defendant that he was welcome to all he could collect; it was *held*, that the plaintiff could not recover back the money paid on the policy. *Aetna Ins. Co. v. Confer*, 158 P. S. 598.

(n) Liability of insurance agents.

152. An insurance agent, who fails to obey instructions of his principal to cancel a policy of fire insurance, is liable to his principal in damages for loss occasioned by a subsequent fire. *Kraber v. Union Insurance Co.*, 129 P. S. 8.

153. An agent of a fire insurance company who violates his instructions not to insure a certain class of risks, is liable to the company for any loss occasioned by his violation; so, where he receives orders to cancel a policy and he delays doing so until the property is destroyed by fire, he is liable to the company. *Sun Fire Office v. Ermentrout*, 11 C. C. 21.

See AGENCY.

III. Life insurance.

(a) Insurable interest.

(1) What is an insurable interest.

154. Where the insurance upon the life of an old woman was taken by the father of her son-in-law, his only interest being that he had kept her for a certain length of time and expected to keep her as long as she lived, the court refused to charge as a matter of law that the insurance was speculative. *Batdorf v. Fehler*, 9 Atlan. 468.

155. Where a young girl was befriended by an elderly man who sent her to school and paid her expenses, and then sent her to a commercial college where she remained until after his death; it was *held*, that she had an insurable interest in the life of her benefactor. *Carpenter v. United States Life Ins. Co.*, 161 P. S. 9.

156. The burden of proving an insurable interest is on the plaintiff; a cousin has not an insurable interest; the want of

an insurable interest may be set up, though the policy by its terms be incontestable after three years. *Brady v. Prudential Life Insurance Co.*, 5 Kulp 505.

157. If one have an insurable interest, the amount or extent of such interest cannot be first raised in the supreme court. *McArthur v. Chase*, 8 Atlan. 204.

158. On the subject of insurable interest, see note to *Ruth v. Katterman*, 3 Atlan. 835.

(2) Wagering policies.

159. Where a person insures his own life and pays the premium himself for the benefit of another who has no insurable interest, such a transaction is not a wagering policy. *Hill v. United Life Ins. Ass'n*, 154 P. S. 29.

160. A life policy whereby a person insures his life for the benefit of his heirs is not a wagering contract. *Northwestern Masonic Aid Ass'n v. Jones*, 154 P. S. 99.

161. A man may insure his life and pay the premiums himself for the benefit of another who has no insurable interest; it was not decided whether a woman who marries a man in ignorance of the fact that he had a legal wife living has an insurable interest in his life. *Overbeck v. Overbeck*, 155 P. S. 5.

162. The absolute assignment of a policy of life insurance to one having no interest in the life of the insured renders it a wagering contract as to the assignee, who cannot recover thereon. *Carpenter v. United States Life Ins. Co.*, 161 P. S. 9.

163. A wagering policy of life insurance cannot be enforced in this state, although valid in the state where it was signed and is to be paid. *McDermott v. Prudential Ins. Co.*, 7 Kulp 246.

164. Where a woman took out a policy of life insurance payable to her executors or administrators, and gave the policy to her daughter-in-law with instructions to pay the premiums on the policy, to pay the insured's funeral expenses, and if anything was left to give it to the granddaughter of the insured;

it was *held*, that the policy was not a wagering policy. *Burke v. Prudential Ins. Co.*, 155 P. S. 295.

165. Where the money with which the assured paid the premiums was furnished by the beneficiary, who had no insurable interest in the life of the insured, but the evidence was conflicting as to whether the money was furnished for that express purpose; it was *held*, in an action to determine the ownership of the proceeds, between the executor and the beneficiary, that the case was for the jury. *Chidester v. Yard*, 155 P. S. 483.

166. Where a nephew by marriage is named as a beneficiary in a policy of life insurance upon the life of his aunt, and he pays all the premiums and assessments due under the policy, he is only entitled to retain out of the money paid to him by the insurance company, the premiums and assessments which he has paid. *Riner v. Riner*, 166 P. S. 617.

167. Where a creditor took out two policies of two thousand dollars each upon the life of his debtor; it was *held*, that both policies should have been considered together, the true question being whether an insurance of four thousand dollars was disproportioned to the whole indebtedness existing when the second policy was issued; if the creditor paid the funeral expenses of the deceased, they should be included in the indebtedness. *Shaffer v. Spangler*, 144 P. S. 223.

168. In an action on a life policy payable to the administrator, suit being brought by the administrator; it was *held*, that an affidavit of defence was sufficient which set up that the policy was issued and delivered to a third party, who took it and paid all the premiums on it as beneficiary, and that such third party had no insurable interest in the life of the insured. *Brennan v. Prudential Ins. Co.*, 148 P. S. 199.

169. In ejectment by a vendor against a vendee after the execution and delivery of the deed, parol evidence that the original contract which led to the deed was a gaming contract of insurance

is inadmissible. *Smith v. Steffy*, 6 Lanc. 169.

(3) Money paid to beneficiaries without insurable interest.

170. In a suit by the administrator of the insured against the assignee of the life policy, who had received payment after the death, the burden is on the plaintiff to prove not only that the assignee was not a relative, but also that he was not his creditor. *Lenig v. Eisenhart*, 127 P. S. 59.

171. Where the beneficiary of a life policy brought suit against an assignee having no insurable interest to recover the proceeds of the policy, which had been paid in full to the defendant, and the latter set up an outstanding title to one-third of the fund in a third person, as an assignee having an insurable interest, and the latter testified to a surrender to the plaintiff prior to the assignment to the defendant; it was *held*, that the defendant was not entitled to set up such a defence. Nor was he entitled to set up title to another interest in a fourth person without an insurable interest, to whom he had paid one-third of the amount received by him before suit brought. *Brennan v. Franey*, 142 P. S. 301.

172. In an action by the beneficiary in a life certificate to recover from an assignee without an insurable interest, the amount received on the policy by the latter, the burden is on the plaintiff to show the want of insurable interest; a *prima facie* case is made out, however, by proof that the assignment was executed in blank and afterwards filled in with the assignee's name, who did not at the time claim to be a relative or a creditor, and that the beneficiary never knew the assignee. *Vanormer v. Hornberger*, 142 P. S. 575.

173. Upon an assignment of an insurance for \$1000 for a debt of \$100, the disproportion as a matter of law constituted the transaction a wager, and the administrator of the insured could recover

from the assignees all sums collected over the debt, premiums paid, and interest. *Cooper v. Shaeffer*, 20 W. N. C. 123; s. c. 11 Atlan. 780.

174. Where a life policy for three thousand dollars was taken out to cover a debt of one hundred dollars; it was *held*, in an action by the executor for the money collected on the policy, that the defendant might show, that if the insured had lived out his expectancy, the assessments and interest thereon would have exceeded the amount of the policy, and upon the production of such evidence, the case was properly submitted to the jury. *Ulrich v. Reinoehl*, 143 P. S. 238. See *Shaffer v. Spangler*, 144 P. S. 223.

175. In an action by an administrator to recover insurance moneys collected by defendant on alleged wager policies; it was *held*, that the defendant was entitled to set off counsel fees paid by him in the suits against the insurance company. *Shaffer v. Spangler*, 144 P. S. 223.

176. After an executor or administrator of a speculative assignee of a life policy has received the money and distributed it in good faith there can be no recovery against the distributees. *Blake v. Metzgar*, 150 P. S. 291.

(b) Of the application.

177. A life insurance company which for years receives from the beneficiary the premiums and retains them, cannot defend on the ground that the mark of the beneficiary to the application was not genuine. *Home Mutual Life Association v. Riel*, 1 Mona. 615; s. c. 17 Atlan. 36.

178. Statements made by an applicant for life insurance, which, though untrue, are made in good faith, will not avoid the policy if they are immaterial to the risk. The act 23 June 1885 (Brightly's Purdon 1046), to that effect, cannot be waived by the assured. *Hermany v. Fidelity Mut. Life Ass'n.*, 151 P. S. 17.

179. Where an applicant for a life policy stated that she had never been

treated for heart disease, and subsequently wrote a letter stating that she had been treated for heart trouble, and the company, three weeks after the receipt of the letter, accepted an assessment; it was *held*, that the evidence was sufficient for the jury to find that the company had waived the irregularity in the application. *Silk v. Mutual Reserve Fund Life Ass'n*, 159 P. S. 625.

180. In an action upon a life policy, it is competent to show that a truthful answer to the interrogatories in the application was in fact given, but that the agent either intentionally or negligently wrote the answer down erroneously, and that the insured, resting on the belief that his answer was correctly written, signed the application in good faith; but where the application was signed by the beneficiary, and he is alive and testifies, he must show affirmatively that he signed in ignorance of the fact that the answer was incorrectly written. *Mullen v. Union Central Life Ins. Co.*, 7 Kulp 422.

181. In an action upon a life policy, where the defence was that the plaintiff and her husband, the insured, and their son had entered into a conspiracy to cheat and defraud the company by means of false answers; it was *held*, that to find the plaintiff to be a conspirator, it was necessary to find that she had agreed in some way with the others to defraud the company and to obtain the insurance fraudulently. *Leidig v. New Era Life Ass'n*, 4 York 135.

182. In an action on a life policy, an affidavit of defence resting upon the application is insufficient if it does not set up that the application was attached to the policy. *Metropolitan Life Insurance Co. v. Jenkins*, 5 Cent. 875.

183. Where the application is referred to by the policy, but it is not attached to the policy when offered in evidence, as required by the act 11 May 1881 (Brightly's Purdon 1046), there is no presumption that it ever was attached; the application forms no part of the contract and the policy is admissible without it. *Ma-*

hon v. Pacific Mutual Life Ins. Co., 144 P. S. 409.

184. The act 11 May 1881 (Brightly's Purdon 1046), directing that all life insurance policies shall contain or have attached to them copies of the application, and otherwise that the application shall not be considered as part of the contract, applies to an endowment policy payable at the end of a term of years or within sixty days after a death occurring before the expiration of that period. *Hendel v. Reverting Fund Assurance Ass'n*, 2 Dist. Rep. 116.

185. Where the plaintiff proved notice to the defendant company to produce the application on which the policy was issued and the defendant failed to do so, alleging that the application was part of the record of another case; it was held, that the policy was properly admitted in evidence. *Fidelity Mutual Aid Ass'n v. Leidig*, 4 York 37. See *Leidig v. New Era Life Ass'n*, 4 York 135.

186. Where an insurance company, in disregard of the act 11 May 1881 (Brightly's Purdon 1046), fails to attach to the policy copies of the by-laws or application, it is error to permit them to be put in evidence against the plaintiff's objection. *Pickett v. Pacific Mutual Life Ins. Co.*, 144 P. S. 79.

187. The act 11 May 1881 (Brightly's Purdon 1046), excluding the constitution and by-laws of life and fire insurance companies as evidence unless attached to the policy, does not apply to an action upon a benefit certificate in a beneficial society. *Beatty v. Supreme Commandry of United Order of Golden Cross*, 154 P. S. 484.

188. A beneficial association is not an insurance company within the act 11 May 1881 (Brightly's Purdon 1046), and in an action for a death benefit the defendant may give in evidence the by-laws though they were not attached to the certificate. *Donlevy v. Shield of Honor*, 11 C. C. 477; *Espy v. American Legion of Honor*, 7 Kulp 134.

(c) Construction of policy.

189. It is presumed that a policy of life insurance taken out by a husband in favor of his wife is intended as a provision for her after his death and not as a security for his debt to her. *Karch's Estate*, 133 P. S. 84.

190. In construing contracts of insurance, that interpretation will be adopted which is most favorable to the insured. *Hendel v. Reverting Fund Assurance Ass'n*, 2 Dist. Rep. 116.

(d) Age of the insured.

191. A false and fraudulent representation as to age, verbal and not included in any written or signed application, is a good defence to an action on the policy. The act of 11 May 1881 (Brightly's Purdon 1046) refers only to copies of written applications signed by the applicant. *Norristown Title Co. v. Hancock Insurance Co.*, 132 P. S. 385; 25 W. N. C. 397; affirming s. c. 5 Montg. 83.

(e) Use of intoxicating liquors.

192. Where the insured, in answer to a question, stated that he had never been addicted to the use of opium, alcoholic, or other stimulants; it was held, that addicted to the use of alcoholic drinks meant "devoted to drink by customary practice, habitually practising drinking, giving up to intemperance." *Leidig v. New Era Life Ass'n*, 4 York 135.

(f) Suicide.

193. One clause of a policy avoided it in case of suicide, another provided that after three annual payments no defence should be available other than fraud; held, that the latter clause had no effect on the condition against suicide. *Starck v. Union Central Life Insurance Co.*, 134 P. S. 45; s. c. 26 W. N. C. 12; reversing s. c. 7 C. C. 511.

(h) Covenant against unlawful acts.

194. A condition in a life policy, providing for a forfeiture in case the insured,

by any unlawful act, shall take his own life or impair his health, was *held* not to be violated, where the insured, while trespassing on a train of cars, was thrown under the wheels and killed. *Evans v. Phoenix Mut. Relief Ass'n*, 9 Lanc. 59.

(4) Previous rejection.

195. Where the insured, in answer to a question, stated that he had never been rejected in an application for life insurance; it was *held*, that whether, under the circumstances of this case, there had been a refusal of an application was for the jury to determine. *Leidig v. New Era Life Ass'n*, 4 York 135.

(k) Premiums.

196. The acceptance of premiums on three former occasions after maturity does not continue the policy after a subsequent default. *Lantz v. Vermont Life Insurance Co.*, 139 P. S. 546; s. c. 27 W. N. C. 276; reversing s. c. 25 Ibid. 356.

197. A covenant that an omission to pay assessments shall render the policy void does not amount to an agreement to pay the assessments. *New Era Life Association v. Dare*, 6 C. C. 527.

198. Where the premiums upon a life policy were paid by a third person with the knowledge of the insured, and under an agreement with the agent that the person paying the premiums would get the face of the policy, or if not, then the money would be repaid; it was *held*, that such premiums could not be recovered by the administrator of the person injured, where the policy had been cancelled in her lifetime. *McDermott v. Prudential Ins. Co.*, 7 Kulp 246.

199. Where the agent of a life insurance company was indicted for offering a rebate of insurance in violation of the act 7 May 1889 (Brightly's Purdon 514), the indictment should not be quashed for defects in matter of form which are amenable, nor on the ground that the act is unconstitutional. *Comm'th v.*

Morningstar, 144 P. S. 103. See s. c. 12 C. C. 34.

200. Where an information charged the defendant with having offered a rebate of premium on a life policy to Jane Orr, and the indictment charged him with having offered such rebate on a policy to be issued to Richard Orr; it was *held*, that the variance was fatal and the indictment would be quashed. *Comm'th v. Morningstar*, 12 C. C. 34. See s. c. 144 P. S. 103.

(l) Assignment of policy.

201. A life insurance company is not bound to delay payment for the full ninety days to give possible adverse claimants an opportunity to make known their claims. Payment to an assignee having a *prima facie* regular title and without notice is good as against the executrix. A letter from the holder, urging prompt payment and offering indemnity, has in it no element of notice of an adverse claim. *Home Mut. Life Association v. Seager*, 128 P. S. 533.

202. Where ten persons held policies on their individual lives for like amounts, and assigned the same to an agency to collect and distribute the proceeds in case of death to the survivors; it was *held*, that the assignment was good and a payment to the agency discharged the insurance company; but the question of the right of the legal representatives of the insured to recover against the agency was not decided. *Hill v. United Life Ins. Ass'n*, 154 P. S. 29.

203. Where an assignee of a life policy, who is also a creditor, takes out letters of administration on the debtor's estate and recovers on the policy in a suit brought as administrator, the supreme court upon appeal will permit the record to be amended so that the plaintiff may also appear as assignee. *Clifford v. Prudential Ins. Co.*, 161 P. S. 257.

(m) Notice and proof of loss.

204. Where the president of the defendant company, in a letter written to

the plaintiff's attorney, stated that the company did not contest the claim nor refuse to pay it, but preferred to await developments in another suit; it was *held*, that this was a distinct admission of the notice of the loss and a waiver of proof of loss. *Fidelity Mutual Aid Ass'n v. Leidig*, 4 York 37. See *Leidig v. New Era Life Ass'n*, 4 York 135.

(n) Liability for loss.

205. Where a creditor held a life policy for six thousand dollars on the life of her debtor, and agreed to take therefor a paid-up policy for twenty-five hundred dollars, and at the time of the transaction the debtor had been dead for ten days, the supreme court, in reversing a decree sustaining a demurrer to a bill to set aside the transaction, *held*, that the transaction was a bargain made under the influence of a mutual mistake of facts, and that it would be grossly inequitable to hold the plaintiff to it. *Reigel v. American Life Ins. Co.*, 140 P. S. 193; reversing s. c. 7 C. C. 445. See s. c. 153 P. S. 134.

206. Where a creditor held a life policy on the life of her debtor, whose whereabouts was unknown, and she made an arrangement with the company, under which she surrendered the policy and took a paid-up policy for twenty-five hundred dollars in lieu thereof, both parties acting on the supposition that the assured was alive when in point of fact he had been dead for ten days; it was *held*, that such an agreement having been made under the influence of a mutual mistake of fact, the plaintiff was entitled to have the original policy reinstated as of the date of its surrender. *Reigel v. American Life Ins. Co.*, 153 P. S. 134; reversing s. c. 12 C. C. 177.

207. Where temporary insurance was effected from October 29th, 1884, to January 24th, 1895; it was *held* to include January 24th, and to cover the life of the insured, who died at 8 p.m. on that day; as there are no fractions of a day unless the parties make them by fixing an hour when the insurance ceases, it continues

in force during the whole of the day on which the renewal premium is to be paid; although the words "until," "between," "from" and "to" generally exclude the days to which they relate, such construction will yield to the manifest contrary intention of the parties. *Thomson v. Connecticut Mutual Life Ins. Co.*, 4 Dist. Rep. 382.

(o) Payment of loss.

208. Where the policy provided that payment of loss should be made to the beneficiary named in the application, but the beneficiary was not otherwise designated in the policy, and the application was in writing but was not attached to the policy; *held*, that the witness who took the insurance might testify as to the beneficiary, if he could do so without reference to or aid from the application. *Norristown Title Co. v. Hancock Insurance Co.*, 132 P. S. 385; 25 W. N. C. 397; affirming s. c. 6 Montg. 17.

209. Where a life policy authorized payment either to an executor or administrator, a husband or wife, or a relative by blood or connection by marriage; it was *held*, that an affidavit of defence, averring payment to the mother, was sufficient to prevent a summary judgment. *Pfaff v. Prudential Ins. Co.*, 141 P. S. 562.

210. A condition in a policy of life insurance as to the designation of the beneficiary, was *held* to make the company the judge as to who was the person equitably entitled to the money; it was further *held*, that such a contract was not contrary to public policy. *Thomas v. Prudential Ins. Co.*, 148 P. S. 594.

(p) Actions on policies.

211. A condition in a life insurance policy that suit must be brought within six months of the death is binding, but the same may be waived by the actions of the officers, which were calculated to and did induce a postponement of the suit. *Edwards v. Metropolitan Life Insurance Co.*, 5 Kulp 259.

212. A clause stipulating that action must be commenced within six months after the decease is not invalidated by a subsequent clause that, if the insured shall die three or more years after the date of the policy, it shall be incontestable. *Brady v. Prudential Ins. Co.*, 168 P. S. 645; s. c. 36 W. N. C. 401.

213. In an action upon a policy of life insurance, where the statement and the copy filed show upon their face that they are not a complete copy or a full statement of the contracts, a demurrer will be sustained. *Fehl v. Phoenix Mutual Life Ins. Co.*, 14 C. C. 183.

214. In an action on an endowment policy, an affidavit of defence was *held* to be too general and inferential, which charged it to be untrue that plaintiff had duly paid all premiums and complied in all respects with the conditions of the policy. *Hendel v. Reverting Fund Assurance Ass'n*, 2 Dist. Rep. 116.

215. In an action upon a life policy, an affidavit of defence is sufficient which avers that the insured did not sign the beneficiary form, a copy of which is attached to the plaintiff's statement, in which the present plaintiff is named as beneficiary, or authorize any one to sign for her or ratify such signature after the making thereof by any other person. *Lavelle v. Prudential Ins. Co.*, 2 Lack. Jur. 306.

216. In an action on a life policy, where the beneficiaries are the widow and children, evidence that the assured, after the date of the policy, filed an application for a pension, in which he made statements inconsistent with the statements to the company, is inadmissible. *Hermany v. Fidelity Mutual Life Ass'n*, 151 P. S. 17.

217. Where a certificate of life insurance provided that the company at the expiration of sixty days after proof of death would pay to the widow of the insured three dollars for every one thousand dollars maximum sum of benefit actually in force upon such decease and upon which the assessments were paid,

provided that the amount should not exceed the maximum sum of three thousand dollars; it was *held*, that the burden of proof was upon the company to show that there were not one thousand dollars maximum sums of benefits actually in force in the company upon the decease of the insured and upon which mortuary assessments had been paid. *Leidig v. New Era Life Ass'n*, 4 York 135.

218. In an action on a life policy where the defendants set up a release, but the plaintiff's testimony tended to show that when she applied for payment the agent of the company refused to pay because the assured had declared that she had never been treated for heart disease, and he read a letter to the beneficiary from a doctor that she had been so treated, and it further appeared that this letter was false and the beneficiary had signed the release in reliance upon the letter; it was *held*, that the case was properly submitted to the jury. *Silk v. Mutual Reserve Fund Life Association*, 159 P. S. 625.

219. In an action upon a life policy it was *held*, that the condition of the health of the insured when the policy was issued was a question of fact, and it would have been error to refuse to submit that question to the jury. *Dietz v. Metropolitan Life Ins. Co.*, 168 P. S. 504; s. c. 36 W. N. C. 403.

IV. Insurance against accident.

220. A corporation chartered for the purpose of publishing a newspaper has no franchise to insure against accident, and will be ousted upon *quo warranto* from such a pretended franchise. *Comm'th v. Philadelphia Inquirer*, 15 C. C. 463.

221. Where a policy of accident insurance provided that suit must be brought within a year, and the company, by its conduct and promises to pay, misleads the plaintiff and causes him to expend time, labor and money in following up his claim, the company will be *held* to be estopped from setting up a defence of failure to bring suit within the year.

Harold v. People's Mutual Accident Ass'n, 12 C. C. 454.

222. A limitation condition in a policy of insurance must be specially pleaded; it cannot be set up under the plea of non-assumpsit. *Harold v. People's Mutual Accident Insurance Ass'n*, 12 C. C. 454.

223. The act 24 April 1857 (amended by the act 13 May 1889, Brightly's Purdon 1059) and the act 8 April 1868 (P. L. 70), authorizing suits to be brought against insurance companies in any county of the commonwealth, apply only to contracts of insurance; they do not apply to a contract for professional services. *Greevy v. People's Mutual Accident Association*, 12 C. C. 285.

224. Where an accident policy constitutes a continual obligation upon both parties until one or the other choose to put an end to it, each new injury requires a new notice and a new proof, without which there can be no recovery. *Spicer v. Commercial Mutual Accident Co.*, 4 Dist. Rep. 271.

225. Where an accident policy insured against death, from violent and accidental injuries as shall externally be visible upon the person, the policy not to cover *inter alia* "inhalation of gas"; and the insured went down into a well to make repairs to a pump and was found dead from asphyxia, resulting from the inhalation of poisonous gas at the bottom of the well; it was *held*, that the death was by external, violent and accidental means, and that the condition against inhalation of gas contemplated a voluntary and intelligent act by the insured and not an involuntary and unconscious act. *Pickett v. Pacific Mutual Life Ins. Co.*, 144 P. S. 79.

226. Where an accident policy provided that the company should not be liable if the assured was injured or killed while upon a railroad bridge, trestle or road bed, and the assured was killed while crossing a railroad at a well-recognized crossing which had long been publicly used; it was *held*, that a recovery might be had on the policy if

the jury believed that the assured used proper care under the circumstances. *Dougherty v. Pacific Mutual Life Ins. Co.*, 154 P. S. 385.

227. A certificate entitling a member to a weekly sum if wholly disabled, does not entitle him to indemnity in case the injury but partially disables him. *Gracey v. People's Mut. Accident Insurance Association*, 38 P. L. J. 25.

228. An accident policy being against total and partial permanent disability, the insured not being permanently injured cannot recover. *Hollobaugh v. People's Mut. Accident Insurance Ass'n*, 138 P. S. 595; s. c. 38 P. L. J. 238.

229. A man having but one eye was insured against the "total and permanent loss of the sight of both eyes"; *held*, that the company was affected with its agent's knowledge that the man had but one eye, and that the insurance was equivalent to one against the "loss of eyesight." *Humphreys v. National Benefit Association*, 139 P. S. 264; s. c. 38 P. L. J. 216.

230. An accident policy against accidental injuries and not against disease, and providing for indemnity for partial permanent disablement, which is defined to be the loss of one hand or foot or both eyes, does not cover indemnity where the foot is not lost or injured and may be used by means of an appliance of a plaster-jacket to the spine, although the foot cannot be used if the appliance were removed. *Stevens v. People's Mutual Accident Insurance Association*, 150 P. S. 132.

231. Under an accident policy insuring against accident which shall wholly and continuously disable the insured from transacting any and every kind of business pertaining to his occupation, there can be no recovery where the insured was able during the whole period to transact and did transact some parts or some kinds of business pertaining to his occupation, and attended to some extent to all the duties of every kind connected with his business. *Spicer v. Commercial Mutual Accident Co.*, 4 Dist. Rep. 271.

232. An accident insurance company has the right to invest in bonds of a solvent street railway corporation. *In re Accident Ins. Companies*, 4 Dist. Rep. 227.

V. Insurance against storm.

233. In an action upon a policy of insurance against storm, no recovery can be had unless a storm, and not the inherent weakness of the plaintiff's building, was the cause of the loss. *Haas v. Line Lexington Mutual Fire Ins. Co.*, 8 Montg. 180.

VI. Live-stock insurance.

234. The act 11 May 1881 (Brightly's Purdon 1046), requiring applications for insurance to be attached to the policy, applies to a policy of insurance on live-stock. *Mutual Live-Stock Ins. Co. v. Dutton*, 6 Del. 148.

235. A clause against double insurance was held not to be avoided by a previous insurance upon the plaintiff's horses, where such previous insurance was not authorized by the charter of the company which issued the policy; the word "goods" in the charter was held not to include horses. *Knapp v. North Wales Mutual Live-Stock Ins. Co.*, 11 Montg. 119.

236. Where a live-stock insurance company, although organized upon the mutual plan, has the power to issue cash policies, the mere fact of membership does not necessarily imply the liability to assessment; and such person is not bound by a by-law, of which he has no notice, that every member shall be liable to pay his or her proportion of all losses and expenses at such time or times as the directors may require, in proportion to the amount insured by such members; such a member is not bound to make himself acquainted with the by-laws before he became a member. *Given v. Rettew*, 162 P. S. 638; affirming s. c. 11 Lanc. 114.

237. The record of a justice's judgment for assessments on a live-stock insurance policy must show that the defendant was insured in the company, and state that it was for an assessment to pay losses and for what period of time; otherwise the judgment will be reversed on *certiorari*. *Dauphin County Mut. Live-Stock Insurance Co. v. Pidgeon*, 7 C. C. 448.

238. Members of a mutual live-stock insurance company may be assessed after its insolvency on their notes or agreements to pay assessments for losses which happened before the insolvency. *Standard Mutual Live-Stock Ins. Co. v. Madara*, 13 C. C. 555.

239. A decree ordering the receiver of a live-stock mutual insurance company to collect an assessment, will not be reversed on the ground that the assessment is excessive, where the receiver denies that the assessment is greater than is necessary to cover the purpose intended and the supreme court is not convinced to the contrary. *Wood v. Standard Mutual Live-Stock Ins. Co.*, 154 P. S. 157.

240. In an action by the receiver of a live-stock insurance company to recover assessments levied for the purpose of paying the death losses of certain specified horses, an affidavit of defence is sufficient which avers that at the time the assessments were made there was no such indebtedness, nor is there now, and that the claims for which the assessments were made have been paid. *Hoffman v. Whelan*, 160 P. S. 94.

241. Notice to a live-stock insurance company of the death of a horse is notice of an entire loss, and further proof of loss is unnecessary unless requested by the company. *Beech v. Farmers' and Breeders' M. L. S. I. Ass'n*, 137 P. S. 617.

242. Where a member of a mutual live-stock insurance company fails to notify the company of the death of the animal insured as required by the contract, he is liable for all assessments made during the term of his membership, notwithstanding the death of the insured animal. *Care v. Brown*, 31 W. N. C. 501.

243. Where a by-law of a live-stock insurance company provided that the insurance of the company should be confined to a distance not exceeding twelve miles from the borough of Hatboro'; it was *held*, that this did not prevent a person insured in the company from recovering for the death of a horse permanently removed beyond that limit. *Reck v. Hatboro' Mutual Live-Stock & Protective Ins. Co.*, 163 P. S. 443; reversing s. c. 12 C. C. 320.

244. Where a policy of insurance upon a horse provided that it should not apply where the animal was destroyed by any society for the prevention of cruelty to animals; it was *held*, that the company was not liable where the horse was killed by the order of such a society on the ground that it was incurable. *Hinsworth v. People's Mutual Live-Stock Ins. Co.*, 2 Dist. Rep. 541; s. c. 10 Lanc. 336.

245. Where a policy upon a horse provided against loss by death, accident or theft, and the plaintiff averred that his animal was taken with an incurable and contagious disease and was killed by the direction of a skilled veterinarian surgeon; it was *held*, that such a statement was sufficient to require the company to file an affidavit of defence. *Heffner v. Pennsburg Mutual Horse Insurance & Detective Co.*, 11 Montg. 35.

246. Where a horse is taken sick within the year and dies of the sickness after the expiration of the year, its value is fixed by its appraisalment at the beginning of the year, unless the insured has waived his right to such appraised value. *Garner v. North Wales Mut. Live-Stock Insurance Co.*, 4 Montg. 207.

247. Under the act 24 April 1857, as amended by the act 13 May 1889 (Brightly's Purdon 1059), a summons against a live-stock insurance company may be served upon the president of the company at its principal office in a county other than that where the suit is brought, and by the sheriff of the latter county. *Beech v. Farmers' and Breeders' M. L. S. I. Ass'n*, 137 P. S. 617.

VII. Fidelity and casualty insurance.

248. Where an insurance company insured a street railway company from liability from damages on account of injuries resulting from accident to, or caused by, the horses, cars, plant, ways, works, machinery or appliances used in the business of the insured and described in the application; it was *held*, that the insurance company was not liable for a loss which the car company was obliged to pay for personal injuries to a passenger, sustained by the upsetting of a large omnibus sleigh which was used in place of a car while the tracks were obstructed by ice and snow. *Phillipsburg Horse Car Co. v. Fidelity & Casualty Co.*, 160 P. S. 350.

VIII. Mutual insurance companies.

(a) Of the contract of insurance.

249. Mutual insurance companies have no right, under the act 1 May 1876 (Brightly's Purdon 1053), to issue policies on the joint stock plan. *Mutual Insurance Companies*, 10 C. C. 464.

250. A mutual insurance company has no right to insure on the joint stock plan or to issue policies which are non-assessable. *Eastern Mut. Fire Ins. Co.*, 4 Dist. Rep. 228; s. c. 16 C. C. 311.

251. The charter of a mutual company provided that any member, before receiving his policy, shall pay to the treasurer twenty-five cents on each \$1000 of insurance; *held*, that the clause did not apply to a member who had insurance on his barn and applied for an extra insurance on its contents. *Farmers' Mut. Insurance Co. v. Mylin*, 15 Atlan. 710.

252. Where a policy in a mutual insurance company was written, by mistake, for three instead of five years, entered on the books of the company as a five years' policy, and the insured paid assessments thereon after the expiration of three years; it was *held*, in a suit for a loss, that the question of mistake was for the

jury. *Noel v. Pymatuning Mut. Fire Insurance Co.*, 130 P. S. 523.

253. If the by-laws be made part of the policy by reference, the policy holder is bound by a by-law though not appended to the policy. *Susquehanna Mutual Fire Ins. Co. v. Leavy*, 136 P. S. 499.

254. All persons insured in a mutual company are affected with knowledge of its laws and regulations and are bound by them. *Standard Mutual Live-Stock Ins. Co. v. Madara*, 13 C. C. 555.

255. Where a live-stock insurance company, although organized upon the mutual plan, has the power to issue cash policies, the mere fact of membership does not necessarily imply the liability to assessment, and such person is not bound by a by-law of which he has no notice, that every member shall be liable to pay his or her proportion of all losses and expenses at such time or times as the directors may require in proportion to the amount insured by such members; such a member is not bound to make himself acquainted with the by-laws before he became a member. *Given v. Rettew*, 162 P. S. 638; affirming s. c. 11 Lanc. 114. See *Mutual Fire Ins. Cos.*, 16 C. C. 499.

(b) Forfeiture.

256. The stipulation that on thirty days' default in the payment of interest or assessments the policy shall cease, is for the benefit of the company, who can waive the default and collect assessments levied after the default. *Susquehanna M. Fire Insurance Co. v. Leavy*, 136 P. S. 499.

257. Where the by-laws, application or policy of a mutual life insurance association contain no reference as to the terms upon which a member might be reinstated after forfeiture of membership, but in the assessment notice it was stated that no reinstatement could be made or payment received except upon condition that the assured was alive and in good health, and plaintiff failed to pay several assessments and was served with the usual notice, and he paid all the past assessments and furnished proof that he was in good

health, and subsequently paid other assessments which were received without objection or condition; it was *held*, that the action of the company estopped it from asserting a forfeiture of plaintiff's membership. *Comm'th v. Provident Life Association*, 163 P. S. 374.

(c) Assessments.

258. Where the charter of a mutual fire insurance company required that when they made an assessment they should "publish the same," it was *held* that an advertisement in a newspaper was the kind of notice required. *Pennsylvania Training School v. Independent Ins. Co.*, 127 P. S. 559.

259. Where an insurance note on an annual interest plan was not assessable until the notes on a different plan had paid in assessments equal to the interest paid on the former, it was *held*, that the interest not being paid, it was assessable proportionably with the other notes. *Crawford v. Susquehanna M. Fire Ins. Co.*, 12 Atlan. 844.

260. If different classes of premium notes are subject to ratable assessment, varying according to the form of the policy, the assessment should not be by percentages upon their face, but upon the basis of the rating of the risk applied to the amount insured. *Susquehanna M. Fire Ins. Co. v. Leavy*, 136 P. S. 499.

261. Where a member of a mutual insurance association was assigned to a particular class, and subsequently this class was dissolved and the members distributed among other classes by a resolution of the board, and plaintiff continued to pay assessments for three years afterwards; it was *held*, that the company had a right to assume that the member had assented to the change, and that an action would not lie to recover back the assessments paid on the ground of a breach of contract. *Margut v. United Brethren Mutual Aid Society*, 148 P. S. 185.

262. A mutual insurance company may enforce a penalty of twenty-five per cent provided for in the policy for non-pay-

ment of assessments. *People's Mutual Fire Ins. Co. v. Groff*, 154 P. S. 200.

263. Upon the dissolution of a mutual fire insurance company and the appointment of a receiver, the latter under the direction of the court has power to levy an assessment to pay losses. *Solly v. Moore*, 11 C. C. 333.

264. Upon the insolvency of a mutual insurance company, which issued policies upon three plans,—all cash, perpetual, and premium notes,—the latter are subjected to assessment directed by the court, to pay fire losses; to pay the expenses of the receivership; to pay money borrowed by the directors to pay losses occurring during the life of the policy; and to raise a fund to return deposit-money received as perpetual insurance and used in the payment of losses occurring during the policy's life. *Solly v. Potts*, 6 Montg. 209.

265. The statutory period for an appeal from an order authorizing an assessment by the receiver of a mutual fire insurance company having passed, no appeal lies to the refusal to revoke or to grant a rehearing. *Lowenstein v. North Schuylkill Insurance Co.*, 132 P. S. 410.

266. A *feri facias* for an assessment was set aside where the record did not show and there was no affidavit filed showing that there was an assessment notice and neglect or refusal to pay after notice. *Lycoming Fire Ins. Co. v. Sensenig*, 8 Lanc. 289.

(d) Actions for assessments.

267. In an action on a premium note of a mutual insurance company, the statute of limitations does not begin to run until an assessment is made. *Solly v. Moore*, 11 C. C. 333.

268. A mutual insurance company may compromise with insolvent policy holders, and such compromise is no defence in an action against others for delinquent assessments. *Crawford v. Susquehanna M. Fire Insurance Co.*, 12 Atlan. 844.

269. Where a policy of fire insurance is subject to assessments occurring while

the policy was in force, whether they were made during its life or after it had expired, an action brought upon an assessment made after the policy had expired but for losses then adjusted, is no bar to a subsequent action to recover other assessments for losses which had not then been adjusted, but which had occurred during the life of the policy. *Susquehanna Mutual Fire Ins. Co. v. Mardorf*, 152 P. S. 22.

270. In a suit by a mutual life insurance company for assessments, the defendant's application, entries in the plaintiffs' books, and certificates of assessments made, were admitted as evidence to establish the defendant's membership and liability. *New Era Life Association v. Rossiter*, 132 P. S. 314.

271. In a suit upon an assessment by a mutual life insurance company, it is a good defence that the company's agent, at the time of taking the policy, made an untrue statement to the defendant that the company had a paid-up capital of fifty thousand dollars. *New Era Life Association v. Weigle*, 128 P. S. 577.

272. In a suit on a premium note given to a mutual life insurance company, it may be shown that there was a parol agreement to allow a rebate of a certain proportion of the amount of the note at maturity; such a parol agreement does not contradict the note itself. *Michigan Mutual Life Ins. Co. v. Williams*, 155 P. S. 405.

273. In an action for an assessment brought by a mutual insurance company, the policy holder cannot avail himself of a clause in the policy that it shall become null and void upon failure of the insured to pay his assessments; so, he cannot set up a defence that more money has already been collected than is necessary to pay the losses, without furnishing the court also with data as to what would be a sufficient assessment, together with his proportionate share of the same. *Dettra v. Sax*, 3 Lack. Jur. 198.

274. The managers of a mutual fire insurance company may exercise reason-

able discretion in fixing the amount of an assessment; in an action to recover an assessment, where the statement avers that the assessment was duly made, an affidavit of defence is insufficient which avers that the company does not require the assessment to pay losses and necessary expenses, and sets forth a statement of the condition of the company six months after the assessment was made. The affidavit contemplated by the act 1 May 1876, sec. 56 (Brightly's Purdon 1054), has reference to the method of proof upon the trial and not to the exigencies of an affidavit of defence law. *People's Mutual Fire Ins. Co. v. Groff*, 154 P. S. 200.

275. Though a member of a mutual insurance company has been induced to become such by the fraudulent representations of the officers, he cannot set up such fraud as a defence to an action by the receiver of the company for assessments, where other persons have subsequently joined the company as innocent third parties. *Dettra v. Kestner*, 147 P. S. 566.

276. In an action upon an assessment the insolvency of the company is no defence, and the assessment will be presumed to have been properly made. *People's Mutual Fire Ins. Co. v. Bergstreser*, 11 C. C. 646.

277. In an action by the receiver of an insolvent insurance company appointed by the court of another county to recover assessments, the defendants cannot set up in defence matters which are the proper subjects of adjudication in the court appointing the receiver. *Dettra v. Hoffman*, 5 Del. 321.

278. In a suit by a receiver on a premium note to pay fire losses, the defendant may set off a demand due him by the plaintiff company, payable prior to the appointment of the receiver, and there being no allegation of the company's insolvency. *Solly v. Scheetz*, 6 Montg. 112.

279. In an action on a premium note given by a member of a mutual insurance company, the defendant cannot set off a

loss which occurred after the appointment of a receiver. *Standard Mutual Live-Stock Ins. Co. v. Crawford*, 13 C. C. 556.

280. In an action by the receiver of a mutual insurance company to recover unpaid assessments, the defendant cannot set off against such assessments a debt due to him by the company. *Care v. Brown*, 31 W. N. C. 501.

281. Where a receiver had been appointed for a mutual insurance company; it was *held*, that a bill would not lie against the officers of the company by policy holders to compel them to account; and it was further *held*, that it was the duty of the receiver to deal fairly with the members of the corporation, and if access to the books of the company was denied to members by which they could prepare affidavits of defence to suits brought by the receiver, judgment on such suits would be suspended until an inspection was allowed. *Becker v. New Hanover Mut. Fire Ins. Co.*, 8 Montg. 134.

(e) Suits against the company.

282. Where suit was brought on an endowment policy; it was *held*, that an assessment levied fifteen days after suit brought could not be set-off against the plaintiff's claim; a set off can only be made of a demand existing at the commencement of the action. *Hendel v. Reverting Fund Assurance Ass'n*, 2 Dist. Rep. 116.

283. In an action on a life policy in a mutual company, it is not competent for the plaintiff to show as a reason for the non-payment of his annual dues that he failed to receive notice that such dues were to be paid, that he had been told by the agent of the company that he would receive such notice, and that it was the custom of the company to send such notice. *Ottmiller v. New Era Life Ass'n*, 4 York 5.

IX. Foreign insurance companies.

284. Where property is insured by a foreign fire insurance company, and the policy is duly delivered, and the property

is subsequently destroyed by fire; the company will not be heard to allege as a defence that there was no evidence that when the policy was issued the company was authorized to transact business in Pennsylvania, and that therefore the policy was void. *Hoge v. Dwelling-House Insurance Co.*, 138 P. S. 66.

285. The act of 26 April 1887 (Brightly's Purdon 1058), prohibiting, under a penalty, the placing of insurance with a foreign insurance corporation not authorized to do business in this state, does not apply to a citizen who contracts for the insurance of his own private property. *Comm'th v. Biddle*, 139 P. S. 605; s. c. 27 W. N. C. 287.

286. Under the act 1 May 1876, sec. 48 (Brightly's Purdon 1057), the agents of any foreign insurance company not licensed to do business in this state are personally liable on all contracts of insurance made by or through them directly or indirectly; this liability extends not only to the general agents of the company but also to the party who acts for the company in the particular transaction. *McBride v. Rinard*, 15 C. C. 422.

287. An insurance agent who without taking out a state license, issues policies of insurance as agent of an unincorporated association of one hundred individual underwriters of another state, is not liable to the penalty imposed by the act 1 May 1876, sec. 47 (Brightly's Purdon 1057); that act and the act 4 April 1873 (Brightly's Purdon 1057) refer only to incorporated insurance companies. *Comm'th v. Reinoehl*, 163 P. S. 287.

288. The insurance commissioner has no authority to grant a license to a Lloyds association organized under the laws of the state of New York to transact business in Pennsylvania; any business transacted by such an association in this state is unlawful, and any person making, executing or issuing any policy of fire insurance for them in this state is subject to the penalties of the act 4 February 1870 (Brightly's Purdon 514, 1059). *Lloyds Association*, 15 C. C. 586.

INTEREST.

See DECEDENTS' ESTATES: EXECUTORS AND ADMINISTRATORS: INFANT: LEGACY.

- I. When interest is recoverable.
- II. When not recoverable.
- III. When interest begins to run.
- IV. When interest ceases.
- V. Amount recoverable.
- VI. Payment of interest.
- VII. Usurious interest.
 - (a) What is usury.
 - (b) When usurious interest may be recovered back.
 - (c) Defence of usury.
 - (d) Effect of usury.
 - (e) Penalty for charging.

I. When interest is recoverable.

1. Upon an appeal to the common pleas from an award of viewers the jury may include interest from the date the report of viewers was filed. *Weiss v. South Bethlehem*, 136 P. S. 294; s. c. 26 W. N. C. 433.

2. In an action of trespass, interest will be allowed, not as interest, but as compensation for delay. *Comm'th v. Press Co.*, 156 P. S. 516; affirming s. c. 2 Dist. Rep. 411.

3. Where liquidating trustees of a joint stock company are also members of the association, and they purchase the property of the association and secure the purchase money by a bond and mortgage payable when certain litigation between themselves and another member shall be finally determined, such trustees are liable for interest on the whole amount of the purchase money. *Jennings's Case*, 157 P. S. 630.

4. Where an executor has advanced money in payment of his testator's debts, he cannot be denied interest thereon because of negligence which did not result in loss to the estate. *Hobson's Estate*, 42 P. L. J. 456.

5. Where an annuity was charged on land and no demand for payment made; it was held, in an action for sixteen years'

arrears, that the question whether there was a presumption that no interest on the arrears was intended, was for the jury. *Rohn v. Odenwelder*, 162 P. S. 346.

II. When not recoverable.

6. The right to charge interest may be expressly relinquished for a consideration. *Stocker v. Hutter*, 134 P. S. 19; s. c. 26 W. N. C. 221.

7. A municipality is not liable for interest on its bonds subsequent to maturity if it has provided the funds to meet them at maturity. It is not bound to seek the holder and tender the money to him. *Friend v. Pittsburgh*, 131 P. S. 305; s. c. 47 L. I. 515.

8. In trespass, under the act of 29 March 1824, for double or treble damages for cutting timber, the jury cannot award interest in addition to the penalty. *McCloskey v. Powell*, 138 P. S. 383; affirming s. c. 8 C. C. 22.

9. A widow who is executrix will not be allowed interest on money advanced to pay debts where the bequest to her is subject to the payment of debts. *Corby's Estate*, 1 Northam. 219.

10. Equity will not charge a husband as a debtor for arrears of income of his wife's separate estate in the absence of an agreement, express or implied, on his part, to pay interest. *Kittel's Estate*, 156 P. S. 445.

11. In an action for negligence the jury may properly consider the time elapsed since the injury was received; but the plaintiff is not entitled to interest *eo nomine*. *Plymouth Township v. Graver*, 125 P. S. 24; *Pennsylvania Schuylkill Valley Railroad Co. v. Ziemer*, 124 Ibid. 560; *Reading & Pottsville Railroad Co. v. Balthasar*, 126 Ibid. 1.

12. In an action for a negligent destruction of property it is error to charge that the jury might include in their verdict interest on the damages. But the supreme court instead of reversing will, with the plaintiff's assent, reduce the judgment by striking off the interest.

Richards v. Citizens' Natural Gas Co., 130 P. S. 37.

13. Interest should not be included in damages in an action *ex delicto*; but the supreme court will allow the judgment to be amended by remitting the interest. *Emerson v. Schoonmaker*, 135 P. S. 437.

14. Interest as such is not allowed on damages in condemnation proceedings, but it is proper for the jury to consider the lapse of time between the taking of the land and the time of the trial in making up the damages for which to render a verdict. *Klages v. Philadelphia & Reading Terminal Co.*, 160 P. S. 386.

15. Interest does not follow the non-payment of taxes unless the lien be reduced to judgment by *scire facias*. *Barclay v. Leas*, 9 C. C. 314.

16. Where a promissory note was given, payable at a future day with interest payable semiannually, subject to certain other collateral agreements which provided that in case the note should not be paid at maturity, the plaintiff should look to certain securities alone for payment of the note, and he expressly waived all right to proceed against any other property of the defendant; it was *held*, that plaintiff could not sustain an action to recover semiannual interest accrued on the note, as there was no personal liability attached to the maker for the payment of either principal or interest. *Reed v. Cassatt*, 153 P. S. 156.

17. A prothonotary who has received fees for the sheriff or other officer, is not liable for interest thereon unless he has refused to pay them over after a demand. *Shafer v. McIlhaney*, 154 P. S. 58; affirming s. c. 12 C. C. 27.

18. Where a county treasurer, through the neglect of the commonwealth's officers, fails to make a prompt return of the state personal property tax, and subsequently embezzles the fund, the county is not liable for interest on that portion of the fund which it is entitled to receive back from the state. *Comm'th v. Philadelphia County*, 157 P. S. 531, 550, 558.

19. Where a daughter whose mind was

so weak that she was incapable of managing her own property, assigned the proceeds of a life insurance policy of five thousand dollars to her mother without any consideration, but upon the understanding that the income was to be used for the maintenance and support of the daughter, and the mother supported the daughter for twenty-five years and made no charge for support and rendered no account of the income; it was *held*, that the daughter could not, after the death of the mother, sustain a claim for interest on the fund during the time her mother held it. *Harker's Estate*, 167 P. S. 197.

20. Where a policy of fire insurance for six thousand dollars was assigned by the policy holder as collateral security to the amount of three thousand dollars, and subsequently the buildings were destroyed and the insurance money was attached by a creditor, and on the trial the jury found that a certain sum was in the hands of the garnishee subject to the transfer as collateral, and there was nothing to show that interest had been included in the verdict; it was *held*, on a distribution of the fund, that the assignee was only entitled to three thousand dollars without interest. *Swartley v. McCracken*, 7 Montg. 49.

21. An assignee for creditors will not be charged with interest on the balance in his hands pending exceptions to the auditor's report on his account. *Comm'th v. Anstett*, 2 Northam. 192.

22. In an action on a recognizance *sur* appeal from the orphans' court, interest cannot be recovered for the period of delay occasioned by an unsuccessful appeal. *Comm'th v. Wistar*, 142 P. S. 373.

23. In an action for rent, where the defendant testified that he tendered to the plaintiff the amount of rent due less a certain sum, which at the time he stated, he claimed as a set-off for work done for plaintiff, and the plaintiff agreed to take the money and give a receipt on account, which the defendant refused; it was *held*, that the tender was sufficient and that defendant was not liable for interest on

the amount of rent he admitted to be due. *Nickols v. Jones*, 166 P. S. 599.

See TENDER.

III. When interest begins to run.

24. Where an insurance company denies *in toto* its liability for the loss, it is not entitled to the benefit of a provision in the policy giving sixty days for the adjustment and payment of the loss, and the insured may recover interest from the company from the date of the loss. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 P. S. 346.

25. Where a promissory note is given by a husband to his wife, and is payable on demand "with interest from this date until paid," the wife may recover from his estate interest from the date of the note; in such a case, the presumption that the interest was applied from year to year to the family expenses is inapplicable. *Reber's Estate*, 143 P. S. 308.

26. Where a note was payable on demand, interest does not begin until the demand is made; where there was no proof of demand before suit brought, the bringing of suit is a demand and interest then begins. *Penn Safe Deposit & Trust Co. v. Thomas*, 4 Dist. Rep. 421.

27. Interest does not run upon a contract until the time fixed for payment; where a contract to pay a contractor for paving provided that payment should be made when the assessments were made and collected, and if they were not collected at the end of two years then the whole amount then unpaid to the contractor should become due; it was *held*, that such amount did not bear interest prior to the end of the two years. *Booth v. Pittsburgh*, 154 P. S. 482.

28. In the settlement of partnership accounts, interest has no place until a balance is struck. *Breneman v. Breneman*, 12 Lanc. 153.

29. Upon the conclusion of an active partnership business, where one partner takes all the money of the firm into his possession and refuses to make a prompt

settlement, he will be charged with interest from a date at which the affair should have been settled. *Steiger v. Bradley*, 34 W. N. C. 123.

30. If a parent lend money to a child and take security, it is a debt and not an advancement; if payable on demand, it bears interest from the time of demand. *Daisz's Estate*, 6 Lanc. 177; affirmed in *Daisz's Appeal*, 128 P. S. 572.

31. Where residuary legatees have, by mistake, received an amount in excess of their interest, they will be required to refund to the widow her share, but interest will only be allowed from the date of the demand for restitution. *Grim's Estate*, 147 P. S. 190; affirming s. c. 48 L. I. 86.

32. If reclamation be made of moneys paid under a mutual mistake, interest is due only from the time the demand for restitution is made. *Grim's Estate*, 48 L. I. 86.

33. Where, by mutual mistake, it was not discovered that money was owing to the plaintiff by the defendant until after the lapse of some time; it was held, that the defendant was liable to interest only from the time he was informed of the existence of the debt and a demand was made for its payment. *Myers v. Johnson*, 2 York 99.

34. A wife is not entitled to interest from her husband's estate on money of hers used by him in his lifetime, except from the date of his death. *Wormley's Estate*, 137 P. S. 101; s. c. 27 W. N. C. 13.

35. Where a judgment note was given by a husband to a trustee for his wife for borrowed money and was payable one day after date, and the wife lived with the husband seventeen years after the date of the note, and the wife's declarations were proven that she did not claim interest, the supreme court refused to reverse a decree of the court opening the judgment entered after the wife's death with interest, and directing an issue to try how much was due on the note. *Beaver v. Slear*, 168 P. S. 466.

36. Where the decedent was tenant by

the curtesy of the real estate of his first wife and he received the purchase money of the property in his lifetime; it was held, that his first wife's children were entitled as creditors of his estate to interest on their shares from the moment of his death. *Urian's Estate*, 11 C. C. 495; s. c. 30 W. N. C. 308.

37. A debt converted by a testator into an advancement bears interest only from the time fixed by him. If no date be fixed by the will, interest is chargeable upon the expiration of a year after decedent's death. *Patterson's Appeal*, 128 P. S. 269.

38. Where a testator gave to his daughter such wages for her work and labor as might be recovered against his estate by due course of law; it was held, that no further proof of a contract relation was necessary, and that the gift was a legacy, the amount of which was to be ascertained by a judicial proceeding, interest to begin one year from the date of testator's death. *Knauss's Estate*, 148 P. S. 265; reversing s. c. 9 C. C. 621.

39. Where executors and legatees unsuccessfully resist a claim for collateral inheritance tax, the judgment will bear interest from the expiration of one year after the date of the decedent's death. *Small's Estate*, 12 C. C. 226. See s. c. 151 P. S. 1; reversing s. c. 11 C. C. 1.

40. The committee of a lunatic conducting his business and becoming indebted to his estate is not, upon the death of the lunatic, chargeable with interest until one year thereafter. *Bercaw's Estate*, 2 Northam. 181.

41. Interest on advancements is chargeable from one year after the ancestor's death. *Butler's Estate*, 37 P. L. J. 442.

42. In estimating damages to a leasehold interest may be allowed on the loss for each year of the term. *Jones v. Pittsburgh & Lake Erie Railroad Co.*, 10 Cent. 413.

43. Where a widow's interest is secured on land conveyed, annual instalments draw interest from the time they fall due. *Van Storch's Estate*, 5 Kulp 389.

44. Upon a proceeding to compel the payment of an annuity out of real estate upon which it is charged, the orphans' court may allow interest on the arrears from the respective dates at which they accrued. *Brotzman's Estate*, 133 P. S. 478.

45. Where royalties on a patent are due on the first day of each month, interest will be allowed on each instalment as it becomes due. *Jarecki v. Hays*, 161 P. S. 613.

46. Where municipal claims are to be paid in instalments, interest is allowable on each instalment as it falls due. *South Chester Borough v. Garland*, 162 P. S. 91; affirming s. c. 5 Del. 305.

47. Where the interest of a devisee in real estate was sold at sheriff's sale under his mortgage, subject to the prior lien of certain legacies, the interest of which was payable by a trustee to certain grandchildren; it was held, that the trustee was entitled to interest on the proceeds payable to him, from the date of confirmation of sale to the date of actual payment. *Hays's Estate*, 130 P. S. 454.

48. Where a husband upon purchasing real estate took title in his wife's name and the latter contributed a small amount of the purchase money, and subsequently the property was sold, and with the proceeds the husband bought other real estate in his own name and dealt with it as his own for several years, until there was a separation between himself and his wife; it was held, that the evidence was sufficient to rebut the presumption of a gift, but that the wife was entitled to a portion of the purchase money contributed by her, with interest from the time the husband sold the property and began to treat the proceeds as his own. *Moore v. Moore*, 165 P. S. 464.

49. Where a judgment for five hundred dollars was amicably revived for "five hundred dollars with interest"; it was held, that the reasonable intendment was that the judgment was to bear interest from the date of revival, and interest prior thereto could not be allowed on dis-

tribution to the prejudice of a subsequent encumbrancer. *Kistler v. Mosser*, 140 P. S. 367; reversing s. c. 2 Northam. 189.

50. If on revival of a judgment the interest be not added, an auditor awarding payment will allow interest from the date of the last payment endorsed on the judgment bond. *Linville's Estate*, 8 Lanc. 97.

51. It is the duty of a judgment creditor to see that his judgment is rightly entered on the judgment docket; where a judgment is revived by amicable *scire facias* for the specific amount of the principal sum without mentioning interest, interest can only be recovered to the prejudice of subsequent lien creditors, from the date of the revival; and this, although it be shown that interest had actually been unpaid for two years previous thereto. *McCamant's Estate*, 12 Lanc. 251.

52. Where a landowner appeals from an award and afterwards withdraws his appeal, the court will not allow interest from the date of the award, but from the date of the withdrawal of the appeal by the entry of judgment as of the latter date. *Donaldson v. Pennsylvania R. R. Co.*, 5 C. C. 62 n.; s. c. 160 P. S. 391 n.

IV. When interest ceases.

53. Where a mortgagee claims against the general estate of an insolvent decedent, he will be allowed a dividend on the principal of his bond and interest to the date of the decedent's death; where an estate is insolvent, interest upon all claims can only be computed to the decedent's death. *Keebler's Estate*, 4 Dist. Rep. 346.

54. Interest on money paid into court on the extension of real estate ceases from the time of payment. *Van Storch's Estate*, 5 Kulp 389.

55. An administrator may retain an honest debt against the estate which would otherwise be barred by the statute of limitations, but no interest will be allowed after the grant of letters. *Lazarus's Es-*

tate, 6 Kulp 53; affirmed in 142 P. S. 104, and reversed in 145 P. S. 1.

56. One having a judgment against a township is entitled to collect debt and interest to the date of actual payment; but where the judgment has been included in a schedule of debts marshalled against the township, on the basis of which a special tax has been ordered to pay all debts and interest to the date of the decree, the courts will not by mandamus order the township treasurer to pay interest which may accrue after the decree imposing the special tax. *In re Plains Township*, 7 Kulp 234.

57. Upon a sale for payment of debts, interest on a judgment against decedent should be calculated to the return day and confirmation of the last sale. *Le-fever's Estate*, 7 Lanc. 131.

V. Amount recoverable.

58. In a suit upon a note executed in another state, the rate of interest is regulated by the statutes of that state. *Sprools v. McCloud*, 5 Cent. 453.

59. A promissory note not made payable elsewhere is payable at the place where it was made, and bears interest according to the law of the latter place. *Clark v. Searight*, 135 P. S. 173.

60. The right of the commonwealth to a tax cannot be lost by the neglect or unfaithfulness of her agents, but this rule applies only to the tax and not to the penalties; where a city collected the tax on loans and paid it over to its treasurer, and for sixteen months afterwards not a quarterly return or payment was requested or exacted by the commonwealth's officers; it was *held*, that interest on the tax at twelve per cent should be lowered to six per cent, and that the fees of the attorney-general should be stricken off. *Comm'th v. Philadelphia County*, 157 P. S. 558.

61. Where there was found among the effects of a decedent a promissory note for fifty thousand dollars signed by him to the order of his sister, due one day

after date, and on the same paper was a memorandum that "this note is invested in government bonds at four per cent, belonging to Eliza Gilmor," and the decedent had a large sum of money invested in such government bonds, and there were two receipts on the note for interest at the rate of four per cent; it was *held*, that the memorandum was clearly insufficient to warrant an inference that the decedent held the bonds in trust for his sister; and it was further *held*, that the sister was entitled to interest on her note at the rate of four per cent only. It was further *held*, that the evidence was not sufficient to establish a trust in certain mortgages and judgments found in a wallet and labelled with the name of the decedent's sister. *Gilmor's Estate*, 158 P. S. 186.

62. Where a vendee of land agreed to pay the "accruing interest" on a mortgage; it was *held*, that the words "accruing interest" meant running or accumulating interest, and did not embrace any part of a six months' interest which was overdue and unpaid at the date of the contract. *Gross v. Partenheimer*, 159 P. S. 556.

63. Where a mortgage called for six per cent but a decedent had collected interest for about fifteen years at the rate of five and one quarter per cent; it was *held*, that after his death, his executors could collect the interest at six per cent. *McElwain's Estate*, 11 Lanc. 193.

VI. Payment of interest.

64. The payment of the annual interest on a bond may be inferred from the fact that the obligor was at all times able to pay, and that the obligee was dependent upon the interest for her support. *Haines's Appeal*, 2 Cent. 341. See note to *Rockhill v. Rockhill*, 14 Atlan. 762.

65. A payment of interest after the maturity of a debt is not a sufficient consideration to support an agreement to extend the time of payment; such a

promise of extension will not discharge a surety. *Boring's Appeal*, 9 Cent. 394.

66. Where the obligee in a bond endorses payment of interest on the bond in the presence of the obligor, each time the interest becomes payable, it is a sufficient execution of a gift of the interest to the obligor. *Lewis's Estate*, 139 P. S. 640.

VII. Usurious interest.

(a) What is usury.

67. A transaction is not usurious merely because the judgment note in controversy was given on the same day and executed in exchange for royalties on coal, to which the plaintiff was entitled under a previous agreement. *Trine's Appeal*, 13 Atlan. 765.

68. Usury is not established by the fact that the plaintiff purchased a number of small notes of the defendant at a discount, and two new notes were taken for their face value. *Donehoo's Appeal*, 15 Atlan. 924.

69. A bonus for a loan secured by a separate note, which is subsequently paid, may be set up as a credit against a judgment given for the original loan. *Blymyer v. Colvin*, 127 P. S. 114. See *Colvin v. Blymyer*, 121 Ibid. 582.

70. Where a municipal lien was filed for paving, and it appeared that the defendant had loaned money to the contractor to complete his contract, and that the agreement of loan provided for an allowance to the defendant of ten per cent upon all bills, which he might have to pay by reason of his being the owner of real estate upon the line of the street, but there was no provision in the agreement as to how or when the loan should be repaid; it was *held*, that the lender could show by parol evidence that the agreement between him and the contractor was, that the amount borrowed should go as against the claim of the contractor for paving; and it was further *held*, that the deduction of ten per cent was not

usurious. *Philadelphia v. Kelly*, 166 P. S. 207.

71. It is usury for an unincorporated building association to deduct premiums from the principal of a mortgage executed to a trustee in its behalf, and in an action by the building association after incorporation upon such a mortgage, the defence of usury may be set up by the mortgagor or his assignee for creditors. *Roland's Estate*, 2 York 122.

(b) When usurious interest may be recovered back.

72. A vendee of land who pays a certain sum to his vendor to be paid by him to a certain judgment creditor, cannot recover from the latter the usury on his judgment received by him from the vendor. *Gullinger v. Zahniser*, 5 Cent. 303.

73. Upon the assignment of a usurious judgment there is an implied agreement in law that the judgment is a valid one for the amount shown on its face, and the assignee may recover from the assignor the amount of usurious interest, which had been paid on the judgment. *Hildebrand's Estate*, 3 York 191.

(c) Defence of usury.

74. A debtor cannot, at the time the debt is contracted, waive his right to object to the payment of or to sue for and recover usurious interest paid by him. *Mellon's Appeal*, 7 Atlan. 201.

75. The court will not strike off the satisfaction of a judgment and open the same to permit usurious interest therein to be set up as a defence to a subsequent judgment for the same debt, where it appears that the satisfaction was entered at the defendant's instance and not fraudulently as a device to cover up usury. *Pettis's Appeal*, 126 P. S. 420.

76. If the consideration of a judgment be twofold, usury for forbearance in not pressing a debt, and a release from a certain contract, the judgment will be opened to ascertain the proportion which was for forbearance. *Scott v. Harper*, 5 Montg. 143.

77. It is not unlawful for a debtor to pay more than six per cent interest, and another creditor has no right to attack such a transaction unless the agreement to pay a higher rate was part of a scheme to cheat and defraud the other creditors of the debtor. *Selser's Estate*, 141 P. S. 529; affirming s. c. 7 C. C. 417.

78. The mere omission by a mortgagor, at the request of the mortgagee, to set up the defence of usury in a proceeding to determine whether the mortgage was a first or second lien, will not estop the mortgagor from subsequently setting up the defence of usury. *Reap v. Battle*, 155 P. S. 265; affirming s. c. 6 Kulp 423.

79. The satisfaction of a mortgage and the taking of a new mortgage in its place does not extinguish the mortgagor's right to have an usurious payment on the first mortgage applied in discharge *pro tanto* of the principal debt. *Reap v. Battle*, 155 P. S. 265; affirming s. c. 6 Kulp 423.

80. A mortgagor against whose land a judgment has been entered upon a *scire facias*, cannot, after the land has been sold at a judicial sale, have the judgment opened on the ground of usury, where the mortgagee offers to file a paper renouncing and relinquishing all right to sue and to recover a judgment upon the bond accompanying the mortgage. *Reap v. Battle*, 155 P. S. 265; affirming s. c. 6 Kulp 423.

81. In a *scire facias sur mortgage* against the mortgagor, who is no longer the owner of the property, she has no such interest in the result of the suit as will enable her to set up usury paid by her on the mortgage. *Broomell v. Anderson*, 8 Atlan. 764.

82. In a *scire facias sur mortgage*, the only person who can defend, because of usury included in the mortgage, is the mortgagor; a terre tenant cannot, as a general rule, make such a defence. *Reap v. Battle*, 155 P. S. 265; affirming s. c. 6 Kulp 423.

83. Where the mortgagor, in a *scire facias sur mortgage*, declined to defend with terre tenants against usurious inter-

est and repudiated of record any such defence, and after judgment was obtained against the terre tenants, voluntarily confessed judgment to the mortgagee, and the judgment against the terre tenants was subsequently reversed; it was held, that the mortgagor was estopped from joining with the terre tenants in proceedings to open the judgment confessed, and from defending in a subsequent trial against the amount of the claim alleged to be usurious. *Stayton v. Graham*, 139 P. S. 1.

84. Upon the trial of a *scire facias sur judgment*, the only defence is a denial of the existence of the judgment or proof of satisfaction; usury is no defence to such an action. *Bickel v. Cleaver*, 13 C. C. 314.

85. In an action by a national bank as an endorsee of a promissory note, it is no defence that the note was discounted at twenty-five per cent, and that by reason of said usurious rate of interest, the plaintiff was not entitled to recover any interest thereon, nor to recover an amount exceeding the actual amount paid for the note. *Second National Bank of Clarion v. Morgan*, 165 P. S. 199.

(d) Effect of usury.

86. A surety upon a note will not be discharged by the payment of usurious interest by the principal unless there be evidence of some change in the contract. *Keener v. Miller*, 3 York 217.

87. Any usurious interest paid will be deemed a credit on the principal sum due, but where a judgment is regularly entered in a court of record, the proper forum to determine the question of usury is the court in which the judgment was entered upon a motion to open the judgment. *Mahoney's Estate*, 15 C. C. 302.

88. As to the effect of the payment of usury to an agent, see notes to *Bonus v. Trefz*, 2 Atlan. 375; and *Nichols v. Osborn*, 3 Ibid. 155.

(e) Penalty for charging.

89. The penalty for charging usurious interest cannot be enforced, where the

usurious interest on a note is included in a renewal note, without an agreement that the latter shall be in payment of the original, and a judgment on the renewal note is subsequently paid in full. *Kearney v. First National Bank*, 129 P. S. 577.

90. The sums which may be recovered from a national bank, under the act of Congress 3 June 1864, for taking usurious interest are penalties. *Osborn v. First National Bank of Athens*, 154 P. S. 134.

91. An affidavit of defence cannot be required in a suit for a penalty, such as a suit under the National Banking Act, to recover twice the amount of usurious interest; and this, though such penalty be collectable in an action of debt. *Union Glass Co. v. First Nat. Bank of Newcastle*, 10 C. C. 565.

92. In a suit under the National Banking Act to recover twice the amount of usurious interest paid, the bank cannot be required to produce its books to be used in evidence on the trial of the cause. *Union Glass Co. v. First National Bank of Newcastle*, 10 C. C. 574.

INTERPLEADER.

See EXECUTION, VIII.: PLEADING, XXIII.

INTESTACY.

See DECEDENTS' ESTATES: DESCENT.

INTOXICATION.

See CRIMINAL LAW, III.

ISLANDS.

See LAND.

JAILS.

See COUNTY: COUNTY COMMISSIONERS.

1. The act 1 April 1852 (P. L. 211) having vested in the county commissioners of Schuylkill county the appoint-

ment of the keeper of the county prison, subject to the approval of the quarter sessions; it was *held*, that the court could not review such an appointment in pursuance to the views, preferences and opinions of any section of the community, nor could it inquire into the reasons which prompted the appointment. *Martin's Case*, 11 C. C. 279; *Dunkelberger's Case*, 14 C. C. 641.

2. The quarter sessions has jurisdiction to order and conduct an investigation of the management of the county prisons where the State Board of Charities has filed charges against a sheriff and keepers; the court may fine and imprison the sheriff and keepers for misconduct in the management; it has power to remove prison keepers for misconducting themselves in office; so it may hold keepers to bail to answer the charge of furnishing liquor to prisoners. *Bucks County Prison*, 15 C. C. 569.

JOINDER OF ACTIONS.

See PLEADING, II.

JOINT DEBTORS.

See DEBTOR AND CREDITOR, I.

JOINT OWNERS.

See EVIDENCE, XXIX: PARTNERSHIP: SHIPPING.

- I. Tenancy by entireties.
- II. Survivorship.
- III. Tenancy in common.
- IV. Partnership between tenants in common.
- V. Contracts between.
- VI. Power to bind co-tenant.
- VII. Acquisition of joint estate.
- VIII. Rights of joint owners.
- IX. Suits between joint owners.
- X. Joint owners of personalty.

I. Tenancy by entireties.

1. Where land is conveyed to husband and wife, they become tenants by entireties, and when, on a sale of the land so held, they take in their joint names a mortgage for the purchase money, the presumption is that they intend to hold the mortgage as they did the land. Tenancy by entireties is not abolished by the act 31 March 1812 (Brightly's Purdon 1089), abolishing survivorship in joint tenancy; nor by the married persons' property act 3 June 1887 (P. L. 332). *Bramberry's Estate*, 156 P. S. 628.

2. A husband and wife making a deposit in their joint names, hold by entireties, and the survivor takes the whole, and this, though the husband before his death gave notice of his intention to withdraw. *Donnelly's Estate*, 7 C. C. 196; s. c. 46 L. I. 230.

3. Where a mortgage is assigned to husband and wife in equal moieties or half parts as tenants in common, the husband and wife held by entireties, and upon the death of either, the survivor takes the whole by right of survivorship. *Young's Estate*, 15 C. C. 296; s. c. 35 W. N. C. 164.

See HUSBAND AND WIFE.

II. Survivorship.

4. The act of 31 March 1812 (Brightly's Purdon 1089), abolishing survivorship in joint tenancy, does not apply to trust estates. *Hart's Estate*, 7 C. C. 369; s. c. 46 L. I. 454.

III. Tenancy in common.

5. A deed to a grantee and her heirs for the use of the grantee and her heirs, enumerating as her heirs four of her children by name, creates a tenancy in common in the grantee and the four children with an immediate right of possession in all. *Brazington v. Hanson*, 149 P. S. 289.

6. In trespass under the act of 27 March 1824 (Brightly's Purdon 2006) for

cutting timber, if the plaintiffs show title to an undivided three-fourths of the land and the defendants are in possession of the remaining one-fourth, though under a defective title, the parties must be regarded as tenants in common. *Bush v. Gamble*, 127 P. S. 43.

7. Where the plaintiff claimed to be the joint owner of an engine, and he brought suit against the defendant to recover a portion of the proceeds of the sale of the engine made by the defendant, who claimed that plaintiff either had no interest or if he had, the defendant's principal was plaintiff's trustee, but there was evidence that plaintiff had exercised acts of ownership, and declarations of defendant were offered to show that plaintiff had an independent interest in the property; it was held, that the case was for the jury. *Means v. Gridley*, 164 P. S. 387.

8. Where the claimant and three defendants were lessees in an oil lease and the plaintiff claimed a fourth interest, and it appeared by an agreement between the defendants that one of them was to have a one-eighth interest, and there was evidence of a prior parol agreement by which plaintiff was entitled to one-half of the one-eighth; it was held, that the evidence was sufficient to overcome the presumption that the parties were to share equally. *Smiley v. Gallagher*, 164 P. S. 498.

9. Where three tracts of land are all subject to the same oil and gas lease and are devised respectively to the owner's three children, the royalties accruing under the lease are divisible among the three devisees; and this, although all of the wells are sunk on one only of the three tracts. *Wettengel v. Gormley*, 160 P. S. 559.

10. Where certain employees of the owner of the farm were to raise tobacco upon it and were to receive one-half of it as compensation for their labor; it was held, that such employees were but croppers, and as such, they acquired no property in the tobacco until it was divided. *McCormick v. Skiles*, 163 P. S. 590.

IV. Partnership between tenants in common.

11. An agreement between two tenants in common of an oil lease to drill an additional well at their common cost, will not as between themselves create a partnership; in the absence of a distinct agreement the presumption is that they treated with each other as owners of separate interests in an undivided lease. *Dunham v. Loverock*, 158 P. S. 197.

12. No presumption of partnership arises from the operation of an oil well by tenants in common. *Neill v. Shamburg*, 158 P. S. 263.

13. Where two tenants in common of a mine lease entered into an agreement with each other to drill wells on the property and each to pay one-half the costs of sinking the well and pumping the oil, and the oil produced was to be run into pipe lines, serving the district and there credited, one-half to each of the tenants in common; it was held, that no partnership existed between them. *Butler Savings Bank v. Osborne*, 159 P. S. 10.

14. A division of the product between tenants in common does not make them partners; persons who join in the purchase of goods for the purpose of dividing them among themselves and not for the purpose of selling them are not liable to third parties as partners. *Taylor v. Fried*, 161 P. S. 53.

15. Where the recorded title to real estate is in tenants in common who are also partners, and no purchaser or lien creditor appears, and there is no contract expressly made upon the faith of such title, it may be shown by parol that the property was bought with partnership money, and that it was the intention of the partners to hold it as partnership property; and this may be shown by the testimony of the surviving partner where such testimony neither helps to establish a liability in his own favor, nor to shift upon the deceased partner a burden which the estate was not already carrying, but simply aids in deciding to which of two

conceded creditors a fund ought to go. *Miller's Estate*, 14 C. C. 147.

16. That land was conveyed to three persons as tenants in common, who were partners and subsequently used it in connection with the partnership business, does not, standing alone, make it a partnership property. *Shyfer's Estate*, 1 Northam. 153.

V. Contracts between.

17. Where a tenant in common mortgaged his interest to his co-tenant to indemnify him against a contingent loss, by having to pay a guaranty to third persons, and after the execution of the mortgage, the mortgagor sold and conveyed the mortgaged premises to the mortgagee; it was held, that there was no such confidential relations between the parties as required the mortgagee to disclose to the mortgagor the facts concerning the production of oil on a neighboring leasehold, owned by the mortgagee. *Neill v. Shamburg*, 158 P. S. 263.

VI. Power to bind co-tenant.

18. Upon a contract to sell land to three vendees, a delivery of the deed to one amounts to an acceptance of delivery by all. *Payne v. Echols*, 15 Atlan. 895.

19. Where several tenants in common appoint one of their number to collect the rents, one of the joint owners has a right, at any time, to revoke the agency so far as his own interest is concerned, and after notice of such revocation, it is the duty of the tenant to pay over to the revoking owner his proportionate share of the rent. *Barrett v. Bemelmans*, 163 P. S. 122.

20. In an action for rent by one of several joint owners of a house and lot, where it appeared that all of the joint owners had appointed one of their number a trustee to collect the rent, and that the trustee had rented the premises to the defendant for one year with the privilege of renewal, and prior to the expiration of

the year, he had renewed the lease and the plaintiff claimed that she had revoked the appointment of the trustee and notified the defendant to pay her share of the rent to herself; it was *held*, that an affidavit of defence that the defendant had no notice that the trustee was not to renew the lease, and that no notice had been given to her as provided in the lease, and that she had continued to pay the rent to the trustee, was *held* to be sufficient to prevent judgment. *Barrett v. Bemelmans*, 155 P. S. 204.

21. Where a brother of full age, acting for himself and as next friend of his minor sister, asserts a forfeiture of an oil lease of land owned by them in common, he cannot afterwards recover for himself his share of the monthly damages stipulated in the lease and accruing between the date of the assertion of forfeiture and the institution of the suit; it seems that if the action of the brother was judicious and for the best interests of the minors, the forfeiture would be sustained against them. *Wilson v. Goldstein*, 152 P. S. 524; reversing s. c. 12 C. C. 337. See *Heinouer v. Jones*, 159 P. S. 228.

22. Where the lessees of an oil and gas lease were not tenants in common, but joint grantees of a right or privilege, and were bound jointly to perform the covenants of the contract; it was *held*, that the declarations and acts of two of the lessees were binding upon the third. *Hooks v. Forst*, 165 P. S. 238.

23. Where land is devoted by the owners to a particular purpose (as church property), which use entered into the consideration of the contract of purchase, one of the tenants in common cannot defeat the joint purpose by partition without the consent of the co-tenants; equity has no jurisdiction to decree partition of church property owned in common by two congregations. *Swoyer v. Schaeffer*, 13 C. C. 346.

VII. Acquisition of joint estate.

24. That a tenant in common cannot acquire a tax title to the prejudice of his co-tenants, see note to *Chace v. Durfee*, 14 Atlan. 919.

25. A joint owner of an oil lease, work upon which had been temporarily discontinued, who, through an agent, procures another lease of the same property to himself, holds a proportional part of the same as trustee for his co-tenant. *Weible's Appeal*, 127 P. S. 34.

26. One tenant in common cannot purchase an encumbrance or an outstanding title and set it up against his co-tenants for the purpose of depriving them of their interests; where a tenant in common purchases with his own money, in the name of another, the estate in common at a tax sale, the purchase inures to the benefit of all his co-tenants. *Tanney v. Tanney*, 159 P. S. 277; affirming s. c. 41 P. L. J. 43.

27. A purchase by a tenant in common at a tax sale of the estate held in common, does not create a resulting trust under the act 22 April 1856 (Brightly's Purdon 1212), so as to bar the other tenants in common from the right to institute an action of ejectment after the expiration of five years from the tax sale. *Tanney v. Tanney*, 159 P. S. 277; affirming s. c. 41 P. L. J. 43.

28. Where tenants in common accept the proceeds of a tax sale of the estate in common, in ignorance of the fact that the estate has been bought by one of their own number, they will not be estopped from subsequently avoiding the deed to the purchaser. *Tanney v. Tanney*, 159 P. S. 277; affirming s. c. 41 P. L. J. 43.

29. One of several tenants in common cannot purchase a mortgage upon the land and set it up against his co-tenants for the purpose of depriving them of their interests; a sheriff's sale on such a mortgage will be restrained by injunction. *Fisher v. Hartman*, 165 P. S. 16.

VIII. Rights of joint owners.

30. Where three persons built a building, and the property being divided between them, the stairways being wholly upon the portion allotted to the defendants; it was *held*, that the right of the plaintiff to use the stairways was a permanent servitude. *Pierce v. Cleland*, 133 P. S. 189; affirming s. c. 1 Lack. Jur. 185.

31. Where four brothers purchased a burial lot, and erected a monument thereon at their joint expense, and on each side of the monument inscribed the name of one of the brothers, and set apart the space opposite each name for such brother's family; it was *held*, that no one of the brothers could permit the interment in his portion of the lot without the consent of the other owners, of any person not a member of the family; and where the executors of the widow of one of the brothers cut off the raised letters on one face of the monument; it was *held*, that a court of equity would, by a mandatory injunction, require an entirely new monument to be erected at the expense of the widow's estate. *Lewis v. Walker*, 165 P. S. 30.

IX. Suits between joint owners.

32. One tenant in common may maintain assumpsit against his co-tenant for a share of the profits, upon proof that the whole was received by the defendant. *Haggerty v. McGeever*, 5 Kulp 463.

33. A tenant in common working a coal mine belonging to joint owners is bound to pay to his co-tenant a proportion of the money realized by the sale of the coal. *Southwest Coal & Coke Co. v. Warden*, 1 Atlan. 421.

34. If one tenant in common in exclusive possession operate a slate quarry opened and developed, the measure of the damages of his co-tenant under the act of 25 April 1850 is the fair market value of the slate in place, the royalty or slate-leave to be obtained for the privi-

lege of removal. *Fulmer's Appeal*, 128 P. S. 24.

35. Where one of several heirs has had possession of the real estate, equity will compel him to account to his co-heirs for their proportions of the rental value of the land; and this, whether his exclusive possession was with or without the consent of the other owners. *Clayton v. McCay*, 143 P. S. 225.

36. Tenants in common, who are also trustees, and who occupy part of the common real estate, are liable to their co-tenants for rent of the same. *Spellbrink's Estate*, 15 C. C. 506.

37. Each tenant in common has an equal right to the possession of the whole, and one could only maintain an action of account at common law against his companion, in the case where he had expressly constituted him his bailiff. *Kennedy's Estate*, 1 Lack. L. N. 135.

38. Where two joint owners owned three-fourths, and another co-owner owned the other fourth, and the whole tract was charged with a dower charge of \$2475, payable to nine heirs, of which the last mentioned co-owner was one, and the first two owners paid \$2200 to the other heirs, and received their release, and subsequently their interest was sold at sheriff's sale; it was *held*, upon distribution, that the third co-owner was not entitled to recover any of the proceeds, as the other two joint owners had already paid more of said dower than they were bound to pay. *Bowman v. Bowman*, 1 York 215.

39. In ejectment against a co-owner where the defendant claims title by adverse possession, a parol gift from the father to the defendant, though not good in itself, is evidence that he entered adversely. *Craig v. Craig*, 11 Atlan. 60.

40. A tenant in common may recover in ejectment against a co-tenant who takes possession of the whole premises and asserts title thereto; the actual ouster need not be accompanied by actual force. *Shrawder v. Snyder*, 6 Montg. 66; reversed on another point in 142 P. S. 1.

41. Trespass for damages for cutting timber by two co-tenants against a stranger will not lie where the cutting was actually done by one of the co-tenants, though the stranger may have been concerned therein. *Ramsey v. Brown*, 1 Mona. 641; s. c. 17 Atlan. 207.

42. The act of 4 May 1869 (Brightly's Purdon 2082), though it gives a tenant in common the same remedy against his co-tenant as against a stranger, does not authorize in his favor the penalty of double or treble damages provided by the act of 27 March 1824 (Brightly's Purdon 2006). *Bush v. Gamble*, 127 P. S. 43.

43. Where the lessee of a tenant in common is lawfully in possession of the whole tract, an entry by the other tenant in common, coupled with an unlawful taking of a portion of the crop, becomes a trespass *ab initio*; the remedy of the excluded tenant in common is an action against the co-tenant, or, if he repudiates the lease, he may sue the lessee for mesne profits or for use and occupation. *Baker v. Lewis*, 150 P. S. 251.

44. Trespass lies by one tenant in common against another where there has been a total destruction of the subject-matter of the tenancy in common; it lies by a land-owner against his neighbor for the cutting down of a tree standing upon the boundary line between his lands and his neighbor's. *Miller v. Holland*, 13 C. C. 622; s. c. 3 Dist. Rep. 449.

45. Where a tree is on the line between two adjoining properties, a court of equity will enjoin its destruction at the instance of one of the owners. *Comfort v. Everhardt*, 35 W. N. C. 364.

46. One of three joint owners of an oil lease is not liable to a second owner, employed by the third owner without defendant's consent, for a share of the expenses in working the well, and this though he had received his share of the product. *Thompson v. Newton*, 7 Atlan. 64.

47. One tenant in common may become a creditor of his co-tenant for the

amount expended by him in the improvement of the joint property. *Kieffer's Estate*, 136 P. S. 535; s. c. 26 W. N. C. 561.

48. Where a writ of estrepement was issued at the suit of one tenant in common against another to prevent the cutting and removal of timber; it was held, that the court had power to open the writ so far as to permit the defendant, upon entering security, to remove the timber which had been cut. *Hensal v. Wright*, 10 C. C. 416.

X. Joint owners of personalty.

49. A devise of income to three children, naming them, vests in each of the children. The incident of survivorship is taken from the joint tenancy by the act of 31 March 1812 (Brightly's Purdon 1089). *Kollock's Estate*, 7 C. C. 348; s. c. 46 L. J. 281.

50. Upon a bequest of income to two, "to be paid to them equally during their natural lives," and upon their death the principal to be divided; held, that upon the death of one the survivor was entitled to the entire income for life. *Erwin's Estate*, 5 Montg. 18.

51. Upon a bequest of income to two brothers during the terms of their natural lives, and at their decease to be divided between nephews and nieces; held, that on the death of one brother the survivor became entitled to the whole income for life. *Morison's Estate*, 5 Montg. 155.

52. If there be satisfactory evidence of the assent of the plaintiff's co-owners to his action of replevin, and claim of title, the defendant cannot defeat the action by setting up the title of the plaintiff's co-owners. *Ferguson v. Rafferty*, 128 P. S. 337.

53. In an action against two upon an alleged joint contract, a letter by one defendant to the other is admissible on the question of ratification. *Zoebisch v. Rauch*, 133 P. S. 532.

54. Where one of two owners of a

patent agreed to pay half of the profits of the manufacture to his co-owner, and the two owners applied for a reissue of the patent; it was *held*, that the agreement between the parties was not affected by the fact that such reissue was refused. *Culp v. Allen*, 166 P. S. 286.

55. One joint owner of a patent cannot sue another for infringement nor compel a contribution of profits. *Battin v. Martin*, 10 Lanc. 209.

JOINT STOCK COMPANIES.

I. Organization.

- (a) Names in articles.
- (b) Contribution and description of property.
- (c) Individual liability of partners.
- (d) Recording articles.

II. Elections.

III. Management of business.

IV. Powers and liabilities.

V. Mortgages.

VI. Rights of bondholders.

VII. Promissory notes.

VIII. Checks.

IX. Suits against joint stock companies.

X. Assignment of interest.

XI. Dissolution by limitation.

XII. Insolvency.

I. Organization.

(a) Names in articles.

1. If the articles of agreement do not contain the full names of all the parties, if the amount subscribed does not correspond with the amount stated, if it be not stated when and how the subscriptions were to be made, if the location of the business be not specified, and there be no certificate as to the condition of the subscriptions, there is no compliance with the act of 2 June 1874 (Brightly's Purdon 1086). *Pears v. Barnes*, 1 Atlan. 658.

2. The requirement that the statement shall set forth the full names of the mem-

bers is sufficiently complied with where the names are given with initials, if they are so used by the persons in business, and those by which they are generally known in the community. *Lafin v. Steytler*, 146 P. S. 434.

3. The requirement as to full names of members is met by giving the initials alone, where such form is usually used by the members in business and they are so known in the community. *Gearing v. Carroll*, 151 P. S. 79.

(b) Contribution and description of property.

4. Where property has not been contributed, scheduled and valued as directed by the act 1 May 1876 (Brightly's Purdon 1088), there is no payment of the capital and the partners are liable as general partners; property described as having been purchased by the partners from another limited company subject to the payment of its debts, is not such a contribution of property as that act contemplates, and so an item of "bills receivable \$2206.17" is insufficient where no other information is given by which a creditor could ascertain whether the notes were worth anything or not. *Haslet v. Kent*, 160 P. S. 85.

5. A contribution of a sum certain representing the difference between the estimated assets and liabilities of a subscribing firm renders the organization defective; and this, though the certificate would certify in this respect according to the fact. *Van Horn v. Corcoran*, 127 P. S. 255.

6. The fact that patent rights, contributed under the act of 1 May 1876 (Brightly's Purdon 1088), subsequently sold for much less than valued at, is not sufficient to hold the members liable as general partners. *Rehfuss v. Moore*, 134 P. S. 462; affirming s. c. 47 L. I. 36. See s. c. 46 L. I. 26.

7. Under the act 1 May 1876 (Brightly's Purdon 1088), allowing contributions to be made in real or personal estate,

mines or other property at a valuation to be approved by all the members, a schedule containing a description and valuation of the property to be inserted in the articles of association; it was *held*, that land lying in an adjoining state may be the subject of such a contribution; that it is immaterial that the lands were encumbered, at least when notice of that fact was given in the articles, nor does it matter that the title consisted only of a contract of purchase on which nothing had been paid, an accident having delayed performance which was carried out a few months afterwards. When the schedules contained a full description by location metes and bounds and area and a statement of the undivided interest therein contributed by each member, with the valuation of the total contribution so made by each, and a valuation of all the lands as a whole, the requirements of the act are substantially complied with; the company may fix the valuation to suit itself, and that it is excessive is immaterial, nor is it necessary that each piece of property be valued separately. *Cock v. Bailey*, 146 P. S. 328; *Laftin v. Steytler*, 146 P. S. 434.

8. Where part of the stock is subscribed for by paying in the notes of a third person, the members become individually liable for the debts of the company. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

9. The certificate, under the act of 1 May 1876 (Brightly's Purdon 1088), must set forth such a description of the property contributed as will enable creditors to ascertain precisely of what the property consisted and judge of its value. A description, as "merchandise, lumber, book accounts, and bills receivable," is insufficient. *Van Horn v. Corcoran*, 127 P. S. 255; *Sheble v. Strong*, 128 Ibid. 315.

10. Where the description of property contributed as cash is too general to enable any one to form a correct estimate of its extent, and a lumpage valuation renders it difficult to judge of value, they

cannot be supplemented by oral testimony, and the members are liable as general partners. *Gearing v. Carroll*, 151 P. S. 79.

11. When property contributed is an equity subject to payment of liens or debts of any kind, the certificate should state that fact; a certificate is defective which alleges a cash subscription of \$24,000, of which fifty per cent is to be paid by a given date, and the balance when required, when it appears that no cash was ever paid, and only notes were given after much delay. *Reynolds v. Creveling*, 4 Dist. Rep. 419.

(c) Individual liability of partners.

12. If the certificate of organization be defective, the parties are liable to a common law action as general partners; creditors are not confined to the remedy provided by the second section of the act of 2 June 1874 (Brightly's Purdon 1086). *Van Horn v. Corcoran*, 127 P. S. 255.

13. A judgment against a limited partnership (under the act of 2 June 1874, Brightly's Purdon 1086) is no bar to an action for the same debt against the members as general partners. *Sheble v. Strong*, 128 P. S. 315.

14. If the capital be paid into the hands of the treasurer, the members will not be held liable as general partners, because a portion is subsequently applied to carrying out a bad bargain in the purchase of property connected with the partnership business. *Masters v. Lander*, 131 P. S. 195.

15. Where a person subscribes a sum of money to a limited partnership, to be applied to the payment of a mortgage on real estate which he has contributed to the association, and in consequence of his failure to pay the same the mortgage is foreclosed, and the real estate is bought in by the mortgagee, such subscriber may be compelled to pay the money by execution against him personally on a judgment against the association. *Cox v. Watts*, 157 P. S. 93.

16. Where two members of a joint

stock company granted to the association the coal under certain land, reserving royalties, and the grantors assigned the royalties to the plaintiff, who brought suit for same against the members of the company as general partners; it was *held*, that the assignors, being members of a company who contracted among themselves that their liability should be limited to the stock subscribed, they and the plaintiffs claiming under them were estopped from alleging that the association was defectively organized and the liability general. *Egbert v. Kimberly*, 146 P. S. 96.

17. Where a creditor assists in the organization of a joint stock company by his debtors and others, and subsequently, as arranged beforehand, receives the bonds of the company in payment of the indebtedness, he is estopped from alleging a defective organization so as to hold the members liable as general partners. *Allegheny Nat. Bank v. Bailey*, 147 P. S. 111.

18. Sufficiency of an affidavit of defence to an action against a joint stock company seeking to make the members liable as general partners. *Masters v. Lander*, 10 Cent. 830.

19. Partners are not necessarily made liable as general partners by reason of a failure to keep a subscription-list book; this provision may be treated as directory if the book is capable of being made up from other books and accounts. *Reynolds v. Creveling*, 4 Dist. Rep. 419.

(d) Recording articles.

20. The failure of a joint stock company to record its articles before the commencement of negotiations which culminated in a contract after the articles were recorded, was *held* not to render the members of the association liable as individuals or general partners for the goods delivered under the contract. *Hinds v. Battin*, 163 P. S. 487.

II. Elections.

21. The members of a joint stock company may agree that in the management of the company there shall be two votes of equal power, one belonging to one member and the other belonging to the other two remaining members, and such an agreement applies to the election of liquidating trustees; in such a case, where one vote is cast for one set of trustees and the other vote for another set, there is no election and the court has power to appoint the trustees. *Imperial Steel Co.*, 2 Dist. Rep. 826.

22. An executor cannot vote the stock of his testator in a joint stock company. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

23. A transfer of stock to third persons for the purpose of having them elected directors, the stock remaining the property of the original owner, is not a valid proceeding, and directors so elected cannot hold their office. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

III. Management of business.

24. Upon a bill by the minority of the members of a joint stock company, for the manufacture and sale of steel, equity will enjoin a change in the location of the works. *Jennings's Appeal*, 16 Atlan. 19.

25. Where, by an agreement in writing between the members, it was provided that subject to the control of the majority in questions relating to the business, a certain member should have special charge of the mills and manufacturing; it was *held*, that such agreement created a term of employment for the life of the partnership that could not be terminated by a vote of the majority in number and value of interests; that the superintendent, though he tendered his resignation but withdrew it before it was accepted, was entitled to the salary until the dissolution of the partnership; but in an action to restrain the superintendent from acting as such and for damages, it was *held*, that he could not recover in addition

to his salary, the costs, counsel fees and expenses incurred by him in independent litigation with the plaintiffs. *Jennings v. Beale*, 146 P. S. 125. See *Jennings's Case*, 157 P. S. 630.

IV. Powers and liabilities.

26. A limited partnership for the making of springs has power to purchase with its surplus the stock of a steel manufacturing corporation, especially when the purchase is made to secure steel on favorable terms. *Layng v. French Spring Co.*, 149 P. S. 308.

27. The contract of a construction company who took the bonds and stock of a gas company in payment, to pay interest on advance payments upon the purchase of the gas company's stock, was held not to be *ultra vires*. It was further held, that the company would be bound by such a contract if they continued to use the same form of subscription after the time had expired during which interest was to be allowed. *Hetfield v. Addicks*, 154 P. S. 1. See *Porter v. Beacon Construction Co.*, 154 P. S. 8.

28. The manager of a construction company was held not to be liable upon the contract of the company to pay interest on advance payments on subscriptions of stock. *Hetfield v. Addicks*, 154 P. S. 1. See *Porter v. Beacon Construction Co.*, 154 P. S. 8.

29. The managers of a joint stock company will be restrained by a preliminary injunction from selling the entire business and property of the association without the consent of all the shareholders. *Carter v. Producers' and Refiners' Oil Co.*, 164 P. S. 463; affirming s. c. 41 P. L. J. 380.

30. A joint stock company is liable for the tortious act which it authorizes, but its members and officers are not personally responsible for such acts unless they participated in them. *Whitney v. Backus*, 149 P. S. 29.

31. All contracts exceeding five hun-

dred dollars must be reduced to writing and signed by at least two managers, to be binding on the association. *Walker v. Keystone Brewing Co.*, 131 P. S. 546.

32. Where a draft for a sum exceeding five hundred dollars drawn upon a joint stock company was accepted in the name of the drawee "per Bernard Lauth, chairman," and Lauth was the only manager who signed the acceptance, and the draft was afterwards delivered by another of the managers to the payee, who had it discounted by a bank; it was held, that the bank was bound to know that the signatures of two managers were necessary to a valid acceptance, and it was further held, that if Lauth signed the acceptance with the understanding that his name was to be one of the two required by the statute, and that it was to be signed also by the manager by whom it was delivered and placed in his hands for that purpose, then Lauth did not become personally liable by reason of the neglect of his fellow-manager to complete the acceptance. *Mercantile Nat. Bank v. Lauth*, 143 P. S. 53.

33. A written contract of a joint stock association, being for a liability exceeding five hundred dollars, and signed but by one manager, will not be reformed in equity. *Andrews v. Youngstown Coke Co.*, 7 C. C. 67.

34. If a partner contribute real estate subject to encumbrances, and subsequently pays the partnership sums on account thereof, which applies the payments to the partnership business; upon the property being sold for the mortgage debt, the partnership is liable for any deficiency. *Tasker v. Brown*, 8 C. C. 390.

35. The act 2 June 1874, sec. 5 (amended by the act 10 May 1889, Brightly's Purdon 1087), was not intended to relieve the association of liability for indebtedness contracted for its own benefit in the regular course of its business and approved by formal resolutions upon the minutes; and this, though the indebtedness exceed five hundred dollars and is not reduced to writing and signed by two

managers. *Pittston Engine & Machine Co. v. Fuller*, 11 C. C. 182.

36. Where the members of a joint-stock company unanimously gave the chairman exclusive control of all purchases, and he subsequently made a verbal agreement with the plaintiff to purchase a bill of iron, the whole amount of which was upwards of two thousand dollars, but which was delivered in nine separate shipments on separate days, each shipment being less than five hundred dollars, and the company accepted the ore and used it; it was *held*, that the company was liable for its value. *McLaughlin v. Centre Mining Co.*, 10 C. C. 533.

V. Mortgages.

37. The mortgage of a leasehold by a joint stock company is a valid lien on the leasehold notwithstanding defects in the recorded statement, and a neglect of statutory requirements in the management of the association. *Briar Hill Coal & Iron Co. v. Atlas Works*, 146 P. S. 290.

VI. Rights of bondholders.

38. Where the bonds of a joint stock company are secured by a mortgage, and the bondholders through a trustee designated by them purchase the mortgaged premises subject to the mortgage, they cannot afterwards proceed upon the bond and collect the amount thereof from the company or from the defendants as individuals. *Cock v. Bailey*, 146 P. S. 328.

VII. Promissory notes.

39. If a joint stock company has received the proceeds of a note, made or endorsed in its name by its secretary, it cannot set up an illegal making or indorsement as a defence. *McGeorge v. Harrison Chemical Manufacturing Co.*, 141 P. S. 575; affirming s. c. 25 W. N. C. 327.

40. The note of a joint stock company executed by its treasurer, is negotiable

though bearing the impress of a device purporting to be the seal of the association, but unattested. *Stevens v. Philadelphia Ball Club*, 142 P. S. 52.

41. To charge the members individually with a note because of the omission of the word "limited" from the indorsement, it must appear that the members sought to be charged have participated or acquiesced in the omission. *Sellersville Nat. Bank v. Banks*, 9 C. C. 92; s. c. 2 Northam. 292.

42. In an action against a joint stock company upon its indorsement of a promissory note; it was *held* to be a good defence that the indorsement was not made by two managers of the company, but judgment was permitted to be taken for five hundred dollars. *Bank v. Walton*, 30 W. N. C. 47; s. c. 1 Dist. Rep. 423; contra, *Bank v. Walton*, 1 Dist. Rep. 422.

VIII. Checks.

43. A check given by a joint stock company must contain the full name of the company, or else the party signing it will be held individually liable; and this, in the absence of fraud and where all the parties knew that the check was intended as a partnership check. *Baltimore & Ohio R. R. Co. v. Wilkins*, 10 C. C. 269.

IX. Suits against joint stock companies.

44. In an action against a joint stock company, a sheriff's return of a summons as served by giving a true and attested copy thereof to a "superintendent and agent" of the company and making known to him the contents thereof, is a good return. *McGeorge v. Harrison Chemical Manufacturing Co.*, 141 P. S. 275; affirming s. c. 25 W. N. C. 327.

45. Where a bill is filed in the name of a joint stock company and certain of its members against another member of the association as defendant, and the supreme court orders the costs to be paid by plaintiff, the decree for costs is against

the individual plaintiffs and not against the association. *Jennings's Case*, 157 P. S. 630.

46. A member of an association, under the act of 2 June 1874 (Brightly's Purdon 1086), may maintain an action against it for a debt due him. *McGeorge v. Harrison Chemical Manufacturing Co.*, 141 P. S. 565; affirming s. c. 25 W. N. C. 327.

47. Where a bill was filed by a member of a joint stock company praying for a dissolution and an account, and a decree for an account was entered by consent; it was *held*, that after the master had made his report stating the account, it was too late for the defendants to object that such a bill would not lie. *Weller v. Wood*, 6 Kulp 526.

X. Assignment of interest.

48. The provision of the act 2 June 1874, sec. 4 (since amended by the act 25 June 1885, Brightly's Purdon 1087), restricting the right of the transferee of an interest to participate in the business until he or she shall be elected or admitted as a member, is for the protection of the remaining shareholders and may be waived by them; where one of the members on the day of organization transferred his shares to his mother, who was never elected a member, but the remaining members continued the son in a board of management as his mother's representative; it was *held*, that this was an informal but effectual consent to the assignment, and the members did not thereby become liable as general partners. *Globe Refining Co.'s Estate*, 151 P. S. 558.

49. Under the act 2 June 1874, sec. 4 (amended by the act 25 June 1885, Brightly's Purdon 1087), where transferees of an interest in an association have not been elected to membership, they are entitled to the appointment of an appraiser to fix the price and terms upon which such interest shall be taken by the association, and upon the application for such an appraiser, the court will not decide a dispute in regard to the title of

the petitioners to the interest which they claim. *In re Hunt*, 2 Lack. Jur. 310.

XI. Dissolution by limitation.

50. Under sec. 9 of the act 2 June 1874 (amended by the act 10 May 1889, Brightly's Purdon 1088), where an association ends by its own limitation, it is dissolved by the voluntary action thereof, and the winding up of the business must be by three trustees; in such a case a bill for an account and a receiver cannot be sustained. *Tindel v. Park*, 154 P. S. 36.

51. Where liquidating trustees of a joint stock company are also members of the association, and they purchase the property of the association and secure the purchase money by a bond and mortgage payable when certain litigation between themselves and another member shall be finally determined, such trustees are liable for interest on the whole amount of the purchase money. *Jennings's Case*, 157 P. S. 630.

52. Liquidating trustees are entitled to credit for salaries paid to persons employed in the management and care of the business, and they are also entitled to compensation for their services as trustees. *Jennings's Case*, 157 P. S. 630.

53. The only legal method of prolonging the existence of a joint stock company after the time limited in the articles is by executing new articles; where the business is continued by a parol agreement among the partners, it becomes a common law or unlimited partnership. Where one of the partners died after the original term had expired and the business was continued by another of the partners; it was *held*, that the latter had no authority to bind the association by confession of judgments, and that the partnership could only be wound up by the election of three liquidating trustees in accordance with the act 10 May 1889 (Brightly's Purdon 1088). It is very doubtful whether a partner can bind the company by a confession of judgment even during the existence of the associa-

tion, but he surely cannot do so after the association has been dissolved, and whether the partnership be limited or unlimited. *Eichelberger v. Woltman*, 7 York 85.

XII. Insolvency.

54. A joint stock company having given a mortgage to secure an indebtedness, and then made an assignment for creditors, the court refused to restrain the sale of the property under the mortgage at the suit of the assignee. *Fisher's Appeal*, 14 Atl. 225; s. c. 12 Cent. 678.

55. Upon an assignment for creditors by a joint stock company, a member of the company may claim as a creditor, and is entitled to receive his *pro rata* share of the fund with the other creditors. *Globe Refining Co.'s Estate*, 151 P. S. 558.

56. Upon the distribution of the proceeds of real estate of a joint stock company, and a contest between judgment creditors, it was *held*, that the company did not acquire title until the execution and delivery of a deed from the grantor (a married woman), as required by statute. *Gardner v. Meadville Glass Works*, 8 C. C. 199.

57. Stockholders of a joint stock company may at a meeting, duly called and held, direct the chairman and secretary to make an assignment for the benefit of creditors; such an assignment was *held* to be legal without a formal authorization by the board of managers; and this, though the by-laws provided that the board of managers should have entire control of the company's business. *Rodgers Printing Co. v. Santa Claus Co.*, 11 C. C. 529.

58. Equity has jurisdiction of a bill filed for the appointment of a receiver for a joint stock company. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

59. Where the members of a joint stock company acquiesced in its illegal organization for ten years, when some of them owing to increased hazards filed a

bill for a receiver; it was *held*, that this acquiescence did not estop them from setting up the illegal organization. *Frank v. Lewis Foundry & Machine Co.*, 41 P. L. J. 33.

JUDGES.

1. The act 4 May 1893 (Brightly's Purdon 320), constituting Lebanon county a separate judicial district, abolished the office of associate judge not learned in the law in that county, and in case of a vacancy the governor could fill the same only until that act went into effect. *Lebanon County Associate Judges*, 14 C. C. 145.

2. Where the president judge of a district is under no disability to hold the regular term but only to try a particular case, he cannot certify that case under the act 1 May 1861 (Brightly's Purdon 329) to any judge in the commonwealth, but he must transmit it to the nearest disinterested president judge, under the act 22 April 1856 (Brightly's Purdon 329); under the latter act the judge called in may try the single case at the regular term with the regular panel of jurors, and thus dispense with the delay, expense and machinery of a special court. *Comm'th v. White*, 161 P. S. 576.

3. Where a law judge of another district is called upon under the act 24 March 1887 (Brightly's Purdon 314), he may file his opinions in vacation disposing of pending motions for new trials; and this, although such motions be disposed of adversely to the wishes of the associate judges not learned in the law. *Korman's Application*, 162 P. S. 151.

4. Associate judges unlearned in the law may grant a liquor license notwithstanding the dissent of the president judge. *Branch's License*, 164 P. S. 427.

5. The associate judges have no power to strike off a judgment refusing a liquor license and to enter a different judgment without notice to the parties. *Kahrer's License*, 12 C. C. 12.

6. A judge is not required to take an

additional oath before entering upon the duty of selecting jurors. *Klemmer v. Mount Penn Gravity R. R. Co.*, 163 P. S. 521. *Comm'th v. Smith*, 12 Lanc. 337.

7. The expediency of jointly indicting prisoners is for the district attorney to determine and not for the judge. *Franklin's Appeal*, 163 P. S. 1.

8. A judge of the oyer and terminer and quarter sessions cannot, of his own motion, and without notice or hearing, make an adjudication of the office costs in certain cases at the previous session of the court, and file it "subject to the exception in writing by the respective officers concerned and hearing upon the same." *Franklin's Appeal*, 163 P. S. 1.

JUDGMENT.

See APPEAL AND ERROR: ASSIGNMENT: BOND: CERTIORARI: CRIMINAL LAW, XX.: EJECTMENT: ESTOPPEL: EVIDENCE, VI.: EXECUTION, XV.: FRAUDULENT JUDGMENTS: INTEREST: JURISDICTION: JUSTICES' COURTS: MECHANICS' LIENS: PRACTICE.

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X. Rule of *stare decisis*.

I. Entry and assignment of judgment.

(a) Entry of judgment.

1. A valid judgment, even for costs, cannot be entered by a divided court. *Nolde v. Madlem*, 5 Cent. 728. See *Madlem's Appeal*, 103 P. S. 584.

2. The words "I hereby confess judgment for the said amount" at the end of a note are sufficient authority for the attorney of the holder to enter up a judgment thereon. *James v. Crownover*, 6 Atlan. 42.

3. Under the act 24 February 1806 (Brightly's Purdon 1093), the prothonotary will not be compelled by mandamus to enter one judgment on several judgment notes for one fee. *Moyer v. Wren*, 9 C. C. 441.

4. Where an instrument is not technically assigned, as provided by the act of 28 May 1715 (Brightly's Purdon 224), judgment is properly entered thereon in the name of the payee to the use of the assignee. *Harris v. Berry*, 7 C. C. 239.

5. Where a judgment note is payable to "myself or bearer," judgment may be entered thereon by the bearers through their attorney. *Vietor v. Johnson*, 148 P. S. 583.

6. Where a note is payable to order with the warrant of attorney to confess judgment "in favor of the holder of the note," a judgment may be entered in favor of a subsequent holder. *Champlin v. Smith*, 164 P. S. 481.

7. The insertion in the body of a promissory note of the words "on default of payment I hereby confess judgment in the above amount" is sufficient to warrant the entry of a judgment by the prothonotary in case of default. *Burgunder v. Lederer*, 12 C. C. 222.

8. Where a judgment note was dated April 1st, 1888, and was payable one year after date and judgment was entered thereon in August, 1886; it was held, that it must be presumed that the note was delivered to the plaintiff as evidence of a then existing indebtedness payable in

future, and the warrant to confess judgment became operative at the pleasure of the payee immediately on delivery. *Volkenand v. Drum*, 143 P. S. 525; reversing s. c. 6 Kulp 153.

9. Where a bond is given conditioned for the payment of certain notes as they become due, judgment may be entered upon a warrant of attorney accompanying the bond, before the notes become due, but execution cannot issue until default is made in the payment of the notes. *Integrity Title Ins. Trust & Safe Deposit Co. v. Rau*, 153 P. S. 488.

10. A confession of judgment by a husband to his wife was held to be unconditional and authorized the entry of judgment by the prothonotary. *Richards v. Richards*, 135 P. S. 239; s. c. 26 W. N. C. 339.

11. The prothonotary may, under the act of 24 February 1806 (Brightly's Purdon 1093), enter judgment upon a bond payable in instalments and containing a confession of judgment for the amount unpaid, with indorsements of payments. Duties and powers of a prothonotary considered. *Whitney v. Hopkins*, 135 P. S. 246; s. c. 26 W. N. C. 337.

12. Where an instrument for the payment of money in instalments authorized the prothonotary to enter judgment for the amount of any instalment due and unpaid as fixed by the affidavit of the party of the first part; it was held, that the filing of an affidavit was a condition precedent without which the prothonotary had no authority to enter judgment; and it was further held, that the court had no authority to authorize an affidavit to be filed *nunc pro tunc*. *Koons v. Hendricks*, 6 Kulp 165; s. c. 4 Del. 423.

13. A judgment by confession against a partnership should show the names of all the partners and be indexed against all of them. *Gardner v. Austin*, 14 C. C. 549.

14. A power of attorney to confess judgment is not revoked by the subsequent insanity of the defendant; judgment may be entered thereon. *Spencer v. Reynolds*, 9 C. C. 249.

15. Upon the conviction of a licensee of a violation of the liquor laws, the district attorney should enter up judgment, by virtue of the warrant attached to the bond, against him and his sureties for the amount of the fine and costs imposed only; if judgment be entered for the full penal sum the court will strike it off for the excess, but the bond will stand for the use of all persons interested therein. *Comm'th v. Johnson*, 8 C. C. 378.

16. In entering a judgment against a married woman, a statement may be filed therewith showing the nature of the indebtedness for which the note was given. *Krumrine v. Bottorf*, 12 C. C. 67.

17. A mistake, in the entry of a judgment will not be corrected to the prejudice of subsequent lien creditors. *Stroudsburg Bank v. La Bar*, 7 C. C. 163.

18. In the absence of fraud, accident or mistake, parol evidence is not admissible to contradict a judgment note by proof that judgment was not to be entered upon it. *Lippincott v. Rittenhouse*, 9 Montg. 159; s. c. 5 Del. 343.

19. A judgment irregularly entered by the attorney and not taken in open court, as required by the rules of court, is voidable only at the instance of the defendant and cannot be attacked by a stranger in a collateral proceeding. *Brundred v. Egbert*, 164 P. S. 615.

20. It is not a fraud in law for an executor to confess a judgment for a *bona fide* debt, barred by the statute. *Woods v. Irwin*, 141 P. S. 278.

21. Under the act 2 August 1842 (Brightly's Purdon 1094), judgment may be entered against some of the defendants for want of a sufficient affidavit of defence, while a rule for judgment is discharged as to other defendants, but the liquidation of the judgment must be postponed until the final disposition of the case. *Campbell v. Floyd*, 153 P. S. 84; affirming s. c. 39 P. L. J. 253.

22. In an action against several persons on a joint debt, judgment cannot be entered against certain of the defendants

for want of a sufficient affidavit of defence, unless judgment be also entered against those of the defendants who have made no defence whatever. *Robinson v. Floyd*, 153 P. S. 98; reversing s. c. 39 P. L. J. 265. *Murland v. Floyd*, 153 P. S. 99.

23. A judgment for an amount admitted to be due in an affidavit of defence, taken in court, after notice of counsel, will not be reversed by the supreme court. *Colwell v. Wehrly*, 150 P. S. 523.

See PRACTICE.

(b) Attorneys' commissions.

24. The defendant will not be subjected to the payment of attorney's commissions in the absence of evidence of a demand before entering, and this rule applies although the note was left in the hands of an attorney, and before the entry the defendant was informed of that fact, and that if he desired to make payment he should call upon the attorney to do so. *Lindley v. Ross*, 137 P. S. 629.

25. Where real estate was subject to a mortgage, and the terre tenant being informed that payment was demanded, requested a statement which was rendered on August 30, and marked "good until September 11," and on September 6 a *scire facias* was issued, and on September 11 the terre tenant paid the debt and interest, the costs to be adjusted in the pending suit; it was held, that the mortgagee was not entitled to recover attorney's commissions provided for in the mortgage. *National Savings Ass'n v. Waters*, 141 P. S. 498.

26. An attorney's commissions in a judgment note are not costs, but a part of the plaintiff's claim. *Miller v. Miller*, 147 P. S. 548.

27. In a *scire facias sur mortgage*, a preliminary demand for payment is not necessary to entitle the plaintiff to recover his attorney's commissions, nor is it any defence that the amount of the mortgage was paid before execution. Where the mortgage was for fifteen thousand dollars and provided for five per cent commissions, the court allowed

two per cent. *Warwick Iron Co. v. Morton*, 148 P. S. 72; affirming s. c. 7 Montg. 87.

28. Upon the distribution of the proceeds of a sheriff's sale paid into court, a subsequent judgment creditor has no standing to contest the amount of attorney's commissions, included in a prior judgment. *Zug v. Searight*, 150 P. S. 506.

29. Upon an issue to determine the validity of a judgment note, where both parties acknowledged that the rate of the attorney's commission was inserted after the delivery of the note, the question as to who made the alteration was for the jury. *Martin v. Kline*, 157 P. S. 473.

30. The plaintiff in a judgment is entitled to stipulated attorney's commissions, though he himself be an attorney-at-law and collects the same. *Hook v. Montgomery*, 7 C. C. 268.

31. An attorney's commission for collection is subject to the equitable control of the court; where a judgment note for nine hundred dollars provided for a commission of ten per cent, and after the note was entered up the defendant obtained a rule to open the judgment, which was discharged, the court allowed an attorney fee of five per cent. *Salsburg v. Mack*, 11 C. C. 408.

32. An attorney's commission will be ordered to be paid where it is provided for in the body of the note and the execution is endorsed "five per cent attorney's commission"; and this, though the commission be not added into the stated amount for which judgment was entered. *Clarkson v. States*, 13 C. C. 56.

33. Upon a *scire facias sur mortgage* for one thousand dollars, it was held to be a good affidavit of defence that the defendant had tendered, subsequent to the filing of the *scire facias*, the amount of principal, interest and costs and two and one half per cent commission, which was refused on the ground that the plaintiff was entitled to five per cent, it being further alleged that the last semiannual interest was paid the day it was due and the mortgage was assigned to the plaintiff

two days afterwards, who issued the *scire facias*. *Teller v. Willett*, 31 W. N. C. 127.

34. In an action on a mortgage containing an attorney's commission clause, it is no ground for a new trial that the jury found for the plaintiff less the commission. *Krug v. Brandstaedter*, 6 York 155.

(c) Assignment of judgment.

35. The purchaser of a judgment has a right to rely on the record; he is not bound by an agreement between his assignor and the purchaser of a junior judgment against the same parties that the lien of the latter judgment shall be superior to the former. *Winton's Appeal*, 5 Atlan. 433.

36. A portion of a judgment against a municipality being assigned of record to a third person, the defendant paid the whole judgment to the plaintiff and the court refused to allow a mandamus for the portion assigned. A municipality is not bound to recognize an assignment of part of its obligation. *Schuck v. Pittsburgh*, 11 Atlan. 651.

37. The assignment of a judgment, if for a fair and honest consideration, need not set out the purposes to which the proceeds are to be devoted by the assignee. *First National Bank v. Ladd*, 126 P. S. 188.

38. The assignment of a judgment subject to a previous assignment of \$500 of it to a third person, makes the second assignee a trustee for the first to the extent of the \$500. *Ibid*.

39. Where the assignment of a judgment was absolute on its face, and the evidence of the parties was conflicting as to whether the assignment was merely made for collection; it was held, that the question whether the defendant held the money in trust for the plaintiff was properly for the jury. *Schwartz v. Heraker*, 140 P. S. 550.

40. An attorney at law has no implied authority to assign his client's judgment in consideration of the cancellation of his own individual obligation. *Bosler v. Searight*, 149 P. S. 241.

41. Where, after the entry of a judgment, portions of the land bound thereby were demised for oil and gas production, and upon the issue of an execution the grantees, under the act 22 April 1856 (Brightly's Purdon 1095), applied for an order on the plaintiff to sell first the unaliened land, or otherwise on payment of the judgment to assign the same, and the petitioners paid the money into court; it was *held*, that independently of the act 22 April 1856, the petitioner having paid the money into court in compliance with an order made at the plaintiff's instance, such payment was the equivalent of a payment to the plaintiff, and it was not error for the court to enter a final order for the assignment of the judgment to the petitioner. *Porter v. Vanderlin*, 146 P. S. 138.

42. Upon the assignment of a judgment which is a lien on real estate, a collateral parol agreement that the assignors were to receive a credit upon account of their indebtedness to the assignee is not within the statute of frauds. *Goldbeck v. Kensington Nat. Bank*, 147 P. S. 267; affirming s. c. 10 C. C. 97; 48 L. I. 76.

43. The transfer of a judgment by a husband to a wife at a time when the husband is out of debt is a valid gift; the consideration of natural love and affection will sustain it. *Reese v. Reese*, 157 P. S. 200.

44. The assignees of different portions of a judgment can only recover or collect the judgment on the original plaintiff's title and in his name; where one of several assignees has issued a *scire facias* to revive and is then paid the amount of his claim, another of the assignees may assess his damages upon the writ thus issued without issuing a separate writ. *Ernst's Estate*, 164 P. S. 87.

45. Where different portions of a judgment have been assigned to different persons, any one of them has the right to use the legal name of the plaintiff to revive it, and when the writ is issued by one, it is for the benefit of all; if the

scire facias recites the name of the legal plaintiff and defendant, the number and term of the judgment and its date and amount, the renewal is valid; and this, although the names of the use plaintiffs are not recited in the writ. *Ernst's Estate*, 164 P. S. 87.

46. A defendant, without notice of the assignment of a judgment, is justified in paying it to the plaintiff of record. *Cowden v. McClelland*, 4 Montg. 133.

47. The plaintiff will be restrained by injunction from proceeding to execution upon the complaint of one who has purchased the judgment from him by parol. *Jamison v. Dech*, 1 Northam. 98.

48. Where a wife holds a judgment against her husband, her assignment to her husband's creditor as collateral for his debt is valid, upon proof of her husband's oral assent thereto. *Jones v. Jones*, 2 Northam. 341; s. c. 4 Del. 396.

49. Where the vendee of a house and lot gave in part payment a judgment against a third party; it was *held*, that the vendor and assignee of the judgment had no recourse against the vendee because of the existence of a prior judgment against the defendant; it was the duty of the assignee to have discovered the existence of such prior judgment. *Hildebrand's Estate*, 3 York 191.

50. Upon the assignment of a usurious judgment, there is an implied agreement in law that the judgment is a valid one for the amount shown on its face, and the assignee may recover from the assignor the amount of usurious interest which had been paid on the judgment. *Hildebrand's Estate*, 3 York 191.

51. Where a subsequent lien creditor has paid a prior judgment under a legitimate effort to protect his interests, his right to subrogation is clear; but where the prior judgment creditor has issued execution, the court will not compel him to accept payment from a subsequent lien creditor, and to assign his judgment to him. *Blick v. Weller*, 3 York 206.

II. Transfer of judgments.

(a) To another county.

52. The court of the county to which a judgment is transferred has no power over it save for purposes of lien and execution; it may, however, pass upon the regularity of its process thereon. *Nelson v. Guffey*, 131 P. S. 273; reversing s. c. 37 P. L. J. 65.

53. No *testatum fieri facias* can issue upon a judgment entered upon an exemplification from another county, nor upon a judgment of revival thereon. *Ibid.*

54. The court of a county to which a judgment is transferred having full power to set aside a *testatum fieri facias* improperly issued thereon, it is error for the court of the county to which the writ is directed to enjoin the plaintiff from procuring its enforcement. *Ibid.*

55. The court to which a judgment is removed has no power over it except for purposes of execution. *Brown v. Belles*, 6 Kulp 15.

56. Though a judgment in one county has lost its lien as to realty there, it may, upon exemplification, be transferred to another county, and entered of record, judgment taken, damages assessed, and execution had against personalty. *Homberger v. Whitely*, 12 C. C. 10.

57. Where a judgment was obtained before a justice in Sullivan county against a non-resident, and a transcript of the same was entered before a justice in Schuylkill county; it was *held*, upon *certiorari* to the latter judgment, that the common pleas of Schuylkill had power to inquire into the validity of the original judgment. *Rea v. Titman*, 14 C. C. 651.

58. Although a court cannot directly review the judgment of a justice rendered outside of its jurisdiction, yet when a transcript of such a judgment is delivered to a justice within the jurisdiction, and judgment is entered thereon, a writ of *certiorari* will lie to the latter; and if it be found that the original judgment is void, the latter judgment will be reversed.

Montgomery v. Souder, 8 Lanc. 185. See *Worst v. Souder*, 8 Lanc. 187.

(b) Of a justice's transcript.

59. A judgment entered upon a transcript is superseded by an appeal duly taken, perfected and filed within twenty days from the date of the original judgment. *Malinoski v. Gorski*, 6 Kulp 210.

60. There is no authority for the entry of a justice's transcript except in the county where the original judgment was obtained; such a judgment entered in another county will be stricken off. *Bowman v. Silvus*, 6 Kulp 496.

61. Where the transcript of a justice fails to show how a personal service of the summons was made, the judgment is not void but voidable and can only be impeached by direct proceedings. *Cockley v. Rehr*, 12 C. C. 343.

62. The court cannot amend a justice's transcript filed as a lien, so as to change the defendant's name. *Koehler v. O'Donald*, 2 Northam. 315; *Bachman v. Keiper*, *Ibid.* 316.

63. An execution issued upon a transcript of a justice without a previous execution before the justice and a return of *nulla bona* is not void, but voidable; it is an irregularity of which the defendant alone can take advantage. *Stroudsburg Bank v. La Bar*, 7 C. C. 163.

64. An attachment execution may, under the act 9 May 1889 (Brightly's Purdon 1144), be issued on a justice's transcript of a judgment for one hundred dollars or upwards, although the same be not filed in the common pleas until ten years after the judgment was rendered and no return of *nulla bona* has been made to the justice. *Miller v. Stone*, 14 C. C. 352.

65. An attachment execution cannot issue upon the transcript of a justice's judgment more than five years old, without a revival. *Pysher v. Pysher*, 2 Northam. 233.

66. The court cannot open a judgment entered upon a transcript, but where it appears to be void on its face, such a

judgment may be stricken off. *Ward v. Fannon*, 7 Kulp 488. *Cockley v. Rehr*, 12 C. C. 343.

67. The common pleas has no jurisdiction to open a judgment entered on a transcript and to let the defendant into a defence; and this, though the statute of limitations would be an effective plea. *Brendle v. Gorley*, 14 C. C. 113. See s. c. 13 C. C. 654.

68. The common pleas has no power to open a judgment entered on the transcript of a justice; the act 23 March 1877 (Brightly's Purdon 437), authorizing taxpayers to become parties to suits against municipal corporations, does not give the common pleas the right to inquire into the validity of a judgment recovered before a magistrate, upon the petition of a taxpayer. *Driscoll v. Chester*, 5 Del. 387.

69. If the filed transcript of a justice's judgment be void upon its face, the court should on motion strike it from its records. *McKinney v. Brown*, 130 P. S. 365.

70. Where an appeal has been entered from the judgment of a justice, a transcript of the judgment filed in the common pleas will be stricken off. *Rubinsky v. Patrick*, 13 C. C. 262.

71. Where a judgment entered in the common pleas upon a justice's transcript is void on its face for want of jurisdiction, it will be stricken off on motion, and the court has no authority to permit the transcript to be amended. *Klinger v. Koons*, 13 C. C. 641.

72. Where a judgment is taken before a justice by default and the record does not show that the constable was sworn to his return, a transcript of the judgment entered in the common pleas will be stricken off. *Couch v. Heffron*, 15 C. C. 636.

73. Where the judgment of a justice is void for want of jurisdiction, neither time nor knowledge of its existence will prevent a transcript of the same being stricken from the record of the common pleas. *Couch v. Heffron*, 15 C. C. 636.

74. A transcript of a justice's judgment will be stricken off where an appeal has been entered within the time limited by law; and this, although the bail on the appeal be defective. *Shugar v. Mumford*, 1 Dist. Rep. 324.

75. Where the transcript of a justice's judgment shows a return by the constable and a personal service, yet fails to disclose that the return was made under oath, a judgment by default entered by the justice is void and the transcript will be stricken off. *Knoblauch v. Heffron*, 3 Dist. Rep. 765.

76. Upon a motion to strike off a judgment entered on a justice's transcript, where it appeared that suit was brought against three persons, and that only one appeared and the justice entered judgment for plaintiff and against defendants, the same being by default as against two; it was held, that the record showed a good judgment against the one who appeared and the court refused to strike it off. *Coolbaugh v. Huether*, 6 Kulp 209.

77. Upon a rule to strike off a judgment entered on a justice's transcript, where the record of the justice does not show the date of the return of service, it will, in the absence of affirmative proof to the contrary, be presumed that the summons was returned before the hearing of the case. *Shea v. Plains Township*, 7 Kulp 554.

78. Where a transcript of a justice's judgment is void upon its face, it will be stricken from the records of the court; where the record did not show any appearance at the hearing, or that any evidence had been taken and the judgment was entered by default, the court struck off the judgment although the defendant had been guilty of gross laches in not applying for relief for more than ten years. *Stanton v. Groff*, 10 Lanc. 68; s. c. 5 Del. 206.

79. Where a justice's transcript showed that the plaintiff had not personally appeared before the justice, but had merely sent his affidavit and the justice had refused a continuance to enable the

defendant to employ counsel, the court refused to strike off the judgment where the defendant had not taken an appeal or *certiorari* in time. *Johns v. Humphreville*, 11 Lanc. 180; s. c. 5 Del. 474.

80. The transcript of a justice's judgment will not be stricken off because it was not entered until thirteen years after judgment. *Pysher v. Pysher*, 2 Northam. 233.

81. Where it appears that a judgment has been entered upon a justice's transcript and that the defendant is a married woman, the court will allow a writ of *certiorari* to bring up the record and stay proceedings upon an execution issued upon the transcript pending the decision of the *certiorari*. *Davidson v. McWilliams*, 4 Del. 456.

82. Prior to the act 3 June 1887 (P. L. 332), where a justice gave a judgment against a married woman and his docket did not show a binding cause of action against her; it was *held*, that the judgment was void and that a transcript filed in the common pleas would be stricken off. *Rice v. Foy*, 2 Lack. Jur. 419. See *Foy v. Rice*, 3 Lack. Jur. 17.

83. The transcript of a justice's judgment against a married woman, which does not show affirmatively her liability under the statute, will be stricken off. *Royer v. Wolf*, 7 Lanc. 315.

84. Where a judgment is entered on a justice's transcript, and it is shown that the defendant was a married woman when the judgment was given, and the transcript does not show that the cause of action is such as would render a married woman liable, the judgment will be stricken off. *Barney v. Fahs*, 8 Lanc. 193; s. c. 4 Del. 442. See *Davidson v. McWilliams*, 4 Del. 456.

85. Where a transcript of a judgment before a justice against a husband and wife did not show that the debt was contracted by the wife or incurred for anything for which she could bind herself, and it appeared that the copy of the summons for the husband was left with the wife without setting forth his absence

from home, the judgment as to the wife was stricken off, but the court *held*, that the judgment as to the husband was at most only irregular or voidable and was conclusive until reversed by legal proceedings. *Dornes v. Staley*, 10 Lanc. 89. See *Shreiner v. Dommel*, 10 Lanc. 90.

86. Where a married woman confessed judgment before a justice and a transcript was entered in the common pleas, the court refused to strike off the judgment although the record showed her coverture and did not show her liability. *Shreiner v. Walker*, 11 Lanc. 318.

See HUSBAND AND WIFE, IV. (4).

JUDGMENT, IV. (a) (8).

JUDGMENT, IV. (b) (4).

III. Effect of a judgment.

87. A debtor in failing circumstances may prefer his creditors, by confession of judgment, as he sees fit. In giving several judgments to his attorney to be entered up, he may prefer his attorney's judgment to the others. *Harris's Appeal*, 5 Cent. 553.

88. A sheriff's sale under a judgment for want of an appearance against an executrix and devisee upon a *scire facias* to revive a judgment against the decedent is not rendered invalid by a subsequent inquisition in lunacy finding that she had been a lunatic for four or five years previously. *Shannon v. Newton*, 132 P. S. 375; affirming s. c. 5 Montg. 167.

89. A judgment for want of an affidavit of defence is not void, though the instrument filed be not within the rule of court; it is but voidable. *Clarion, Mahoning and Pittsburgh Railroad Co. v. Hamilton*, 127 P. S. 1.

90. A debt or claim not in judgment cannot be set off against a judgment; nor a claim due by a third person. *Cowden v. McClelland*, 4 Montg. 133.

91. The plaintiff in a judgment against a decedent is not bound by an agreement among the latter's heirs, upon partition, that each shall pay an equal part. *Wood v. Codding*, 134 P. S. 91.

IV. Opening and striking off judgments.

(a) Opening judgments.

(1) When a judgment will be opened.

92. A judgment entered on a note was properly opened where the petition averred payment and the use plaintiff denied the allegations of the petition, but the depositions showed a conflict of testimony as to the question of payment. *Hunter v. Mahoney*, 148 P. S. 232.

93. An accommodation judgment note under seal when given without restriction may be pledged to secure an antecedent debt of the payee, but where the payee has received it with the restriction that he use it to obtain a loan, he cannot pledge it for an antecedent debt, and a judgment entered thereon will be opened. *Altoona Second Nat. Bank v. Dunn*, 151 P. S. 228.

94. A judgment on a *scire facias sur* mortgage will be opened upon the proof of payments to the plaintiff's assignor where, though the evidence was sufficient to put the defendant on inquiry as to plaintiff's title, yet there was evidence which made it a question for the jury whether the plaintiff knowingly or negligently permitted the assignor to act so as to mislead the defendant to suppose that the assignor had authority to receive the payments. *Fisher v. O'Donnell*, 153 P. S. 619; reversing s. c. 9 Lanc. 301.

95. Where, upon a rule to open judgment, it appeared that there was nothing due to the plaintiff when the judgment was entered, that the plaintiff had assigned the judgment on condition that the assignee should collect the same and account to the plaintiff after deducting fees and expenses, and subsequently plaintiff revoked the authority of the assignee; it was *held*, that the judgment would be opened and an issue awarded to determine how much was equitably due to the assignee, and in such issue, the burden was on the assignee to show the amount of his expenses, that they were proper in nature and amount, and that they had

been incurred in good faith before he was notified that his power had been revoked. *Vanderpool v. Vanderpool*, 162 P. S. 394.

96. Where a judgment was entered on a warrant of attorney of an illiterate woman nearly seventy years of age, and she denied that she had ever signed the note, and averred that she had never had any transaction with the plaintiff whereby she became liable to him for any sum whatever, and she further averred that she had loaned the plaintiff five hundred dollars, for which he gave her a judgment note, and it appeared that though the plaintiff averred that he had loaned the money and had paid his own note on a certain date, yet in a letter of a subsequent date addressed to the defendant's daughter, he had requested her to send him the note for five hundred dollars, as he desired to pay some money on it; it was *held*, on appeal, that the court should have opened the judgment. *Steiner v. Scholl*, 163 P. S. 465.

97. A father devised to his daughter a mill property, which he had previously conveyed to her. His executors entered up a bond and warrant for the purchase money, which they found among his papers; as the enforcement of the judgment would principally disinherit the daughter, the judgment was opened and an issue directed to hear testimony *dehors* the will in order to establish its intent. *Dutton v. Suplee*, 8 C. C. 92.

98. A judgment for want of an affidavit of defence will be opened on terms where it appears that the defendant was out of the county and could not have been reached in time to enable him to make defence. *Kunes v. McCloskey*, 10 C. C. 542.

99. A judgment will be opened where the testimony discloses such a state of facts as would move a chancellor to decree the note to be void or to be reformed because of fraud or forgery. *Silverman v. Shulausky*, 16 C. C. 131.

100. A judgment given by a father to a son without consideration will be

opened where there is any evidence of imposition or undue influence. *Brehony v. Brehony*, 5 Kulp 266.

101. A judgment for the purchase money of a bottling business will be opened on evidence of false representations as to the number of boxes filled with bottles in the hands of customers. *Volkenand v. Drum*, 5 Kulp 267; s. c. 4 Del. 36. See s. c. 4 Kulp 523. See *Volkenand v. Drum*, 143 P. S. 525.

102. The court may, in an extreme case, open a judgment on an award of arbitrators. *Kase v. Danville, Hazleton & W. B. Railroad Co.*, 5 Kulp 537.

103. The alteration of the individual judgment note of a partner, by the subsequent signature of his co-partner, and the words "trading as, etc.," is a material alteration, and a judgment entered thereon against the firm will be opened at the instance of the original maker. *Kocher v. Schoener*, 6 Kulp 41.

104. Upon a rule to open a judgment entered upon a judgment note, where three disinterested witnesses testified that the signature of the defendant was not genuine, and the plaintiff offered no evidence, the judgment was opened. *Peters v. McDonald*, 7 Kulp 308.

105. A judgment will be opened where the credibility of witnesses is involved, and there is more than one oath against oath, and the court is in doubt about the facts. *Armbrust v. Kennedy*, 7 Kulp 520.

106. A judgment will be opened where it appears that an appeal from a justice's judgment on the same instrument is pending, and that the defendant has complied with the conditions of the bond. *Rosso v. Maresco*, 1 Lack. Jur. 414.

107. The signature by a mark to a judgment note without a subscribing witness may be proved; but if denied under oath by the alleged maker, the judgment entered thereon will be opened. *Burrows v. Davis*, 6 Lanc. 398.

108. A judgment for want of an affidavit of defence, caused by neglect of defendant's counsel, will be opened where

a clear defence is disclosed by the depositions. *Keenan v. Dugan*, 6 Lanc. 408.

109. Where it appeared that the judgment was entered on a judgment note given by the agent of a manufacturer of mowing machines to his principal for unsold machines, the court opened the judgment upon evidence that the plaintiff subsequently took away the machine from the defendant's warehouse; and this, although the plaintiff claimed to have given the defendant full credit for the machine on the note filed and others. *Morgan v. Stoner*, 12 Lanc. 164.

110. The court will open a judgment where the preponderance of the testimony is that the defendant was to be credited thereon with certain services rendered. *Meredith v. Streeper*, 4 Montg. 187.

111. Where the defendant testified that the note in suit was a forgery, and the plaintiffs made no answer, the court opened the judgment. *Albertson v. Hayden*, 5 Montg. 154.

112. If the consideration of a judgment be twofold, usury for forbearance in not pressing a debt, and a release from a certain contract, the judgment will be opened to ascertain the proportion which was for forbearance. *Scott v. Harper*, 5 Montg. 143.

113. A judgment entered on a note will be opened where it appears that it was given at a time at which the maker has been subsequently found to have been insane; and this, although the judgment plaintiff was not a party to the proceedings in lunacy. *Glass v. Hillary*, 30 W. N. C. 258.

114. Where it appeared that the defendant signed the note when he was on a drunken spree, and he testified that he had no knowledge of signing the note, and the plaintiff was unable to show clearly the defendant's indebtedness; it was held, that the judgment should be opened, and the case sent to a jury. *Marshall v. Hale*, 4 York 6.

115. Where the original judgment was upon a note given by a weak and igno-

rant man, threatened with arrest for felony, though no felony had been committed, and the judgment had been revived by default, the court opened the judgment, even after the lapse of thirteen years and the making of two payments on account. *Brumbaugh v. Fink*, 5 York 98.

116. A judgment entered on a judgment note will be opened where it appears that the defendant is an illiterate person and that the note had been falsely read to him, and he had been induced to sign it by a trick or fraud practised upon him by the party obtaining the writing. *Oleviler v. Rupp*, 7 York 134.

117. A judgment was opened where the defendant swore that his signature was a forgery, and a comparison of the defendant's signature with admitted signatures showed an apparent difference in the handwriting, and the witness for plaintiff, who testified that he saw the defendant sign the note, contradicted himself as to what notes he saw signed. *Osborne v. Snyder*, 8 York 3.

118. Where a judgment note was given by a husband to a trustee for his wife for borrowed money and was payable one day after date, and the wife lived with her husband seventeen years after the date of the note, and the wife's declarations were proven that she did not claim interest, the supreme court refused to reverse a decree of the court opening the judgment entered after the wife's death with interest, and directing an issue to try how much was due on the note. *Beaver v. Slear*, 168 P. S. 466.

(2) When a judgment will not be opened.

119. Pending a *scire facias* to revive a judgment entered thirteen years before, it is not error to refuse to open the judgment upon an allegation of payment and to permit the defence to be made on the trial of the *scire facias*. *Richards's Appeal*, 127 P. S. 63.

120. A judgment on a bond given in settlement of a prosecution for fornication and bastardy will not be opened

on an averment that it was executed while the defendant was in prison, that he was innocent, that no living child had been born of the obligee, who had died unmarried and without issue. The duress was one of law. *Pflaum v. McClintock*, 130 P. S. 369.

121. A bond and warrant given for the purpose of obtaining money upon it resembles accommodation paper; want of consideration cannot be set up against it even though the holder knew that it was made for the accommodation of the payee. *Weigley v. Conrade*, 132 P. S. 147; s. c. 25 W. N. C. 285.

122. A rule to open a judgment at the instance of a subsequent creditor will be discharged as a matter of course. The proper practice is to apply for a rule on the plaintiff and sheriff to show cause why the money produced by the sheriff's sale should not be paid into court, and dispute the validity of the judgment before an auditor or apply for an issue to be tried in court. Under the act 16 June 1836 (Brightly's Purdon 854), the right to an issue is not a matter of right; an issue will be refused where the application is resisted and sustained by depositions which are sufficient. *Moore v. Dunn*, 147 P. S. 359; affirming s. c. 10 C. C. 79. As to the proper practice in such cases see the opinion of Arnold, J., in this case.

123. Where a certificate of the balance due by a collector of school taxes was filed by the board under sec. 13 of the act 11 April 1862 (Brightly's Purdon 338), and judgment entered for the amount against the collector and his sureties; it was held, that there was no power given to the court to open the judgment, and that the fact that the collector had not been furnished with a warrant when the duplicate was placed in his hands, gave him no equity to require the court to open the judgment. *Comm'th v. Titman*, 148 P. S. 168.

124. There is no authority for opening a judgment of non-suit. A motion should be made to take it off, and upon a refusal

to take it off, the plaintiff should except to such refusal; otherwise, no appeal will lie. *Harvey v. Pollock*, 148 P. S. 534.

125. A declaration by the maker of a judgment note to an intended purchaser, that it is good and will be paid, followed by an offer to pay the holder about the time of its maturity, will operate to estop the maker from instituting proceedings to open the judgment. *Humphrey v. Tozier*, 154 P. S. 410.

126. A mortgagor against whose land a judgment has been entered upon a *scire facias*, cannot, after the land has been sold at a judicial sale, have the judgment opened on the ground of usury, where the mortgagee offers to file a paper renouncing and relinquishing all right to sue and to recover a judgment upon the bond accompanying the mortgage. *Reap v. Battle*, 155 P. S. 265; affirming s. c. 6 Kulp 423.

127. Where a farm was conveyed by a father to a son and notes were given to the father in favor of a brother and sister, but the father retained possession of the notes; it was *held*, upon a rule to open judgments entered on the said notes after the death of the father, where the defendant contended that the conveyance of the farm was intended merely as an advancement, and that the judgments did not represent any indebtedness, that the evidence was insufficient to sustain the contention. *Doty v. Doty*, 155 P. S. 285.

128. The court refused to open a judgment on the ground that the plaintiff and defendant were partners, and that a settlement had been made between them showing that the plaintiff was indebted to the defendant for more than the amount of the judgment, where the evidence to establish such a settlement was *held* to be insufficient. *Seaton v. Shaner*, 158 P. S. 69.

129. A judgment will not be opened on the ground that the bond was given to compound a felony, where the evidence shows that there was no actual agreement not to prosecute, and that the obligor, although charged with a felony, did not

actually commit it. *Woelfel v. Hammer*, 159 P. S. 446. See s. c. 159 P. S. 448.

130. Where several purchasers of a store, by direction of the vendor and as part of the consideration, gave a judgment note to a creditor of the vendor, certain of the obligors cannot allege as a ground for opening the judgment that they joined in the purchase for the purpose of helping a third party who formerly owned the store and who agreed to run it and pay the note. *Mingle v. Rossman*, 161 P. S. 366. See *Krumrine v. Grenoble*, 165 P. S. 98.

131. Under the retail license act 13 May 1887 (Brightly's Purdon 1226), a contract between a brewer and an applicant for a retail license by which the brewer furnishes the capital and is to be paid by instalments, is not invalid, and a judgment confessed for the capital so furnished will not be opened. *German-town Brewing Co. v. Booth*, 162 P. S. 100; reversing s. c. 14 C. C. 189.

132. Where a mortgage is executed to secure negotiable promissory notes and it is assigned to innocent holders of the notes for value before maturity and without notice of any defence, a judgment entered upon the mortgage will not be opened on the ground that the consideration for the notes has failed. *Welton v. Littlejohn*, 163 P. S. 205.

133. Where a note is given on Sunday and contains a confession of judgment, the court will not open the judgment because confessed on that day. *Lee v. Drake*, 10 C. C. 276.

134. Upon a rule to open a judgment, where it appeared that it was confessed to a life tenant of several promissory notes or their proceeds, and who yielded up the notes upon the delivery of the judgment; it was *held*, that the agreement was based upon a sufficient consideration and the judgment would not be opened. *Woodring v. Woodring*, 11 C. C. 603.

135. Where execution was issued upon a judgment without waiver, and before the writ was returned execution was issued

upon another judgment with waiver between the same parties, made up in part of the same debt, the court refused to open the latter judgment or to set aside the execution thereon. *McHugh v. McHugh*, 12 C. C. 380.

136. A judgment in ejectment under a lease will not be opened at the instance of a third party claiming title to the property and claiming that the tenant is in possession under him and not under the plaintiff, where it appears that there had been three actions of ejectment between the plaintiff and such third person, two of which were determined in favor of the plaintiff and one of which is still pending. *McLaughlin v. Zeidler*, 13 C. C. 47.

137. A judgment against a garnishee will not be opened upon the application of a third party, who gave notice to the garnishee that the money in its hands belonged to him and not to the defendant in the execution. *Shultz v. Hoffman*, 13 C. C. 90.

138. Where, upon a rule to open judgment, the testimony of the maker and subscribing witness of a judgment note containing a waiver of exemption showed that the maker intended to make a plain judgment note; that he was an illiterate man and that it was represented to him to be a plain judgment note; the court refused to open the judgment but struck the waiver of exemption from the record. *Brewing Co. v. Keziah*, 5 Del. 11.

139. A judgment will not be opened to admit a defence based on an agreement not connected with the judgment or the consideration on which it rests. *Huldreth v. Davis*, 6 Kulp 322.

140. Where a judgment note was given for two thousand cigars and a safe, and the safe was not to become the property of the defendant unless he paid the note promptly when it became due, and the defendant did not pay the note when it became due and the plaintiff took the safe away, the court refused to open the judgment; the contract was in effect an agreement that the defendant should have the

whole property for a certain price if the purchase money should be paid punctually, but that if it should not be so paid, he should have less property for the price. *Turner v. Smith*, 7 Kulp 139.

141. The court will not open a judgment to enforce a parol agreement to accept a conveyance of land in satisfaction. *Linen v. Sweeney*, 1 Lack. Jur. 196.

142. A judgment for want of an appearance will not be opened upon the mere suggestion that the case involves important questions of law; the default must be excused and a defence shown. *Boies v. Scranton*, 1 Lack. Jur. 204.

143. A judgment will not be opened because of the mere fact that it was entered in the name of the "Peach Bottom School District" instead of "School District of Peach Bottom." *Peach Bottom School District v. Swagert*, 2 York 9.

144. A judgment will not be opened on the allegation that plaintiff is indebted to defendant on a partnership account. *Arndt v. Woodring*, 4 Del. 221.

145. A confessed judgment will not be opened to let in evidence of a set-off against it. *Sweet v. Clark*, 1 Lack. Jur. 124.

146. A judgment by confession will not be opened upon an unsupported allegation that a book account is to be set off against the judgment; the defalcation act does not apply to a judgment entered by confession. *Clark v. Clark*, 2 Lack. Jur. 249.

147. A judgment will not be opened merely upon proof that the defendant has an account against the plaintiff which is equal to the amount of the judgment. *Croop v. Dodson*, 7 Kulp 13.

148. Where the wife of a defendant was separated from him and petitioned to open the judgment against him on the ground that it was collusively confessed for the purpose of depriving her of her dower; it was held, that the judgment would not be opened, but that the proper practice was to direct an issue to determine the validity of the judgment as against the wife. *Taylor v. Neff*, 9 York 5.

(3) *Laches.*

149. A delay of two months in making application to open a judgment will not bar the defendant, where it appears that the suit was pending for three years before the plaintiff became urgent for judgment. *Fisher v. O'Donnell*, 153 P. S. 619; reversing s. c. 9 Lanc. 301.

150. Where defendants in ejectment appeared *in propria persona* and filed a plea, but failed to serve a copy on the plaintiff, whereupon judgment was taken against them and execution issued and duly executed, the court refused to open the judgment and let the defendant into a defence, where the application was made several months afterwards and no good excuse or meritorious defence was shown. *Letchworth v. Bunting*, 12 C. C. 587.

151. Where a defendant had not authorized an attorney to enter judgment for him, but he had actual knowledge that service had been accepted by the attorney and that judgment had been entered by default; it was *held*, that he would not be permitted after the lapse of ten years to disavow the action of the attorney and have the judgment opened. *Lytle v. Forrest*, 4 Dist. Rep. 292.

152. A judgment for want of an affidavit of defence will not be opened after the lapse of eighteen months, unless the depositions show a clear and meritorious defence. *Ware v. Baldwin*, 7 Kulp 278.

153. If the objections to a judgment are meritorious, the court will not refuse to open it for mere delay in presenting the petition. *Steckel v. Steyer*, 1 Northam. 363.

154. Upon a rule to open judgment, long delay in making the application is a very strong circumstance against the petitioner and calls for clear proof on his part. *Nace v. Cole*, 3 Northam. 77.

(4) *Burden of proof.*

155. Upon a rule to open a judgment, the burden of proof is on the defendant to establish a defence. *Roeningk's Appeal*, 2 Cent. 68; *Vogely's Appeal*, 15 Atlan. 878.

156. Upon the opening of a judgment entered on a bond and warrant, if fraud be raised as a defence, it must be affirmatively and positively proved. *Hipps v. Wardle*, 1 Atlan. 727.

157. Upon an application to open a judgment, where the plaintiff makes a full and responsive answer under oath denying the defendant's allegations, the burden of proof is thrown upon the defendant. *Markle v. Fichter*, 7 Kulp 549.

158. Upon a rule to open a judgment, the presumption is in favor of the soundness of the judgment; it will not be opened upon a mere conflict of testimony. *Herr v. Miller*, 12 Lanc. 238.

159. A judgment confessed to an attorney by his client will stand as security only for what is actually due, and on an allegation of fraud will be opened. The burden is on the attorney to establish its fairness. *Acker v. Lambert*, 4 Montg. 189.

160. In a contest between a plaintiff and a defendant in a judgment as to whether certain payments were made on it, the burden of proof is upon the party attempting to show such payments, and where the only evidence is that of the parties to the judgment who contradict each other, the credits cannot be allowed. *Fuhrman v. Fuhrman*, 2 York 169.

(5) *Sufficiency of evidence.*

161. Upon an application to open a judgment entered upon a warrant of attorney, the court has a right to pass upon the evidence; and this, though there be a conflict in the testimony filed by the parties. It is an equitable proceeding, addressed to the discretion of the court. *Applebee's Appeal*, 126 P. S. 385.

162. If the *prima facie* case created by the execution and delivery of a bond and mortgage be not overcome, the court may, in its discretion, refuse to open the judgment on the bond; and this, though there be conflicting evidence in the averment of fraud. *Lenare's Appeal*, 126 P. S. 400.

163. A judgment will not be opened on the unsupported oath of defendant,

which is directly contradicted by other testimony. *Rhine v. Swartley*, 16 Atlan. 846.

164. Upon a petition to open, if the oath of the petitioner is the only evidence and is contradicted by the oath of the plaintiff, the refusal to open will not be interfered with by the supreme court. *Barton's Appeal*, 5 Cent. 459.

165. A judgment will not be opened on the unsupported testimony of the defendant alleging fraud in the procurement of the note, which is opposed by the sworn testimony of the plaintiff. *Lomison v. Faust*, 145 P. S. 8.

166. A judgment will not be opened upon the uncorroborated testimony of the defendant, where the evidence of the plaintiff's agent, a disinterested witness, is a flat denial of the defendant's testimony and is supported by other evidence. *Christie v. Steelsmith*, 158 P. S. 117.

167. As a general rule a judgment should not be opened upon the defendant's oath alone when he is contradicted by the plaintiff; but where there are corroborative circumstances or circumstances from which inferences may be drawn corroborative of the defendant, it is proper to open the judgment and refer the question to the jury. *Stockwell v. Webster*, 160 P. S. 473.

168. A judgment will not be opened on the affidavit of defendant that the note was altered after he signed it, he being contradicted by the corroborated testimony of the plaintiff. *Bender v. Gabel*, 4 Del. 192.

169. Where the allegations of fraud set forth by the defendant upon a motion to open a judgment are all fully denied by the plaintiff and there are no corroborating circumstances, the judgment will not be opened. *Knode v. Cornman*, 6 Del. 113.

170. Where there is oath against oath, the court will discharge a rule to open the judgment. *Flosser v. Rhoades*, 6 Kulp 320; s. c. 4 Del. 600.

171. A judgment will not be opened upon the uncorroborated testimony of the

defendant which is positively contradicted by two witnesses. *Hildreth v. Davis*, 6 Kulp 336.

172. A judgment given for the purchase money of personal property will not be opened upon the oath of a defendant alleging a warranty, against the oath of a plaintiff denying it. *McNeal v. Banks*, 6 Kulp 371.

173. The court refused to open a judgment upon the uncorroborated testimony of the defendant that the note was a forgery, where such testimony was directly contradicted by that of the subscribing witness. *Turner v. Smith*, 7 Kulp 139.

174. A rule to open judgment will be discharged if the testimony of the defendant is uncorroborated and is contradicted by the plaintiff. *Keener v. Shank*, 7 Lanc. 339.

175. A judgment will not be opened upon the testimony of the defendant alone, where the same is denied by the plaintiff who is corroborated by other evidence. *Reger v. Williams*, 8 Montg. 87.

176. A judgment will not be opened where there is oath against oath, and the evidence of defendant as to payment is vague and indefinite. *Phipps v. Rapine*, 9 Montg. 109.

177. A judgment will not be opened on the unsupported testimony of the defendant directly opposed by the testimony of the plaintiff. *Klein v. Daney*, 3 Northam. 75; *Nace v. Cole*, 3 Northam. 77.

178. Upon a rule to open a judgment, where the petition is met by an answer denying some of the facts and demanding proof of the others, a decree making the rule absolute is irregular if the record does not show either that the petition was supported by proofs or that the plaintiff consented to a hearing without them. *Woods v. Irwin*, 141 P. S. 278.

179. A judgment will not be opened on the ground of alleged fraud upon the uncorroborated averment of the defendant, which is denied by the plaintiff in a sworn answer. *Tidioute & Tiona Oil Co. v. Shear*, 161 P. S. 508.

180. A judgment will not be opened where the answer of the plaintiff is responsive to the petition and denies under oath every allegation therein, unless such answer is overcome by the testimony of two witnesses, or of one witness corroborated by circumstances equivalent to another. *Hoffman v. Jacobs*, 12 Lane. 25.

181. In order to open a judgment by confession upon the ground of fraud in procuring the instrument, where no testimony denying the fraud is presented, it is not requisite that the charge of fraud be sustained by more than one witness. *Yost v. Mensch*, 141 P. S. 73.

182. Upon a rule to open judgment, where the defendant swears that he did not know that the note was a judgment note, but his testimony is discredited by the denial of the plaintiff and by three other witnesses, the court will be justified not only in disbelieving him upon that matter, but also in refusing to believe him as to other defences. *Fisher v. King*, 153 P. S. 3. See *Ives v. Snyder*, 7 Kulp 393.

183. A judgment entered upon a judgment note will not be opened until the same is overcome by testimony which, if believed, ought to move a chancellor to decree the note to be void or to be reformed because of forgery, fraud or mistake. *Mangan v. McHale*, 6 Kulp 459.

184. A judgment will not be opened where the testimony is conflicting and unsubstantial and infirm in character. *Rishel v. Crouse*, 162 P. S. 3.

185. Where a judgment has been voluntarily confessed, it will not be opened in the absence of strong evidence of fraud, accident or mistake incident to its execution. *Woodring v. Woodring*, 11 C. C. 603.

186. In order to set aside the judgment for fraud, the evidence must be clear, precise and indubitable; a judgment will not be opened where all the witnesses for the defendant are interested and uncorroborated except by one another, and the plaintiff's evidence is corroborated by disinterested witnesses and by

circumstances. *Markle v. Fichter*, 7 Kulp 549.

187. A rule to open a judgment will be discharged if, upon the testimony, the court would set aside the verdict for the defendant. *Ackerman v. Condroch*, 6 Kulp 226.

188. A judgment will not be opened where, upon all the facts and circumstances, the court would not sustain a verdict for the defendant. *Ives v. Snyder*, 7 Kulp 393.

189. Where the defendant had been adjudged an habitual drunkard for one year prior to the adjudication, and a judgment note was given within the year, the presumption arising from the adjudication was, on a rule to open, held to be overcome by the testimony of the plaintiff that the defendant was sober when he signed the note in suit; and this, though contradicted by the testimony of the defendant and one witness. *Donehoo's Appeal*, 15 Atlan. 924.

190. On a rule to open judgment on the ground of forgery, the preponderance of the testimony was held to be in favor of the validity of the note. *Es-sick's Appeal*, 1 Mona. 588.

(6) Judgments upon a lease.

191. If a judgment be confessed by counsel in ejectment under a warrant contained in a lease, and be regular on its face, a defence can only be set up on a rule to open; a rule to strike off is properly discharged. *Dakeman v. Butterfield*, 135 P. S. 236; *Richards v. Richards*, Ibid. 239; *Whitney v. Hopkins*, Ibid. 246.

192. The court will not open a judgment in ejectment entered upon a lease upon the allegation of a parol lease which would change the term, where the evidence of the lessee is not corroborated, but is contradicted by the lessor, and the time of the alleged parol agreement was when the lessee was already bound by the written lease for a further term of two years. *Gibson v. Vetter*, 162 P. S. 26.

193. Upon a warrant of attorney to

confess judgment in a lease for breach of covenants therein, where the facts are denied, the court will open the judgment and submit the disputed questions of fact to a jury. *Hughes v. Moody*, 10 C. C. 305.

(7) Judgments against married women.

194. Where a married woman had taken no appeal from the judgment of a justice; it was *held*, that she could not, after a delay of three years, and after a transcript had been filed in the common pleas, have the judgment opened to let her into a defence. *Littster v. Littster*, 151 P. S. 474.

195. Where a judgment was entered upon a bond executed by a married woman for her husband's debt, and to save the contents of his store from being sold by the sheriff, and it appeared that she was in no way interested in the store and was not originally liable for the debt; it was *held*, that the judgment was properly opened. *Harris v. Reinhard*, 165 P. S. 36.

196. Where a judgment was confessed by a woman who was married to a man who had a previous wife living, the court refused to open it, though the defendant did not know of the former marriage. *Hunt v. Cleveland*, 6 C. C. 592.

197. A judgment against a married woman must show on its face her liability; otherwise it is void and cannot be cured by collateral proof of the consideration. *Richey v. Carpenter*, 9 C. C. 106; s. c. 7 Lanc. 407.

198. Upon a rule to open a judgment, the defendant will be permitted to prove that she is a married woman if the record fails to show it, but the plaintiff will also be permitted to show that her husband has deserted her and that she is still liable under the acts 22 February 1718 and 4 May 1855 (Brightly's Purdon 903). *Krebs v. Clark*, 9 C. C. 420. See *McIntire v. Bimber*, 9 C. C. 463.

199. Upon a rule to strike off a judgment where the evidence is conflicting as to whether the judgment was given by a wife as a guaranty for her husband or was given for property used in the manage-

ment of her separate estate, the court will open the judgment for the purpose of taking testimony. *Guignon v. Covell*, 10 C. C. 195.

200. A judgment entered upon the judgment note of a married woman will not be opened although it does not, on its face, disclose sufficient ground to sustain a judgment against her where the statement, however, filed with the note, alleges a cause of action within the statute. *Glassmire v. Neill*, 10 C. C. 418.

See HUSBAND AND WIFE, IV., (k), (l).

(8) Justices' transcripts.

201. Where the transcript of a justice's judgment is filed in the common pleas as a lien, that court has no jurisdiction to open the judgment. *Littster v. Littster*, 151 P. S. 474.

202. A judgment upon the transcript of a justice will not be opened where it appears that the proceeding was carried on with the knowledge of the defendant, who contested it in some of its stages, and that the defendant had endeavored by fraud to elude execution. *Rohrbacker v. Schultz*, 10 C. C. 282.

203. The common pleas has no power to open or strike off a judgment entered as a lien on the transcript of a justice. *Cockley v. Rehr*, 12 C. C. 343.

(9) Plea of the statute of limitations.

204. A judgment should not be opened for the sole purpose of affording an opportunity to plead the statute of limitations to a defendant who has already had his day in court; such a plea is regarded as a dishonest defence, for which, alone, a judgment should never be opened. *Woods v. Irwin*, 141 P. S. 278.

205. Where creditors of a decedent do not allege fraud or collusion, they have no standing to ask that a judgment confessed by the executor be opened, on the ground that the debt was barred by the statute of limitations; and this, though the estate be insolvent. *Woods v. Irwin*, 141 P. S. 278.

206. It is within the discretion of the

court of common pleas to open a confessed judgment entered upon a judgment note not under seal for the purpose of permitting the statute of limitations to be pleaded thereto. *Bates v. Cullum*, 163 P. S. 234.

207. The signing of a judgment note opposite a place for a seal indicated by a printed blank and the letters "L. S." does not imply a seal, and where judgment is entered on such a note more than six years after its execution, the court will open the judgment to allow the plea of the statute of limitations. *Bennett v. Allen*, 10 C. C. 256.

208. If a judgment note show upon its face that it is barred by the statute, the judgment entered thereon will be opened to let in such a defence. *Wagner v. Hawley*, 5 Kulp 280.

(10) **Hearing — Evidence — Decree.**

209. Upon a rule to open a judgment confessed by one defendant in an action of tort, the non-confessing defendant has no right to be heard in opposition. *Williams v. Le Bar*, 2 Northam. 274. See s. c. 141 P. S. 149.

210. After a rule to open a judgment has been discharged, the court has power to grant a rehearing; and this, notwithstanding the term has ended. *Silverman v. Shulasky*, 16 C. C. 131.

211. Where a judgment note was given in Armstrong county in this state in a transaction arising there, and it was entered up in this county by use plaintiffs, in business here, and the defendant took a rule to open the judgment, and under said rule took another rule to take depositions in Armstrong county, the court refused to strike off the latter rule. *Hillman v. Rabbitt*, 12 C. C. 611.

212. Where judgment is entered on a judgment note executed in the name of two persons, it is doubtful, where one defendant is dead, whether the other defendant upon a rule to open the judgment is competent to testify that he did not sign the note and that it is a forgery. *Peters v. McDonald*, 7 Kulp 308.

213. Upon a rule to open a judgment, where it appears that there was no service of the writ, the court will not set aside the return of service, but will open the judgment and permit the defendant to file a plea in abatement to the jurisdiction. *Keyes v. Moorhead*, 11 C. C. 43.

214. Where the plaintiff's intestate collected rents and acted as agent for defendant in regard to his houses, and the plaintiff's intestate had entered up a judgment against the defendant for an indebtedness, and the defendant had moved to open the judgment and the parties had agreed that the court should ascertain the amount due to the plaintiff on the judgment; it was held, that the plaintiff could not charge to the defendant on such judgment money paid for extra work on the houses and money paid to the defendant for his own use. *Snively v. Throne*, 8 York 15.

215. Upon a rule to open a judgment and set aside an execution, where it appeared that execution had been issued for fifteen hundred dollars, although eight hundred dollars had been paid on the judgment, it was ordered that a credit of eight hundred dollars be entered on the record, and that the plaintiff pay the costs upon the *fieri facias* and the rule, and that when said credit was entered and costs paid, the rule be discharged. *Scott v. Scott*, 8 York 93.

(11) **Issue and trial.**

216. If a defendant, upon a rule to open, set up an agreement to release him, made since the judgment was entered, he is entitled to an issue to determine the question. *Brock v. Vockroth*, 1 Lack. Jur. 434.

217. Where an application is made to open a judgment on the ground that it has been paid, the proper practice is not to open the judgment, but to award an issue and allow a jury to determine whether the judgment has or has not been paid. *Lee v. Lindsay*, 13 C. C. 309.

218. Where a proceeding is instituted to open a judgment for matters outside

the record, an issue should be made up by a petition verified by affidavit with answer responsive thereto, and the testimony should be limited to the issue thus made up, and the court should state its reasons for the decree. *Fisher v. King*, 153 P. S. 3. See *Ives v. Snyder*, 7 Kulp 393.

219. Where a judgment is opened and an issue is framed to determine its validity, and several questions are to be determined by the issue, such questions should be incorporated in the order of the court, and the jury should be required to answer them separately. *Martin v. Kline*, 157 P. S. 473.

220. Where, upon the opening of several judgments, issues were awarded, and the issue in the case at bar had been tried five times, upon the discovery that no issue had actually been allowed in that case the court permitted an amendment of the record *nunc pro tunc* so as to include it. *Kittanning Insurance Co. v. Adams*, 10 Atlan. 895.

221. If a judgment be erroneously opened, all subsequent proceedings on the feigned issue will be set aside. *Weigley v. Conrade*, 132 P. S. 147; s. c. 25 W. N. C. 285.

222. If in an answer under oath to a rule to open a judgment the plaintiff avers that two of the defendants are sureties only, he is estopped on the trial from proving in their absence that the other defendant declared that he and one of the others were joint borrowers. *Fyan v. Cessna*, 10 Atlan. 29.

223. Where a judgment entered upon a judgment note is opened by the agreement of the parties without terms, the plaintiff by putting the note in evidence establishes a *prima facie* case and puts the burden of proof on the defendant. *Harbaugh v. Butner*, 148 P. S. 273.

224. Where a judgment was opened on the ground that the defendant's signature to the judgment note was a forgery, and the defendant pleaded non-assumpsit; it was held, that the plaintiff was put to the proof that the obligation was duly exe-

cuted and duly delivered by the defendant, and it was error to direct a verdict for the plaintiff where he simply offered the note in evidence without further proof. *Harris v. Harris*, 154 P. S. 501.

225. Feigned issues are, in a special manner, within the equitable power of the court; where an issue has been awarded on the opening of a judgment, the court, if dissatisfied with the verdict, may set aside the verdict and judgment though two years have elapsed from the rendition and entry thereof. *Wilson v. Wilson*, 142 P. S. 572.

(12) Appeal.

226. After an agreement of stay, between the parties to a judgment, and subsequent payments on account, the supreme court declined to interfere with the refusal of the court below to open the judgment. *Drummond's Appeal*, 12 Atlan. 658.

227. The act of 4 April 1877 (Brightly's Purdon 789), providing for appeals in cases of application for opening judgments on warrants of attorney, does not include a judgment confessed in an amicable action. *Blythe Township's Appeal*, 12 Atlan. 849.

228. The refusal to open a judgment can only be reviewed by appeal. Error does not lie. *Gillespie v. Campbell*, 1 Cent. 558.

229. Neither appeal nor error lies to the refusal to open a judgment regularly entered on a verdict. *Gaskill v. Crawford*, 130 P. S. 28.

230. Opening a judgment upon a *scire facias* to revive, rests on the sound discretion of the court and is not reviewable by the supreme court. *Gibson v. Simmons*, 134 P. S. 189.

231. Under the act 20 May 1891 (Brightly's Purdon 789), an appeal will lie from an order made prior to the passage of the act, opening a judgment taken for want of an appearance; on such an appeal, however, the supreme court will only determine whether the discretion of the lower court has been properly exer-

cised. *Kelber v. Pittsburgh Nat. Plough Co.*, 146 P. S. 485.

232. Where a judgment for want of an affidavit of defence is opened upon the petition of the defendant that she was prevented by illness from appearing, that she never received notice of the assignment to the plaintiff, and that she had paid nearly the whole of the amount of the mortgage to the plaintiff's assignor, and that only a small balance remained for which she tendered judgment, the supreme court will not review the order opening the judgment. *Foster v. Carson*, 147 P. S. 157. See s. c. 13 C. C. 86.

233. Where a judgment in ejectment is entered under a warrant in a lease, in which the lessee has waived his right to an appeal, no appeal lies to the supreme court from the refusal of the court below to open the judgment. *Groll v. Gegenheimer*, 147 P. S. 162.

234. Upon an application to open a judgment, the judge acts as a chancellor, and the supreme court, on appeal, will only see that his discretion has been properly exercised. *Comm'th v. Titman*, 148 P. S. 168.

235. Where, upon a *scire facias* to collect taxes whose lien is gone, judgment is entered for want of an affidavit of defence, the supreme court will not, on appeal, open the judgment for invalidity of the lien; the taxes may still be due and collectible, although the lien is gone, and the opening of the judgment in such a case is a matter for the court below. *Philadelphia v. Kates*, 150 P. S. 30.

236. The act 20 May 1891 (Brightly's Purdon 789) does not extend the power of the common pleas to open, vacate or strike off a judgment; it simply extends the right of appeal to certain orders which had been previously regarded as within the discretionary powers of the lower court. *Pennock v. Kennedy*, 153 P. S. 579.

237. The affirmance of a judgment entered for want of an affidavit of defence is conclusive as to all matters that were actually considered, and those which

might have been considered if the defendant had been vigilant; after such an affirmance, an appeal cannot be taken from a subsequent order of the lower court, refusing to open the judgment, where the only ground alleged was after-discovered evidence, which was not offered before on account of the unwillingness of witnesses to give information. *Pennock v. Kennedy*, 153 P. S. 579.

238. An order refusing to open a judgment will not be reviewed by the supreme court, where the plaintiff's testimony is not brought up with the record; where such testimony has been lost or mislaid, it must be supplied in the proper way. *Humphrey v. Tozier*, 154 P. S. 410.

239. Where a judgment is opened by the court below, the supreme court will not interfere where the evidence is conflicting, and there is doubt as to the weight of the evidence, or as to the credibility of the witnesses. *Klopfer v. Ekis*, 155 P. S. 41.

240. An order opening a cautionary judgment will not be reversed on the ground of delay in making the motion. *Duane v. Addicks*, 155 P. S. 124.

241. A refusal to open a judgment will not be reversed on appeal unless it appear that the discretion of the lower court has been abused. *Walter v. Fees*, 155 P. S. 55; *Philadelphia v. Weaver*, 155 P. S. 74.

242. Where the testimony is conflicting, the supreme court will not disturb an order refusing to open a judgment. *Range v. Culbertson*, 168 P. S. 324.

(b) Striking off judgments.

(1) When a judgment will be stricken off.

243. The widow and heirs must be proceeded against within ten years in order to charge real estate of the decedent in their hands. If not proceeded against within that time, a judgment improvidently entered against them will be stricken off. *Allen v. Krips*, 125 P. S. 504; *Allen v. Krips*, 119 P. S. 1.

244. Where a sales agent gave a bond and warrant of attorney to truly account

for all moneys coming into his possession, and judgment was confessed by the obligee's attorney, not for the penal sum, but for an indebtedness that arose prior to the date of the bond; it was not error to strike the judgment from the record. *Bennett v. Haley*, 142 P. S. 253.

245. A judgment will be stricken off where the defendant swears that she had no knowledge that a suit had been brought against her until execution was issued, that the attorney who had accepted service was not her attorney, and that she had never consulted him professionally in respect to the said suit, and that he had no authority from her to accept service as her attorney. *Bryn Mawr National Bank v. James*, 152 P. S. 364.

246. A judgment entered on a judgment note will be declared invalid where the auditor finds that the note was signed by the obligor in the extremity of his last illness, forty-eight hours before his death, when he was entirely prostrated mentally and physically from understanding the effect of his act, that the contents of the paper was not explained to him and the subscribing witnesses are unable to say that he made an affirmative answer when asked whether the signature was his. *Kedward v. Campbell*, 166 P. S. 365.

247. A judgment will be stricken off where the signature of the alleged maker of the note is shown clearly to be a forgery. *Reeser v. Brenneman*, 4 Dist. Rep. 143.

248. A judgment will be stricken off where it appears from the evidence upon the rule that the signature of the defendant to the judgment note is a forgery, and this, notwithstanding the rule that judgments will not be stricken off ordinarily where the record is valid and regular. *Bower v. Altland*, 8 York 137.

249. The treasurer, a director and manager of a corporation cannot sign a valid power of attorney to confess judgment against the corporation without authority from the board of directors or an executive officer of the company; such a judg-

ment will not bind the corporation and will be vacated and set aside. *Jackson v. Cartwright Lumber Co.*, 2 Dist. Rep. 680.

250. A judgment will be set aside where it appears by the testimony of two physicians that the body of the defendant was found drowned before the day on which judgment was entered, and there is no evidence showing that the defendant was living at the time of the entry of judgment against him. *Dellone v. Wagner*, 2 York 41.

251. A judgment in ejectment entered against a tenant on a warrant of attorney for breach of condition of the lease will be stricken off, if the defendant has had no opportunity to be heard on the question of breach. *Secor v. Shippey*, 7 C. C. 555.

252. If the defendant moves promptly the court will strike off a judgment for want of an affidavit of defence, where the statement does not bring the case within the affidavit of defence law. *Ide v. Booth*, 8 C. C. 499; s. c. 4 Del. 235.

253. Where, in a pending suit, a judgment is confessed by the defendant after the death of the plaintiff and before the substitution of his personal representatives, such judgment will be set aside on the application of the latter. *Wentz v. Bealor*, 14 C. C. 337.

254. Where the defendant filed an affidavit of defence and the prothonotary neglected to fill up the jurat, a judgment entered for want of an affidavit of defence was stricken off and the prothonotary directed to complete the record. *Harmon v. Hock*, 6 Lanc. 307.

255. Where a bond was signed by one person and the accompanying warrant was signed by another person, and authorized an attorney in an action of debt against the former to appear and confess judgment against the latter; it was held, that a judgment entered on such a warrant was irregular and would be stricken off. *Liberty Grotto v. Meade*, 11 C. C. 340; s. c. 30 W. N. C. 227.

256. Where a judgment was entered

against a terre tenant upon two returns of nihil to a *scire facias sur mortgage*, the judgment was stricken from the record at the instance of the terre tenant; two returns of nihil against a terre tenant are not equivalent to a service. *Bryn Mawr Trust Co. v. Wilkins*, 10 Montg. 101; s. c. 5 Del. 494.

(2) When not stricken off.

257. A judgment cannot be stricken off for irregularity unless such irregularity appear on the record. *France v. Ruddiman*, 126 P. S. 257.

258. A judgment should not be set aside or stricken off except upon some ground which appears upon the face of the record. *Adams v. Grey*, 154 P. S. 258.

259. A judgment for want of an affidavit of defence will not be stricken off where the statement was filed with the *præcipe*, because of the fact that a copy of the statement was served upon the defendant the day before the service of the writ. *Gorman v. Hibernian Building & Loan Ass'n*, 154 P. S. 133.

260. A judgment for want of an appearance and affidavit of defence will not be stricken off where more than two years has elapsed after the entry of judgment before the motion was made, and such motion was not accompanied by any affidavit explaining the cause of delay. *Dimling v. Herst*, 39 P. L. J. 292.

261. The court refused to strike off a judgment, where there was no testimony offered and the rule was supported simply by the affidavit of the defendant's attorney that he had entered an appearance in time. *Kulp v. Shock*, 8 Lanc. 114.

262. A judgment given by a husband to his wife will not be set aside where the evidence is clear that the wife had separate property and that she paid the money to her husband at the time the judgment notes were given by him to her. *Buser v. Buser*, 2 York 97; s. c. 6 Lanc. 290.

263. Where a judgment is entered upon a warrant of attorney signed by a partnership name, it will not be stricken off

where there is no evidence by whom the name was signed. *Gardner v. Austin*, 14 C. C. 549.

264. A judgment against a partnership will not be set aside and a receiver appointed to settle its affairs where it appears that the judgment was obtained upon a judgment note given by one member of the firm for a partnership debt, and it had been previously agreed to dissolve and that each partner should pay one-half of the firm debts and each hand over to the other one-half the money due the firm and received by him. *Stickel v. Null*, 39 P. L. J. 403.

265. A judgment entered on a bond and warrant more than ten years old without affidavit and motion as required by rule of court, will be allowed to stand on filing the affidavit *nunc pro tunc*, but an execution issued thereon will be set aside upon the petition of a subsequent execution creditor. *Woods v. Woods*, 126 P. S. 396.

266. Where a judgment is entered upon a warrant more than ten years old and without the motion and affidavit required by rule of court, the court may, in its discretion, refuse to strike it off, where it appears that the parties are living and the execution of the warrant and the existence of the debt are admitted. *Emery v. Smith*, 12 C. C. 281.

267. Where a judgment was entered upon a warrant of attorney more than ten years old without leave of court and an attachment execution was issued thereon, the court refused to strike off the judgment but permitted the plaintiff to file his affidavit and petition for leave *nunc pro tunc*. *Seldomridge v. Swope*, 12 Lanc. 91.

(3) Judgments against married women.

268. Where a note in favor of a married woman was altered by an interlineation by her husband, without her knowledge, the court refused to strike off the judgment, but simply opened it to the extent of the amount so added to the note. *Weaver v. Painter*, 3 Cent. 259.

269. Where a judgment note is given by a husband and wife for part of the consideration money of land conveyed to the husband, a judgment entered thereon as to the wife will be stricken off. *Wentz v. Bealor*, 14 C. C. 337.

270. A judgment entered against a married woman upon a judgment note executed by her as surety for her co-obligor is void, and will be stricken off. *Moyer v. Capp*, 15 C. C. 126.

271. Where a beer bottler who was the owner of real estate gave to a brewing company a judgment note to secure payment for beer purchased, and such note was signed by himself and his wife, who was also the owner of real estate, the judgment against the wife was stricken off. *Germania Brewing Co. v. Hambright*, 8 Lanc. 305.

272. Where a judgment was entered by default against a married woman upon a note executed before the year 1887; it was held, that an affidavit that the defendant at the time was a married woman living with her husband, and that the note was not given for necessities or purchase money, was sufficient to authorize the court to strike off the judgment. *Hunter v. Kimble*, 10 Montg. 35.

273. Under the act 29 February 1872 (P. L. 21), authorizing married women to contract for sewing machines; it was held, that a judgment entered upon a bond with a warrant of attorney executed by a married woman in payment of a sewing machine was void, and would be stricken off. *Singer Sewing Machine Co. v. Wilson*, 2 York 98.

274. A judgment entered upon the judgment note given by a married woman for a debt due by her husband will be stricken off; to establish a ratification of such a note after the death of her husband, the promise must be clear and distinct, and the recovery must be on the new promise. *Eppleman v. Bott*, 7 York 185.

275. Since the passage of the act 3 June 1887 (P. L. 332) a judgment against a married woman will not be stricken off

because the record fails to set out the facts which, before the passage of that act, were necessary to give the judgment validity. *Reifsnnyder v. Missimer*, 9 Montg. 94; *Spahr v. Hess*, 9 Montg. 192.

276. Where a judgment against a married woman does not show on its face her coverture, such judgment will not be stricken off, although the fact that she was a married woman may appear in the evidence, if such evidence also establishes facts which render her liable under the act 3 June 1887 (P. L. 332). *Krumrine v. Bottorf*, 12 C. C. 67.

277. Since the passage of the act 3 June 1887 (P. L. 332), the judgment of a married woman is presumably valid and not presumably void, as before that act. *Abell v. Chaffee*, 154 P. S. 254; *Adams v. Grey*, 154 P. S. 258; overruling *Reed v. Hurley*, 7 C. C. 125; *Hartley v. Decker*, 7 C. C. 127; *Richey v. Carpenter*, 9 C. C. 106; s. c. 7 Lanc. 467; *Raymond v. Goetz*, 9 C. C. 353; *Jacobs v. Toliver*, 10 C. C. 623; *Singer Manufacturing Co. v. Cole*, 11 C. C. 214; *Second Poplar Building Ass'n v. Johnson*, 11 C. C. 463; *Ritter v. Crater*, 7 Montg. 47; *McDonald v. McDonald*, 37 P. L. J. 253; *Barney v. Fahs*, 10 C. C. 424; s. c. 8 Lanc. 193; 4 Del. 442; *Stouffer v. Thomas*, 10 C. C. 421. See *Klinger v. Koons*, 13 C. C. 641; *Jester v. Hunter*, 2 Dist. Rep. 690; *Davidson v. McWilliams*, 4 Del. 456.

278. Upon a rule to strike off a judgment where the fact of the defendant's coverture does not appear upon the face of the record, proof may be given of her coverture, but the judgment will not be stricken off if the circumstances, consideration and purposes of the contract appear to be such as to invest her with the powers and liabilities of a *feme sole*. *Janeway v. Fisher*, 2 Dist. Rep. 122.

279. A judgment against a married woman will not be stricken off where there is some evidence under the rule that the judgment was given by her in the prosecution and management of the

business in which she was engaged. *Rosenberry v. Getty*, 8 Montg. 80.

See HUSBAND AND WIFE, IV., (k), (l).

(4) Justices' transcripts.

280. Where a transcript of a justice's judgment shows a return by the constable and a personal service, yet fails to disclose that the return was made under oath, a judgment by default entered by the justice is void, and the transcript will be stricken off. *Knoblauch v. Hefron*, 3 Dist. Rep. 765.

281. The court cannot open a judgment entered upon a transcript, but where it appears to be void on its face, such a judgment may be stricken off. *Ward v. Fannon*, 7 Kulp 488. See *Cockley v. Rehr*, 12 C. C. 343.

282. Upon a rule to strike off a judgment entered on a justice's transcript, where the record of the justice does not show the date of the return of service; it will, on the absence of affirmative proof to the contrary, be presumed that the summons was returned before the hearing of the case. *Shea v. Plains Township*, 7 Kulp 554.

283. Where the justice's transcript showed a summons issued December 15 1889, and served December 17 1890, and that judgment was rendered December 23 1889, and execution issued February 8 1890, the court refused to strike off the judgment, the presumption being that the date of service was a clerical error. *Simpson v. Musser*, 3 Lack. Jur. 95; s. c. 6 York 163. See s. c. 7 York 74.

284. Where a transcript of a justice's judgment is void upon its face, it will be stricken from the records of the court; where the record did not show any appearance at the hearing or that any evidence had been taken, and the judgment was entered by default, the court struck off the judgment, although the defendant had been guilty of gross laches in not applying for relief for more than ten years. *Stanton v. Groff*, 10 Lanc. 68; s. c. 5 Del. 206.

285. Where a justice's transcript

showed that the plaintiff had not personally appeared before the justice but had merely sent his affidavit, and the justice had refused a continuance to enable the defendant to employ counsel, the court refused to strike off the judgment, where the defendant had not taken an appeal or *certiorari* in time. *Johns v. Humphreville*, 11 Lanc. 180; s. c. 5 Del. 474.

See HUSBAND AND WIFE, IV., (l).

JUDGMENT II., (b); IV., (a).

(5) Appeal.

286. A writ of error to a refusal to strike off a void judgment lies at any time; if the judgment be but erroneous or voidable, the writ of error must issue within the statutory period. *Clarion, Mahoning & Pittsburgh Railroad Co. v. Hamilton*, 127 P. S. 1.

287. An appeal lies to the supreme court from the refusal of the common pleas to strike a judgment from its record which is in law a nullity, but upon such appeal no other question will ordinarily be presented than the sufficiency of the record to sustain the judgment. *Philadelphia v. Jenkins*, 162 P. S. 451.

V. Lien of a judgment.

(a) General principles.

288. A verdict for defendant cannot, under the act of 22 March 1877 (Brightly's Purdon 2070), be entered as a lien on the judgment index. *Deacon v. Greenfield*, 26 W. N. C. 264.

289. A judgment against a vendor obtained subsequent to his agreement to convey is a lien upon the unpaid purchase money; but if such unpaid purchase money, represented by a note, be transferred to a *bona fide* holder for value, the lien is gone. *Riddle's Appeal*, 7 Atlan. 232.

290. A judgment entered against a vendor after he has signed articles to sell and before the execution of the deed is a lien upon the land, and the vendor

is not entitled to his exemption against it. *Godshalk v. Bailey*, 4 Montg. 211.

291. The lien of a judgment against a grantee in a deed will not be divested by a subsequent surrender of the deed to the grantor, and the execution of a new deed of the same date to a new grantee. *Feely v. Hoover*, 130 P. S. 107.

292. The act 23 March 1877 (Brightly's Purdon 2070), providing that verdicts shall be a lien, does not authorize the entry of a judgment on the same day that the verdict was rendered, and such a judgment cannot stand in the way of a motion for a new trial made within the prescribed time or a subsequent order pending such motion under proper circumstances authorizing a discontinuance; and this, although such discontinuance will, by necessary implication, carry with it the verdict. *Moravian Seminary v. Bethlehem*, 153 P. S. 583; reversing s. c. 3 Northam. 351.

293. The failure of a judgment creditor to revive and continue the lien of a judgment against the real estate of a principal debtor, does not release the surety where the surety died within five years after the last revival. *Searight's Estate*, 163 P. S. 210.

294. Where a judgment has lost its lien before the date of the sheriff's sale, the sale is invalid and passes no title to the purchaser. *Hockemeyer v. Hartman*, 2 York 173. See *Carl v. Striner*, 1 York 141; 2 York 75.

(b) Priority of lien.

295. A decree for the payment of the costs of the committee of an habitual drunkard, entered upon the judgment docket, has all the effect of a lien from the date of such entry. *Hohman's Appeal*, 127 P. S. 209.

296. If a devisee accept a devise at a price to be paid by him, the land in his hands is charged with a lien for such price, which is superior to subsequent judgments entered against him. A release by a trustee for the person entitled to the valuation money, though duly

recorded, will not as against subsequent judgment creditors relieve the land from the charge, if it appears that the release was without consideration. *Lancaster County National Bank's Appeal*, 127 P. S. 214.

297. Where the lien of a judgment is permitted to expire, a subsequent judgment, entered before the revival, takes precedence in the distribution of the proceeds of real estate. *Miller v. Miller*, 147 P. S. 548.

298. A judgment note signed by the name of the firm is a lien on the partnership real estate, and such a judgment will be supported for the purpose of the distribution of the proceeds of the firm's real estate. *Moore v. Moore*, 153 P. S. 495.

299. A judgment which has been given as collateral security for the payment of promissory notes, does not lose its priority of lien by the renewal of the notes as they fall due. *Laucks v. Michael*, 154 P. S. 355.

300. Where a married woman executes and delivers a deed, and receives the purchase money, but does not acknowledge the deed until several months after the execution, her creditors, who have in the meantime obtained a judgment, acquire no lien upon the land conveyed. *Meade v. Clarke*, 159 P. S. 159.

301. Where the owner of a senior judgment satisfied the judgment by mistake, and the court subsequently struck off the satisfaction; it was *held*, that the judgment did not lose its priority of lien over junior judgments in existence at the time the satisfaction was entered; but as to a judgment entered pending the rule to strike off the satisfaction where the plaintiff advanced money upon the state of the record; it was *held*, that such judgment might be asserted in priority to the satisfied one, but not as against the intermediate judgments; such later judgment would only be entitled to be paid upon distribution where the fund was large enough to pay the intermediate judgments, and would have gone to the

junior judgment if the senior judgment had been actually paid. *McCune v. McCune*, 164 P. S. 611.

302. Where a judgment creditor allows the lien of his judgment to expire before the confirmation of the sale of real estate by an assignee for creditors, he not only loses his priority of lien, but he also loses all preference as a lien creditor, and can only take *pro rata* with the general creditors, after the living liens have been satisfied. *Snively's Estate*, 9 C. C. 422.

303. Where two holders of judgment notes against a common defendant started for the court-house at the same time, to have their judgments entered and to get execution, and the one who was in advance was stopped by a false cry of "Stop, thief!" raised by the other, and was thus wrongfully prevented from getting his execution first in the sheriff's hands; it was *held*, that the execution of the person who raised the cry would be postponed. *Davis's Estate*, 15 C. C. 634.

304. The lien of a judgment is not affected by the omission of the prothonotary to docket it. *McLaughlin v. Phillips*, 10 C. C. 382.

305. Where Sarah Jane Thomas agreed to sell a farm, and signed the agreement as Jane Thomas, and a bank subsequently entered judgment against Jane Thomas on a note signed by her as "Mrs. S. Jane Thomas," and afterwards a deed was delivered by her to the purchasers, she signing it as Sarah Jane Thomas; it was *held*, that the judgment was notice to the purchasers. *Work v. Darby*, 13 C. C. 269.

306. It is the duty of a judgment creditor to see that his judgment is rightly entered in the judgment docket; in foreign attachment where the description of the property was not filed in the prothonotary's office, nor did the prothonotary enter upon the judgment docket the names of the parties with the date of the execution of the writ and the amount of bail required, and the property was subsequently sold to *bona fide* purchasers who had no actual notice of

the attachment; it was *held*, that an execution in the attachment proceedings could not prevail against such subsequent purchasers. *Schall v. Rutledge*, 1 York 33.

See EXECUTION XV.

(c) Extent of the lien.

307. Though mortgages, with a restricted lien, were directed to be given by the purchaser at an orphans' court sale, yet, if bonds be also given bearing even date, without any restriction, judgments entered thereon will have a general lien. *Stauffer v. Ansbacher*, 5 Kulp 369.

308. A judgment entered for want of an appearance in a suit commenced by foreign attachment binds only the property attached; process for its collection does not extend to other property; so, unsuccessful efforts to open or set aside such a judgment do not convert it into a judgment *in personam*. *Smith v. Eyre*, 149 P. S. 272.

309. An article of agreement for the sale of land is an interest in the land, and such interest may be bound by judgment, the lien of which attaches to the land regardless of the vendee's assignment to a third person; such a judgment binds the legal estate the instant it vests in the vendee. *Winter v. Thompson*, 3 Lack. Jur. 398.

(d) Duration of lien.

310. Under the act 19 May 1887 (Brightly's Purdon 828) real estate cannot be taken in execution under a judgment more than five years old prior to a revival of such judgment; the issuing of a *scire facias* on the same day as the *feri facias* will not answer the requirements of the act. *Miller v. Miller*, 147 P. S. 545. See *Miller v. Miller*, 147 P. S. 548; *Eisen v. Benner*, 2 Dist. Rep. 363.

311. Where land is bound by a judgment and is conveyed by the owner to his wife, with the knowledge of the judgment creditor, and the husband and wife continue to live upon the land, the transfer of the title to the wife carries with it the

right to the possession, and the possession thus acquired by the wife is sufficient notice, under the act 16 April 1849, sec. 8 (Brightly's Purdon 1098), to require proceedings to revive the judgment to be commenced within five years from the date of the deed to the wife. *Wetmore v. Wetmore*, 155 P. S. 507.

312. Where land is subject to the lien of a judgment and is conveyed to another, and after the conveyance the judgment is revived against the original owner, but not against his alienee, a sheriff's sale on an execution under the judgment thus revived, occurring more than five years after the conveyance, passes no title to the land; and this, though the alienee died while the judgment by virtue of a *scire facias* was still a lien upon the land. The act 24 February 1834, sec. 25 (Brightly's Purdon 593), which provides that judgments which exist at the time of the death of a decedent shall continue a lien for five years without revival, applies only to a judgment against a decedent which is a lien on his land at the time of his death; it does not regulate the lien of a judgment on land aliened. *Long v. McConnell*, 158 P. S. 573.

313. Where an owner of land subject to a judgment executed a deed to his son and delivered it to a third person to hold until all the debts of the grantor had been paid by the son, and he further directed in his will that the deed should not be delivered to his son until the debts were paid, and after the grantor's death the son obtained possession of the deed without having paid the debts, and subsequently signed an amicable *scire facias* to revive the judgment as terre tenant and also as his father's executor; it was held, that the son took the land under the deed and not under the will, that his title was a voidable one, and that the amicable *scire facias* operated to continue the judgment against the land. *Landon v. Brown*, 160 P. S. 538.

314. The act 1 June 1887 (Brightly's Purdon 1097), amending the act 26 March 1827, by adding a clause preventing the

continuance of a lien of a judgment as against a terre tenant whose deed is recorded, does not affect the act 24 February 1834, sec. 24 (Brightly's Purdon 591), continuing the lien of judgments against the lands of decedents. *Searight's Estate*, 163 P. S. 210.

315. Where land is subject to a judgment lien and is conveyed within the five years, the issuing of a *scire facias* before the lien expires continues the lien against the vendor and the terre tenant for five years from the issuing of the writ; and this, though the writ be issued against the vendor only and service had only upon him, and though the terre tenant has had his deed recorded for more than five years, and no *scire facias* has been issued against or served upon him. If a second *scire facias* against a terre tenant be issued against him and served within five years from the issuing of the first writ, such second *scire facias* will continue the lien against the terre tenant. *Duncan v. Flynn*, 9 C. C. 321.

316. The lien of a judgment, though not revived, is without limit as against the lands of the debtor in the hands of his heirs or devisees. *Timmon's Estate*, 7 Lanc. 97. See Act 18 June 1895 (P. L. 197).

317. Under the act 4 April 1798 (Brightly's Purdon 1096), the lien of a judgment is limited to five years only against purchasers and lien creditors; the lien against the defendant and volunteers is indefinite and no change is made in this respect by the act 26 March 1827 (Brightly's Purdon 1097). *Carl v. Strine*, 1 York 141; affirmed in *Peeling's Appeal*, 2 York 75. See *Hockemeyer v. Hartman*, 2 York 173.

318. The defendant never having any personal liability to the plaintiff and the statutory liability of his land having expired, the moral obligation to pay a barred indebtedness will not be enforced without clear evidence of the intention of the debtor to renew his liability. *Miller v. Miller*, 47 L. I. 475.

(e) Revival of judgment.

(1) Amicable revival.

319. Upon an amicable action to revive three judgments and that judgment be entered thereon, the prothonotary may consolidate them into one judgment. *Beshler's Estate*, 129 P. S. 268.

320. An amicable agreement to revive is void where it is not signed by the defendant, the lien of the judgment has expired, and the terre tenant who signed the paper denies that it was signed with any such intention, which denial is uncontradicted. *Miller v. Miller*, 137 P. S. 47; s. c. 27 W. N. C. 23.

321. Upon an amicable *scire facias* to revive a judgment against a married woman given prior to the act of 3 June 1887 (P. L. 332), a judgment confessed since the passage of that act is valid. The original judgment is sufficient consideration to support the new undertaking. *Lyons v. Burns*, 47 L. I. 222.

(2) Of the *scire facias*.

322. The lien of a judgment was held to be preserved as against the lands of a terre tenant where the amicable *scire facias* to revive described the names of the parties, the term and number of the case, and the date and amount of the judgment; and this, though the terre tenant in signing did not designate himself as terre tenant and the entry in the judgment docket did not so designate him, but he was so designated in the caption of the case in the appearance docket and in the agreement for revival. *White v. Harden*, 154 P. S. 387.

323. A *scire facias* to revive a judgment must, in order to continue the lien, correctly recite the original judgment and substantially identify it as to parties, date and amount. *Landon v. Brown*, 160 P. S. 538.

324. The act of 1 June 1887 (Brightly's Purdon 1097), requiring terre tenants to be named in an original *scire facias* to revive, has no retroactive effect upon an original *scire facias* issued before its pas-

sage. *Salmon v. Bachman*, 8 C. C. 144. See *Duncan v. Flynn*, 9 C. C. 321.

325. An alias writ of *scire facias* to continue the lien against terre tenants must issue within five years of the issuing of the original *scire facias* against the defendant. In such case it is not requisite that judgment be had within five years of the judgment of revival against the defendant in the first writ. *Ibid.*

326. A *scire facias* to revive a judgment may be signed by a deputy prothonotary as well as by his principal. The power of a deputy to act is unaffected by the act of 12 February 1874 (Brightly's Purdon 1741), requiring prothonotaries to appoint principal deputies to act in case of death. *Harden v. Roberts*, 9 C. C. 160.

327. Upon the death of a defendant, an order of court is necessary to bring the name of his executor upon the record as a defendant, and such an order can only be made after notice; before the record is so completed a *scire facias* cannot issue to revive the judgment. *Callahan v. Fahey*, 10 C. C. 488.

328. A *scire facias sur judgment* was held not to be such an action of assumpsit under the procedure act of 25 May 1887 (Brightly's Purdon 1728) as requires an affidavit of defence. *Cowden v. Kennedy*, 7 C. C. 312.

(3) What is a good defence.

329. To a *scire facias* to revive a judgment by an administrator upon a bond to pay the amount to the estate of the obligee after his death, in accordance with his last will, it is a good affidavit of defence that the will, which was subsequently revoked, gave one-third of the residue of the obligee's estate to the obligor to be deducted from the bond, and that the estate has not been settled. *Smith v. Smith*, 135 P. S. 48.

330. To a *scire facias* to revive a judgment, it is a good defence that payment was made by defendant's brother to an attorney who was associated with the plaintiff's attorney of record; and this, though a previous assignment to the

brother and a satisfaction entered by him had been stricken off. *Phillips v. Beatty*, 135 P. S. 431.

331. To a *scire facias* to revive a judgment it is sufficient affidavit of defence to allege that twenty years had elapsed since it was entered. The defendant is not bound to swear that it has been paid. *Wheelen v. Phillips*, 140 P. S. 33; affirming s. c. 47 L. I. 415; 8 Lanc. 116.

332. Upon a *scire facias* to revive a judgment, the only defences allowable are a denial of the existence of the original judgment, and a subsequent satisfaction thereof, in whole or in part. *Reifsnyder v. Missimer*, 9 Montg. 94.

333. Upon a *scire facias* to revive a judgment, it is a good defence that the judgment was obtained before a justice on a promissory note signed by the defendant while a minor. *Smith v. Ruth*, 7 York 189.

334. Upon a *scire facias sur judgment*, payment of the judgment to the original payee and the use plaintiff is a good defence; sufficiency of an allegation of payment in an affidavit of defence. *Standard Building Ass'n v. Hishel*, 7 York 81.

335. Upon a *scire facias* to revive a judgment where the defence is that the defendant's mother paid to the plaintiff a sum of money which, though smaller than the judgment, was in full satisfaction, evidence of the existence of a mortgage prior to the judgment is immaterial. *Fowler v. Smith*, 153 P. S. 639.

336. Upon a *scire facias* to revive a judgment, an affidavit of defence by a terre tenant that the defendant never had title, and that when the judgment was obtained the title was in another person under whom he claims, is sufficient. *Hill v. Taggart*, 5 Kulp 279.

(4) What is not a good defence.

337. Upon a *scire facias* to revive, the defendant must deny the original judgment altogether, or show it has been satisfied since; down to the time of its entry it is conclusive. *Weber v. Detwiler*, 8 Atlan. 910.

338. To a *scire facias* to revive a judgment against a terre tenant, it is no defence that it was erroneously recited that its consideration was for purchase money. *Hammond v. McClure*, 14 Atlan. 412; s. c. 12 Cent. 554.

339. Upon a *scire facias* to revive, unsettled partnership accounts against the plaintiff are not admissible as set-off. *Jenkins v. Anderson*, 11 Atlan. 558.

340. Upon a *scire facias* to revive a judgment, a set-off is inadmissible, unless followed by evidence that the plaintiff accepted and acknowledged it as a credit upon the judgment. *Bishop v. Goodhardt*, 135 P. S. 374.

341. Upon a *scire facias* to revive a judgment, no defence can be interposed which existed before the original action was brought. *Supplee v. Halfman*, 161 P. S. 33.

342. Upon a *scire facias* to revive a judgment, no defence can be made except one which has arisen since the judgment; where a judgment had been entered against husband and wife and revived without any indication of the relationship of the defendants; it was held, that upon its again being revived against them as husband and wife, the presumption was that the coverture took place after the first revival, and that therefore coverture could not be pleaded upon a *scire facias* to revive the last judgment. *Lauer v. Ketner*, 162 P. S. 265.

343. Upon the trial of a *scire facias sur judgment*, no inquiry can be made into the consideration; the only defence which can be made is a denial of the existence of the judgment or proof of a subsequent satisfaction or discharge. *Mulligan v. Devlin*, 12 C. C. 465.

344. Upon the trial of a *scire facias sur judgment*, the only defence is a denial of the existence of the judgment or proof of satisfaction; usury is no defence to such an action. *Bickel v. Cleaver*, 13 C. C. 314.

345. It is no defence to a *scire facias* to revive a judgment that the note on

which the original judgment had been obtained was signed as the result of mistake or misrepresentation. *Gamon v. McCappin*, 2 Dist. Rep. 363.

346. Upon a *scire facias* to revive a judgment, it is not a good defence that the defendant had no notice of the judgment until three years after it was entered, and that he then notified the plaintiff to secure the amount from a third party who owed it, and for whom the defendant was merely security. *Swift v. Aument*, 8 Lanc. 244.

347. Upon a *scire facias sur* judgment, it is no defence that the judgment is void for irregularities appearing on its face; the only defences admissible are a denial of the existence of the judgment and a subsequent satisfaction. *Watson v. Wehrly*, 11 Lanc. 49. See s. c. 9 Lanc. 179; 10 Lanc. 97.

348. Upon a *scire facias* to revive a judgment, it was *held*, that the plaintiff could not be defeated by a verbal agreement that the defendant was to have satisfaction of the judgment and the plaintiff was to hold certain lots in fee discharged of defendant's equitable interest therein, such parol agreement being void within the statute of frauds. *Alderfer v. Boyer*, 7 Montg. 53.

349. To a *scire facias sur* judgment for a fiduciary debt, it is no defence that the defendant has been discharged in bankruptcy. *Weaver v. Weaver*, 1 Northam. 373.

350. Upon a *scire facias* to revive a judgment more than twenty years old, the question whether the payment had been made thereon within the twenty years was properly left to the jury. *Jenkins v. Anderson*, 11 Atlan. 558.

351. Upon a *scire facias* to revive a judgment nearly twenty years old, it is not a sufficient affidavit of defence which alleges payment of the antecedent debt, but not of the judgment itself. *Nealon v. McNeal*, 3 Lack. Jur. 117; s. c. 5 Del. 325.

(5) Judgment of revival.

352. Where a judgment was entered before bankruptcy of defendant, upon a *scire facias* to revive after bankruptcy, the verdict was moulded so as to affect only real estate, on which it was a lien prior to the bankruptcy proceedings. *Walters v. Oyster*, 1 Atlan. 430.

353. If a judgment, upon revival, have added to it a waiver of exemption and a provision for attorney's commissions, such additions do not break the continuity of its lien in favor of other liens existing at the date of such revival. *Early v. Zeiders*, 137 P. S. 457; s. c. 26 W. N. C. 533; reversing s. c. 7 C. C. 569.

354. Upon a writ of *scire facias* to revive, the judgment should follow the original in the amount, date, and names of the parties. Such a defect is fatal upon a plea of *nul tiel record*; if there be no such plea, however, the judgment will stand as effective if the record show an identity of the proceeding; and this, though there be an irregularity in the names of the plaintiffs. *Wood v. Coddington*, 134 P. S. 91.

355. Where a purchaser of land bound by a judgment does not record his deed or take possession, a revival of his judgment within the five years against the defendant alone will continue its lien as against such purchaser. *Conklin v. Cleveland*, 37 W. N. C. 143; reversing s. c. 14 C. C. 154.

356. Upon two returns of *nihil* to a *scire facias sur* judgment, judgment cannot be taken by default until ten days after the return day of the alias. *Bloomsburg Iron Co. v. Lance*, 4 Del. 264.

357. Upon a *scire facias* to revive a judgment, judgment cannot be entered upon two returns of "*non est inventus*;" such a return is only applicable to a *capias*. *Toolan v. Morrison*, 2 Lack. Jur. 77.

358. Upon a writ of *scire facias sur* judgment against several defendants, and judgment against all but one defendant, the latter is not entitled to a judgment for costs against the plaintiff. *Freyman v. Bean*, 6 Montg. 163.

359. Opening a judgment upon a *scire facias* to revive, rests in the sound dis-

cretion of the court and is not reviewable by the supreme court. *Gibson v. Simmons*, 134 P. S. 189.

360. Where judgment was entered for want of an appearance on a *scire facias* to revive upon two returns of *nilhil*, the same will be opened upon proof that the judgment was twenty years old when the *scire facias* was issued; the presumption is that a judgment over twenty years old has been paid, and the burden is on the plaintiff to show the contrary. *Green v. Plattsburg*, 13 C. C. 335.

361. If judgment of revival be had on two *nilhils*, the court will afford a defendant, who has not been guilty of laches, an opportunity to plead an equitable defence. *Nelson v. Guffy*, 37 P. L. J. 65.

362. Where a judgment for five hundred dollars was amicably revived for "five hundred dollars with interest"; it was held, that the reasonable intendment was that the judgment was to bear interest from the date of revival, and interest prior thereto could not be allowed on distribution, to the prejudice of a subsequent encumbrancer. *Kistler v. Mosser*, 140 P. S. 367; reversing s. c. 2 Northam. 189.

363. If on revival the interest be not added, an auditor awarding payment will allow interest from the date of the last payment endorsed on the judgment bond. *Linville's Estate*, 8 Lanc. 97.

364. It is the duty of a judgment creditor to see that his judgment is rightly entered on the judgment docket; where a judgment is revived by amicable *scire facias* for the specific amount of the principal sum without mentioning interest, interest can only be recovered to the prejudice of subsequent lien creditors from the date of the revival; and this, although it be shown that interest had actually been unpaid for two years previous thereto. *McCamant's Estate*, 12 Lanc. 251.

(6) Effect of revival.

365. The amicable revival of a judgment is valid against one, although the original judgment be entered against

him and another defendant. *Beshler's Estate*, 129 P. S. 268.

366. If a judgment in favor of A. against himself and others be assigned to B. and revived by B., it is good against A. and his creditors. *Sponsler's Appeal*, 127 P. S. 410.

367. A revival by agreement against a terre tenant, there being nothing to show of what land the defendant is an alienee, does not create a personal judgment, nor does it create a lien on land purchased by him from the judgment debtor, prior to the entry of the original judgment. *La Bar's Estate*, 7 C. C. 171. See *Stroudsburg Bank v. La Bar*, Ibid. 163.

VI. Conclusiveness of a judgment.

(a) General principles.

368. If a defendant has had his day in court and neglected to make his defence, that is the end of the contention. He cannot afterwards restrain execution by bill in equity. *Maher's Appeal*, 2 Cent. 864.

369. The conclusiveness of a former adjudication depends upon the identity of the rights involved; a point which might have been made on a former trial is concluded by the judgment therein, whether actually made or not. *Myers v. Kingston Coal Co.*, 126 P. S. 582. See *Myers's Appeal*, 16 W. N. C. 137.

370. As to what matters in a former action are *res adjudicata*, see note to *Almy v. Daniels*, 4 Atlan. 758.

(b) Who are concluded by a judgment.

371. Where a defendant in attachment execution appears at the hearing before a justice and claims the benefit of the exemption law and the justice disallows the claim and enters judgment against the garnishee, from which judgment the defendant takes no appeal, he cannot afterwards question the validity of the judgment by a rule to show cause why the money paid into court by the garnishee should not be withdrawn by the defendant. *Boland v. Spitz*, 153 P. S. 590.

372. Upon the distribution of an assigned estate, creditors cannot attack a judgment because it is a fraud on the debtor; but only when it has been fraudulently and collusively given, for the purpose of hindering and delaying them. *Sponsler's Appeal*, 127 P. S. 410.

373. Where a widow was enjoined from disposing of certain property claimed by the executors of her husband, until the final settlement of the estate, she claiming the property as a gift from her husband, and her claim was sustained in a court of equity and affirmed by the supreme court; it was *held*, that the creditors of the decedent were precluded by such judgment from any further proceedings in the orphans' court. *Koons's Estate*, 6 Kulp 520. See *Koons v. Koons*, 4 Kulp 30.

374. An order of sale for the payment of debts obtained upon the petition of a son and administrator of the decedent, the principal item being a judgment obtained in the common pleas by the son against the estate, will not be vacated upon the petition of a daughter alleging that the debt was not due by the estate, but that the judgment was upon obligations entered into by the widow of the decedent in her lifetime; the validity of such a judgment cannot be impeached collaterally except on the ground of fraud. *Schmidt's Estate*, 36 W. N. C. 152.

375. In a *scire facias* against an executor, widow and devisees to charge the testator's real estate with the payment of a debt, under sec. 34 of the act 24 February 1834 (Brightly's Purdon 596), a prior judgment for the same debt against the executor is conclusive upon him when defending as devisee. *Comm'th v. Cochran*, 146 P. S. 223.

376. A judgment cannot be questioned collaterally or by any stranger thereto except he be a lien creditor. *Philadelphia v. Dobson*, 10 C. C. 34.

377. Where a judgment has been obtained on a *scire facias* issued on a mechanic's claim which contains a description of the lot on which the building is erected,

and the property is sold by a receiver under order of court, an auditor appointed to distribute the money has no power, at the instance of a mortgage creditor, to define the curtilage of the mechanic's lien so as to include only a part of the property; a judgment on a mechanic's lien cannot be impeached collaterally by third persons except for fraud or collusion; and this, although they are lien creditors of the defendant. See act 16 June 1836, sec. 9 (Brightly's Purdon 1308). *Sicardi v. Keystone Oil Co.*, 149 P. S. 139.

378. In ejectment by a sheriff's vendee under a judgment confessed, the plaintiff's title cannot be impeached by evidence that at the time the judgment note was given the defendant was a lunatic. *Weaver v. Brenner*, 145 P. S. 299.

379. A judgment of a court of competent jurisdiction which is perfectly regular and valid on its face cannot be impeached in a collateral proceeding by showing that the defendant was a married woman. *Breckwaoldt v. Morris*, 149 P. S. 291.

380. The record and proceedings for specific performance, under and by virtue of which defendants acquired title, are admissible in evidence in ejectment, and parol evidence is not admissible to contradict the record in order to show that one of the plaintiffs had no guardian. *Cochran v. Sanderson*, 151 P. S. 591.

381. A decree appointing as guardian the executor of the estate in which the minors are interested cannot be collaterally attacked; where an executor appointed guardian and under a decree of court sold at private sale certain real estate belonging to the minors; it was *held*, that such minors on coming of age could not bring ejectment and allege the invalidity of the guardian's appointment. *Kramer v. Mugele*, 153 P. S. 493.

382. A judgment on a *scire facias sur mortgage*, where the return of the sheriff shows a regular service of the writ as if against an adult, cannot be subsequently attacked in an action of ejectment by proof *dehors* the record that the defendant was an infant at the time of the

service of the writ. *Kennedy v. Baker*, 159 P. S. 146.

383. Upon the distribution of an assigned estate, a judgment against a firm, of which the deceased assignor was a member, cannot be charged against his individual property, the record of the judgment not showing the names of the individual members of the firm. *Fox's Appeal*, 11 Atl. 228.

384. A judgment recovered against a borough for damages for injuries from a defective sidewalk is, in an action over by the borough against a property owner, conclusive as to the defect, the liability of the borough, and the amount of damages, if he had notice and could have defended the action. He is not, however, estopped thereby from showing that he was under no obligations to repair. *Brookville v. Arthurs*, 130 P. S. 501.

385. Since the act 3 June 1887 (since supplied and repealed by the act 8 June 1893, Brightly's Purdon 1299), a married woman may engage in business and enter into contracts in regard to it or in regard to the management of her separate estate, or for necessities as fully as a *feme sole*; and she may confess a judgment for an indebtedness whenever by her contract she may subject herself to the liability to be sued; such a judgment cannot be questioned on distribution by a stranger to it on the ground that the record does not exhibit facts showing that it was authorized. *Koechling v. Henkel*, 144 P. S. 215.

386. A judgment irregularly entered by the attorney and not taken in open court, as required by the rules of court is voidable only at the instance of the defendant and cannot be attacked by a stranger in a collateral proceeding. *Brundred v. Egbert*, 164 P. S. 615.

387. Where two writs of *scire facias sur mortgage* were issued, and a return of "*non est*" was made to the first writ, and of "*nihil habet*" to the second; it was held, that the irregularity to the return to the first writ would not render void the judgment entered upon the second writ; such

judgment was only voidable at the instance of the defendant if he acted within a reasonable time, and could not be attacked by a person other than the defendant in an action of ejectment thirty years after the judgment was entered. *Brundred v. Egbert*, 164 P. S. 615.

388. In covenant upon a bond against principal and surety, conditioned for the faithful performance by principal of his duties as business agent for plaintiff, a judgment in account render against the principal is conclusive against the surety as to the amount due. *Holmes v. Frost*, 125 P. S. 328.

389. In an action on a replevin bond, the surety cannot set up as a defence matters that were controverted in the action of replevin and settled by the verdict and judgment in that case. *Cox v. Hartranft*, 154 P. S. 457.

(c) Who are not concluded.

390. The record of the conviction of a third person of adultery with the plaintiff in an ejectment, is not evidence against her, she not being a party to the criminal proceeding. *McKendry v. McKendry*, 131 P. S. 24.

391. An order of removal unappealed from is not conclusive as against any other district than the one from which the pauper was removed. *Jenkins Township v. Paradise Township*, 8 C. C. 164.

392. In a suit by one judgment creditor against another, alleging a conspiracy with the common defendant to cheat and defraud the plaintiff by procuring the revival of the defendant's judgment, the plaintiff may show that the latter had been paid previous to its revival. *Elsbree v. Morley*, 2 Mona. 281.

393. Where a testator left four children and a grandson, who was a son of a deceased daughter, and he gave a specific sum to a trustee, the income of which was to be paid to the executors, who were to use it at their discretion for the purpose of maintaining and educating the grandson until he should arrive at the age of twenty-five years, and then the

whole of the income was to be paid to him and at his death the principal was to be paid to his issue, or in default, to the testator's children; and by a codicil it was directed that "should any attempt be made at law or otherwise" during the minority of his grandson to withdraw his person from the custody of his executors, by the boy's father or any other person, then the executors were to suspend all further payments and all provision for the grandson was revoked; and after testator's death, it appeared that the boy was voluntarily surrendered to the custody of his father and the executors subsequently filed an account, and upon their application and that of the testator's four children the attorney for the executors was appointed auditor, and no notice was given to the grandson or his father of the proceedings, and the auditor distributed the whole estate to the testator's four children; it was *held*, that the decree of distribution was not conclusive upon the grandson; that the words "any attempt" in the codicil did not mean a surrender as the result of correspondence; but the grandson had no right to any income withheld before his twenty-fifth year by the executors in the exercise of their discretion, but that he was entitled to all the income accruing after he reached the age of twenty-five years. *White's Estate*, 163 P. S. 388; affirming s. c. 2 Dist. Rep. 207. See s. c. 1 Dist. Rep. 508; 12 C. C. 93.

394. A decree of the orphans' court directing a sale of real estate for the payment of debts, is not binding in a collateral proceeding, upon persons whose rights and interests were injuriously affected by the decree, but who were not parties to the proceeding and never had a day in court. *Sager v. Mead*, 164 P. S. 125.

395. A judgment obtained against an executor does not conclude heirs and devisees in the distribution of the real estate of the testator; they may question any item included in the judgment. *Zuber's Estate*, 10 Montg. 137.

(d) What judgments are conclusive.

396. A judgment against the defendant, an upper riparian owner, for diverting the water of a stream, is conclusive, in a subsequent action by the same plaintiff, of his right to recover. Punitive damages may be given in the second suit for such continued diversion. *Long v. Trezler*, 8 Atlan. 620.

397. The judgment of a referee, appointed to distribute a fund produced by a sheriff's sale, that the judgment under which the sale was made, given to a trustee for defendant's wife and others, was not fraudulent, is *res adjudicata* in a subsequent proceeding by attachment execution issued by a contesting judgment creditor against the trustee. *Wetherald v. Van Stavoren*, 125 P. S. 535.

398. A judgment on a *scire facias sur* mortgage is conclusive on the distribution by an auditor of the proceeds of a sheriff's sale thereunder. *Thompson's Appeal*, 126 P. S. 434.

399. The auditor of an assignee's account has no power to inquire into the validity of a judgment regular on its face, but he may receive evidence that a judgment given for one purpose has been fraudulently used for another purpose. *Stark's Appeal*, 128 P. S. 545.

400. A judgment confessed for a sum certain cannot be collaterally attacked in a suit by the defendant against the plaintiff for the breach of an agreement, the consideration of which was the judgment itself. *Weaver v. Adams*, 132 P. S. 392.

401. The validity of a judgment, regular on its face, cannot, there being no allegation of collusion, be inquired into by an auditor, on the distribution of a fund arising from the sale of a decedent's real estate, but evidence may be received of payments thereon. *Lefever's Estate*, 7 Lanc. 131.

402. An action for maliciously obtaining a judgment in trover against the plaintiff by fraud cannot be maintained where such judgment is still existing;

it cannot be so collaterally attacked. *Stackhouse v. Keiger*, 25 W. N. C. 436.

403. If, after the dissolution of a foreign attachment, a second be issued without leave, it will be dissolved and the writ quashed; it is *res adjudicata*. *Graham v. Canton & Waynesburg Railroad Co.*, 26 W. N. C. 203. See s. c. 25 *Ibid.* 65.

404. After a sheriff's sale under a mortgage and the delivery of the deed to the purchaser, it is too late to question the validity of the acknowledgment of the mortgage or the regularity of the proceedings under the *scire facias*, prior to the acknowledgment and delivery of the sheriff's deed. *Benninghoff v. Stephenson*, 161 P. S. 440.

405. Where a creditor conducts proceedings for an account against an assignee and is held by his acts to be estopped from setting up or enforcing the assignment, he cannot afterwards in another proceeding establish a trust between himself and the assignee as regards the same property. *Robb v. Van Horn*, 150 P. S. 508. See *Crans's Appeal*, 9 Atlan. 282.

406. One who applies for an interpleader under the act 11 March 1836 (Brightly's Purdon 1064), must be a mere stakeholder and must offer to bring the property into court; when the case has proceeded to judgment for the plaintiff, the defendant cannot have the right of recovery tried over again by bringing in the claim of an adverse right, which was available as a defence to the action. *De Zouche v. Garrison*, 140 P. S. 430.

407. Where land has been condemned for the purposes of a bridge and damages paid to the owner, and subsequently additional land of the same owner is condemned by reason of a change in plans; in an adjustment of damages in the second proceeding, the former proceedings are *res adjudicata* as to the plaintiff's special benefits from the construction of the bridge; in the second proceedings the inquiry must be limited to the damages sustained and the benefits conferred by the change in the plan. *McElheny v.*

McKeesport & Duquesne Bridge Co., 153 P. S. 108.

408. The affirmance of a judgment entered for want of an affidavit of defence is conclusive as to all matters that were actually considered and those which might have been considered if the defendant had been vigilant; after such an affirmance, an appeal cannot be taken from a subsequent order of the lower court refusing to open the judgment, where the only ground alleged was after-discovered evidence which was not offered before, on account of the unwillingness of witnesses to give information. *Pennock v. Kennedy*, 153 P. S. 579.

409. In trespass *quare clausum fregit* for cutting timber, the record of an action of ejectment in which the plaintiffs recovered against the defendants, with the execution and return, establishes the actual possession of the plaintiffs at the time of suit brought. *Bush v. Gamble*, 127 P. S. 43.

410. In an action for mesne profits, where the plaintiff has previously recovered in ejectment, the judgment in ejectment is conclusive of the plaintiff's right to the possession of the premises, and to recover the mesne profits as against the defendant in the ejectment. *Shaeffer v. Eichert*, 10 C. C. 360.

411. The confirmation of the finding of an inquisition in lunacy is a judicial decree and cannot be attacked collaterally, except for fraud. *Siegfried's Estate*, 1 Northam. 49; affirmed in *Halsey's Appeal*, 120 P. S. 209.

412. A defendant who has been heard on his objections to a sheriff's sale cannot, on the principle of *res adjudicata*, be heard on the same reasons on motion to set aside. *Morse v. Freck*, 7 C. C. 456.

413. Where a judgment is attacked in the common pleas by a judgment creditor, it cannot subsequently be attacked in the orphans' court by the same party. *Ralston's Estate*, 153 P. S. 645.

414. Upon a conveyance of land in one county to a trustee residing in another county, the decree of the court of the

former county upon the trustee's account will be *held* as conclusive, where it appears that no objection had been made to its jurisdiction. *Helpenstein's Estate*, 135 P. S. 293; s. c. 26 W. N. C. 194.

415. The judgment of the orphans' court, on an application of trustees of an incorporated charity for leave to sell real estate, is within the jurisdiction of that court and conclusive upon the common pleas. *Mercer Home v. Fisher*, 162 P. S. 239. See *Mercer Home*, 162 P. S. 232; affirming s. c. 3 Lack. Jur. 367; 9 Montg. 171.

416. A prior decree in the orphans' court is only conclusive as to the fund thereby distributed. *Pepper's Estate*, 13 C. C. 407; s. c. 32 W. N. C. 323.

417. A decree of the orphans' court upon the adjudication of an executor's account is a final decree, but it is only conclusive as to what is in the account, and is no bar to a petition for an account of moneys not contained therein. *Young's Estate*, 14 C. C. 547; s. c. 34 W. N. C. 165.

418. The confirmation of a widow's appraisement by the orphans' court is a judgment *in rem* conclusive and binding upon all the world, and can only be questioned on the ground of fraud. *Transue's Estate*, 2 Northam. 393.

419. Where a summons issued by a justice shows a return of "served by copy," the judgment entered thereon cannot be attacked in an action of replevin to recover the goods sold on execution under the judgment; and this, although the justice's docket contains the entry "served by leaving copy at place of business." *Sweeney v. Girolo*, 154 P. S. 609.

420. Where a taxpayer furnished materials to the supervisors for which he was allowed a credit on his road taxes, and a dispute having arisen between him and the supervisors, he brought suit against the township before a justice, and at the hearing the justice, with the consent of the parties, made an entry on his docket that the parties appeared and

settled by the defendants giving the plaintiff a credit in full for all road taxes, including the current year, and the township subsequently sued the taxpayer for such road taxes; it was *held*, that the written agreement of the parties on the docket of the justice was conclusive against the claim; and this, though neither of the parties had signed the docket. *French Creek Township v. Moore*, 165 P. S. 229.

421. Where the transcript of a justice fails to show how a personal service of the summons was made, the judgment is not void but voidable and can only be impeached by direct proceedings. *Cockley v. Rehr*, 12 C. C. 343.

422. The adjudication of a justice that a tenant is entitled to defalcate his account against rent is conclusive in an action brought by the tenant against the landlord for distraining for and selling more than the amount of the balance after deducting the set-off allowed. *Lowenstein v. Helfrich*, 7 Kulp 533.

423. A magistrate's judgment of non-suit against the plaintiff is conclusive unless appealed from. The magistrate cannot open it and grant a rehearing. *Gord v. Middleman*, 25 W. N. C. 556.

424. Upon an appeal from a judgment on a rule for judgment for want of a sufficient affidavit of defence, the judgment of the supreme court ought to be "appeal dismissed but without prejudice"; where, however, there was no dispute as to the amount due, and the only question submitted to the court was as to the legal construction of a written contract; it was *held*, that a judgment of the supreme court was conclusive of the right of action; and this, although the statutory form was not strictly followed. *Bolton v. Hey*, 6 Del. 162; affirmed in 168 P. S. 418.

See JUDGMENT, VIII.

(e) What judgments are not conclusive.

425. Where a terre tenant filed a bill against the mortgagor and mortgagee alleging fraud, and the same was dismissed

without prejudice to plaintiff's right to set up the defence to the *scire facias* sur mortgage, it was *held*, that the decree was not *res adjudicata*, so as to prevent the same defence being made to the *scire facias*. *Ballentine v. Ballentine*, 15 Atlan. 859.

426. An order of support in desertion proceedings, while evidence in subsequent proceedings of the desertion, is no bar to evidence *pro* and *con* upon the question of reasonable cause. *Hahn v. Bealor*, 132 P. S. 242; s. c. 25 W. N. C. 361; *Van Dyke v. Van Dyke*, 135 P. S. 459; s. c. 26 W. N. C. 227; reversing s. c. 46 L. I. 507.

427. Where it is alleged by a party to a judgment that it has been obtained against him by fraud, he may assail it directly either by appeal or by a motion to open, but he cannot impeach it in an action to recover the money collected by regular process issued upon it. *Ogle v. Baker*, 137 P. S. 378.

428. In an action by a purchaser at sheriff's sale against the sheriff and the second execution creditor, who sold the property as the property of the original defendant a second time; it was *held*, that the validity of the first judgment could be properly inquired into, but such validity could not be affected by declarations of the defendant, not made in the presence of the plaintiff. *Kline v. McCandless*, 139 P. S. 223.

429. A party to a judgment is estopped from relitigating questions, the decision of which was involved therein; but this rule does not extend to estop the plaintiff from setting up in a subsequent action, where the cause of action is not the same, the unconstitutionality of a statute upon which the prior action proceeded. *Philadelphia v. Ridge Avenue Ry. Co.*, 142 P. S. 484.

430. Where a rule to strike off a judgment was made absolute, and the plaintiff, with leave, afterwards withdrew the note from the files and again entered judgment thereon; it was *held*, that he was not thereby estopped from alleging error

in the order striking the original judgment from the record. *Volkenand v. Drum*, 143 P. S. 525; reversing s. c. 6 Kulp 153.

431. Where defendant's grantors applied for an injunction against the plaintiff and was refused the decree prayed for on the ground that, as there was a doubt about the title, it should first be tried at law; it was *held*, that the record of such proceeding was not evidence, in a subsequent ejectment, of an adjudication of the title against the defendants. *Holloway v. Jones*, 143 P. S. 564.

432. Where, by a suit in foreign attachment, a judgment in another court in favor of the defendant against the garnishee has been attached, and subsequently such judgment is opened and it appears that an attaching creditor who opposed this action was paid the amount of his claim and a verdict and judgment is obtained for the defendant, and it appears further that this was in pursuance of a fraudulent agreement between plaintiff and defendant, a case is made out which, if unexplained, would justify the jury, upon the trial of the foreign attachment, that there was collusion and fraud; in such case the verdict and judgment for defendant would not be conclusive upon the plaintiff in the foreign attachment, and the burden would be on the garnishee to show that there was nothing really due on the judgment attached. *Palmer v. Gilmore*, 148 P. S. 48. See *Sommer v. Gilmore*, 160 P. S. 129.

433. Where there is evidence *dehors* the record as to what was included and adjudicated in another action, it would be error to instruct a jury that the plaintiff's claim had been so adjudicated, but the question must be submitted to the jury. *Kaster v. Welsh*, 157 P. S. 590.

434. The record and decree of the orphans' court may be impeached in a collateral proceeding where it is alleged that the decree was obtained by fraud. *Phelps v. Benson*, 161 P. S. 418.

435. A judgment by the supreme court upon an appeal from the probate of a double will, that either party to it may

revoke it either before or after the decease of the other, will not prevent the same will from being attacked on the ground that the testatrix lacked testamentary capacity and was subjected to undue influence; the decision on the first appeal was not *res judicata* as to those questions. *Cawley's Estate*, 162 P. S. 520. See *Cawley's Estate*, 136 P. S. 628.

436. Where, upon the distribution of a balance in the hands of the committee of a lunatic, a claim which was barred by the statute of limitations was allowed; it was held, that the confirmation of the auditor's report was not such a conclusive adjudication, as would preclude the lunatic from pleading the statute in an action upon the claim against him, after being restored to reason. *Raeder's Lunacy*, 167 P. S. 597; affirming s. c. 7 Kulp 275.

437. Where it is sought to set off a judgment in one county against a judgment in another county, such set-off will be refused where it appears upon the inspection of the record in the other county that the court which entered the judgment had no jurisdiction. *Hamor v. Loeb*, 9 C. C. 609.

438. Where a verdict is rendered for the plaintiff and is set aside and a new trial granted, and the court states that a non-suit should have been entered but does not give the reasons therefor, such a judgment cannot be pleaded as a defence to the plaintiff's claim subsequently presented in the orphans' court against the estate of the decedent. *Dunlevy's Estate*, 10 C. C. 454.

439. Upon a motion for a new trial in an action of ejectment, the finding of the jury is only advisory and is not conclusive upon the trial judge. *Lotz v. Reading Iron Co.*, 10 C. C. 497; *Henninger v. Boyer*, 10 C. C. 506.

440. The issue of letters of administration cannot be regarded as an adjudication that the decedent died intestate, in a proceeding to prove a lost or destroyed will. *Buckle's Estate*, 14 C. C. 99; s. c. 33 W. N. C. 393.

See JUDGMENT, VIII.

9) Judgments of courts of other states.

441. In an action on a judgment of another state it is no defence that the judgment was obtained by fraud and collusion. The court in which the judgment was entered is the one to redress such a wrong. *Wyoming Manufacturing Co. v. Mohler*, 1 Mona. 622; s. c. 17 Atlan. 31.

442. The plaintiff's statement should exhibit the full record of a suit in the United States circuit court upon which the right of recovery depends; "particular reference" can only be made to records in the proper county. *Campbell v. Pittsburgh & Western Railway Co.*, 137 P. S. 574; s. c. 27 W. N. C. 79; s. c. 38 P. L. J. 149.

443. In a suit upon a judgment recovered in another state, the judgment is conclusive up to its date, and nothing which occurred previous thereto can be set up in defence; but where, pending the original suit, an agreement was made in settlement thereof, and the judgment was subsequently entered, and after its entry the agreement was carried out; it was held, that the agreement was only an accord and not a satisfaction, and the satisfaction might be set up in the suit here. *Potter v. Hartnett*, 148 P. S. 15; reversing s. c. 28 W. N. C. 120.

444. In an action on a foreign judgment in which the record shows an appearance for the defendant, it is not a good averment in an affidavit of defence, that if an appearance was entered for the defendant he had no knowledge of it whatsoever; such an averment is evasive. *Moore v. Phillips*, 154 P. S. 204.

445. In an action on a foreign judgment, it is a good affidavit of defence, that the defendant was a citizen of Pennsylvania, and that he only had a temporary residence in London and had sailed for home nearly a month prior to the alleged service by mail, and that personal service was never made on him. *Moore v. Phillips*, 10 C. C. 552. See *Moore v. Phillips*, 154 P. S. 204.

446. In an action upon a judgment entered in the court of another state, the record may be contradicted by evidence of facts impeaching the jurisdiction of the court; it is a good defence that the appearance recited was merely constructive, and that the defendant was not in fact served with process and did not appear and had no knowledge of the suit until demand was made upon him in this jurisdiction for payment. *Price v. Schaeffer*, 161 P. S. 530.

447. In a suit upon a foreign judgment, an affidavit of defence is sufficient which avers that no personal service was ever had on the defendant, that the judgment was fraudulent and that the defendant never appeared in the suit until after judgment was entered, and then only for the purpose of having the judgment set aside on the ground of fraud. *Wissler v. Herr*, 162 P. S. 552.

448. An action upon a foreign judgment cannot be sustained where the certificate of the clerk of the court in which the judgment is obtained was made, not by the clerk but by his deputy. *Ensign v. Kindred*, 163 P. S. 638.

449. Where real estate has been sold by executors in another state and administration raised there, the decree of the foreign court as to compensation due the executors in connection with the sale is conclusive here. *Stockham's Estate*, 7 C. C. 321; s. c. 46 L. I. 281.

450. In a suit upon a judgment of another state, an allegation that the defendant is not indebted to the plaintiff and had no knowledge that a judgment had been obtained against him, or even that a suit had been brought, is not a good defence. *Bright v. Smitten*, 10 C. C. 647.

451. Where a transcript from the docket of a justice filed in a court of record in another state becomes a judgment of that court, it is entitled to the same faith and credit in this state as a judgment originally obtained in that court. *Bright v. Smitten*, 10 C. C. 647.

452. In a suit on a foreign judgment, the statute of limitations does not apply;

and this, although the original cause of action may have been based on a contract not under seal. *Weiseberger v. Nevil*, 11 C. C. 40.

453. A judgment of another state can have no greater force in this state than in the state in which it was obtained; where suit was brought upon a Maryland judgment more than twelve years old, which in that state is not good and pleadable, it should not be admitted in evidence in this state. *Bowersox v. Gitt*, 12 C. C. 81; s. c. 2 Dist. Rep. 100.

454. In an action on a foreign judgment, an averment that process was not legally served is not a sufficient affidavit of defence when the record shows that the defendants were summoned; the affidavit should set out sufficient grounds to show that jurisdiction was not acquired. *Motter v. Welty*, 12 C. C. 82.

455. Where the record of a foreign judgment does not show a service on the defendant but simply avers that the defendant appeared by attorney, he may show in a suit on the judgment, that the attorney who entered an appearance for him had no authority to do so. *Home Friendly Society v. Tyler*, 12 C. C. 623; s. c. 3 Northam. 365, 369.

456. In an action upon a judgment rendered in another state, an affidavit of defence that an appeal has been taken from such judgment, which is a *superseas* to any proceedings thereon, is not sufficient to prevent judgment in this state, but the court will stay the execution here pending the final determination of the appeal. *Wood Mowing & Reaping Co. v. Berry Harvester Co.*, 6 Del. 101; s. c. 4 Dist. Rep. 141.

457. In an action upon a foreign judgment the statement need not have annexed an exemplification of the record sued upon. *American Bell Telephone Co. v. Parish*, 7 Lanc. 206.

458. In a suit on a foreign judgment, it was held to be a good defence that the requirements of the law of the state in which judgment was obtained, that an order of court should be obtained grant-

ing leave to bring suit on the judgment, had not been complied with. *McClean v. Keener*, 8 Lanc. 313.

459. A court of equity has power to nullify a judgment of another court of concurrent jurisdiction on the ground of fraud, and decree a sheriff's sale thereunder to be of no effect, but such jurisdiction will not be assumed where the plaintiff's bill contains substantially the same averments as were contained in a petition in such other court praying that the judgment be stricken off and the execution set aside, upon which petition such rules were discharged. *Wallace v. Stevenson*, 42 P. L. J. 363.

460. An affidavit of defence setting up a judgment for the same cause of action in another state must aver that it is conclusive in such state. *Diack v. Wilson*, 27 W. N. C. 251.

461. The authenticated records of a lunacy proceeding in a foreign state will be received as proof of lunacy in this state. *In re Linton*, 29 W. N. C. 550.

462. In an action on a foreign judgment, where the record showed a service on the defendant by the sheriff and an appearance by counsel and a judgment for want of a plea, answer or demurrer, an affidavit of defence was held to be insufficient which set forth that the summons served did not state the place at which the defendant was summoned to appear, and that the attorney who appeared had no authority to represent the defendant. *Polk County Bank v. Fleming*, 33 W. N. C. 75.

463. In an action on a foreign judgment, a return of service by the sheriff is conclusive where it appears that the defendant was a resident of the state in which the judgment was given; where an irregularity is alleged but the courts of the other state have refused relief against the judgment, such irregularity cannot be set up in this state. *Stewart v. Schaeffer*, 33 W. N. C. 365.

464. In a suit upon a judgment recovered in a sister state, the declaration need not contain averments of fact es-

sential to the foreign jurisdiction, if the foreign court was a court of general jurisdiction. *Thompson v. Owen*, 8 Kulp 36.

465. Where a judgment has been recovered against a married woman in another state for a cause of action in which, in such other state, coverture would have been no defence, although it would have been a good defence in this state, such coverture cannot be set up as a defence in a suit upon the judgment in this state. *Thompson v. Owen*, 8 Kulp 36.

VIII. Plea of former recovery.

(a) General principles.

466. Where the narr. in a previous suit was sufficient to cover the claim in a second suit, and judgment was taken in the first suit by agreement, the party alleging that the settlement did not include the claim in the second suit, has the burden of proving that fact. *Moser v. Guarantee Trust & S. D. Co.*, 3 Atlan. 454.

(b) What may be pleaded as a former recovery.

467. A judgment in an amicable action between a claimant and an administrator of a lunatic's estate to test the amount due for maintenance and attendance until her death and burial, is a bar to any further claim against the estate to the time of burial. *Montgomery's Appeal*, 7 Atlan. 231.

468. The prior recovery of a final judgment in another proceeding between the same parties is a bar to a recovery in a proceeding by attachment under the act of 17 March 1869 (Brightly's Purdon 70), and this, though the defendant filed no bond under sec. 3 of that act. *Miller v. Rohrer*, 127 P. S. 384.

469. A former judgment is a bar to any future suit on the same cause of action between the same parties; and this, although in a subsequent case between other parties or upon another

cause of action the court may have reversed its rulings and decided the same principles differently. *Bolton v. Hey*, 168 P. S. 418; affirming s. c. 6 Del. 162.

470. A judgment in favor of the plaintiff upon a *scire facias* to revive, personally served, is a conclusive adjudication of every fact essential to the court's jurisdiction of the parties and of the cause of action, including the fact that the defendant in the *scire facias* was the person against whom the original judgment was obtained. *Burke v. Gibson*, 6 Kulp 310.

471. A court of equity will not enjoin execution upon a judgment on a *scire facias* sur municipal lien, after the discharge of a rule to set aside, based on the same facts. *Felts v. Wilkes-Barre*, 6 Kulp 79. See *Wilkes-Barre v. Felts*, 134 P. S. 529; affirming *Wilkes-Barre v. Ricketts*, 5 Kulp 429.

472. Where, upon a rule to open a judgment, an issue was framed to determine whether the judgment was given in part as an indemnity, and a verdict was rendered for the plaintiff; it was held, that such verdict was an adjudication that the plaintiff was entitled to recover, and was a bar to a second submission of the question upon the trial of a *scire facias* to revive, which had been issued pending the proceedings to open. *Wilson v. Wilson*, 137 P. S. 269. See *Wilson v. Wilson*, 142 P. S. 572.

473. The discharge of a rule to show cause why a bond given by a railroad company to secure damages should not be stricken from the record, is a bar to a subsequent bill in equity to restrain the completion of the railroad upon the same grounds of relief. *Wallace v. Newcastle Northern Ry. Co.*, 138 P. S. 168.

474. In an action for a breach of warranty, it was held, that the fact that the defects in the engine set up in the suit had been set up on a rule to open the judgment entered on a promissory note given for the engine, and that said rule was discharged, would not estop the plaintiffs from setting up the same de-

fects if it appeared that the plaintiffs had abandoned the rule and paid the claim under the compulsion of an execution to prevent a sacrifice of their goods; but if the rule had been abandoned without such excuse, the mere fact that no depositions were taken or argument made would not prevent such discharge from operating as an effectual estoppel. *Himes v. Kiehl*, 154 P. S. 190.

475. Where a bond and mortgage was executed by a wife to secure her husband's debt, and the court struck off the judgment as to the wife, but refused to strike it off or open it as to the husband; it was held, in an action on the mortgage, that such adjudication was a determination of all questions of fraud, want or failure of consideration and was conclusive not only as to the husband but also as to the wife. *Heilman v. Kroh*, 155 P. S. 1.

476. Where a rule to open a confessed judgment has been discharged, the defendant cannot, upon a subsequent *scire facias* to revive, set up the same matters in defence that were passed upon on the rule to open. In such a case on an appeal from a judgment on the *scire facias* the appellant's paper-book must contain the affidavit of defence to the *scire facias* and the opinion of the court discharging the rule to open. *Ahl v. Goodhart*, 161 P. S. 455.

477. Where a rule to set aside a judgment and a sale thereunder has been discharged, the defendant cannot be heard as to the same matters upon a bill in equity to set aside the judgment and sale and enjoin an action of ejectment. *Haneman v. Pile*, 161 P. S. 599.

478. Where trustees under a will mortgaged the real estate under an order of court for the purpose of paying a prior lien and repairing and improving other portions of the estate, and a judgment upon the bond was opened and the defendants let into a defence and the trial was had upon the merits; it was held, that the court of common pleas had jurisdiction to decide everything at issue and that the

defendants had no standing in the orphans' court to enjoin a sale of the mortgaged premises upon a petition similar to that presented to the common pleas. *Lawrence's Estate*, 169 P. S. 185. Reversing s. c. 14 C. C. 662.

479. Where, in committing a lunatic who was a pauper, the court granted a rule upon the overseers of a township to show cause why they should not pay to the county the expenses and costs of a proceeding in lunacy, and the overseers denied their liability and the settlement and the rule was discharged without prejudice to further proceedings against the township of last settlement when ascertained; it was *held*, that such rule was conclusive in favor of the township, and that a second action would not lie against the same township. *Armstrong County v. Plum Creek Township*, 158 P. S. 92.

480. Where a plaintiff prosecutes his claim to judgment in a court not having jurisdiction, he cannot maintain a second suit in a court of competent jurisdiction; the aid of the former court having been invoked by him to his own benefit. *Levey v. Norton*, 10 C. C. 278.

481. Where, in partition proceedings in the common pleas, an agent was allowed to intervene and set up his claim to a one-third interest in the lands under his contract with the decedent, and the decree of the court was adverse to the agent's claim; it was *held*, that such decree was a bar to the agent's right to subsequently maintain a bill for specific performance of the contract of agency and a contract of sale made under it after the death of his principal. *Shisler's Estate*, 13 C. C. 513.

482. A recovery on an oil lease of the royalties provided for therein is a bar to a subsequent suit for damages for breach, during the same period, of the implied covenant for proper and sufficient operations. *Hill v. Joy*, 149 P. S. 243.

483. A bill for an injunction will not lie for the same injury for which a recovery in damages was sought in a previous action in trespass brought by the

plaintiff against the defendant. *Bierer v. Hurst*, 162 P. S. 1.

484. The final decree of a court of equity dismissing a bill upon its merits is a bar to another bill between the same parties for the same matter, but where a bill has been dismissed upon the ground that the court had no jurisdiction, such dismissal is not a bar to a second bill. *Weigley v. Coffman*, 144 P. S. 489.

485. A verdict and judgment for plaintiff for an undivided part of the land sued for in an equitable ejectment is a bar to a subsequent action to recover the other undivided parts of the same land. *Schive v. Fausold*, 137 P. S. 82.

486. One verdict and judgment in an equitable ejectment has all the conclusiveness of a decree in chancery as to every matter therein litigated, and where the record is so general that it does not show what particular matters were litigated, it is competent to show by extrinsic evidence what those matters were. *German-American Tile & Trust Co. v. Shallcross*, 147 P. S. 485.

487. A verdict and judgment in an action of ejectment upon an equitable title have all the conclusive effect which the decree of a chancellor would have. *Schultz v. Griffin*, 2 Lack. Jur. 251.

488. In an action of ejectment, where the plaintiff put in evidence a deed from "M. R., late M. B.," divorced; it was *held*, that a proceeding in equity, in which the defendant was a plaintiff, and wherein a final decree was entered, establishing the validity of the same deed, and the fact of the divorce decided, was properly admitted in evidence, together with the deed, and further, that the defendant was estopped from alleging that the deed was obtained by fraud. *Bennethum v. Bowers*, 141 P. S. 105.

489. An adjudication upon the account of an executor and trustee ordering the investment of a definite sum for the benefit of a legatee, is conclusive against the claim, on a second adjudication, of the legatee for interest on the sum from the death of the testator. *Moyer's Estate*, 141 P. S. 125.

490. A justice's judgment for possession in favor of the landlord is a good defence to an action of trespass brought by the tenant's wife for damages resulting from the legal execution of the writ of possession. *McClelland v. Patterson*, 5 Cent. 734.

491. The judgment of a justice for defendant in a proceeding under the act of 3 April 1830 (Brightly's Purdon 1167) for possession for non-payment of rent is a bar to any other proceeding before another justice to recover for non-payment of rent for the same term. *Marsteller v. Marsteller*, 132 P. S. 517; s. c. 25 W. N. C. 421.

492. Where a suit has been commenced before a justice, and judgment entered, and no appeal taken, such judgment is a bar to a subsequent suit before another justice for the same cause of action. *Nalen v. Burke*, 12 C. C. 490.

493. A suit before a justice on a claim not yet due and a dismissal at the plaintiff's cost is a bar to a subsequent suit when the claim is due. *Buzzard v. Newhart*, 2 Northam. 258.

494. Where a defendant in a suit before a justice presents a book account as a set-off, and such set-off is disallowed by the justice, the defendant cannot afterwards bring suit against the plaintiff for the same account. *DeBurkhardt v. Frank*, 1 York 113.

495. In an action before a justice, the neglect of a defendant to bring in his claim of set-off is a bar to any subsequent suit by the defendant against the plaintiff for the amount of such set-off. *Shetter v. Metzgar*, 4 York 8.

496. Where there has been an arrest and a dismissal, after hearing, upon a charge of desertion, and nothing has been done to change the situation, such adjudication will be treated as conclusive in a subsequent prosecution for the same offence. *Comm'th v. Cawley*, 4 Dist. Rep. 69; s. c. 7 Kulp 539.

497. Where the record of a former action is offered to show that the plaintiff's demand is *res adjudicata*, the question, if determinable from such record, is

one of law for the court. *Goodhart v. Bishop*, 142 P. S. 416.

498. When a judgment is and is not a bar to a subsequent suit, see note to *Kirkpatrick v. McElroy*, 7 Atlan. 649.

See JUDGMENT, VI.

(c) What judgments are not a bar to a second suit.

499. A decree at the suit of a creditor of the vendor, setting aside a conveyance as fraudulent as to creditors, is no bar to a subsequent attachment execution against the vendor as defendant and the vendee as garnishee. *Dicken v. Hays*, 7 Atlan. 58.

500. A verdict of not guilty in a criminal prosecution for receiving stolen goods is no bar to a subsequent action by the owner against the defendant for the price of the same. *Rohm v. Borland*, 7 Atlan. 171.

501. Proceedings under the act of 27 March 1705 (Brightly's Purdon 1959), being penal, do not prevent recovery in trespass for damages done by swine running at large. *Robison v. Fetterman*, 14 Atlan. 245; s. c. 12 Cent. 566.

502. The defendant's acquittal of a criminal charge based on the same transaction cannot be interposed as a bar to a civil proceeding by a warrant of arrest. *Morch v. Raubitschek*, 159 P. S. 559.

503. Where an act of assembly authorized the issuing of warrants for a state road by commissioners as the work progressed, a judgment on one warrant is no bar to a recovery on another warrant for subsequent work under the same contract. *East Union Township v. Comrey*, 9 Atlan. 290.

504. The refusal of a rule for possession, under the local act of 13 May 1871 (P. L. 820), is no bar to an action of ejectment by the purchaser at sheriff's sale. *Bartolet v. Saylor*, 12 Atlan. 854; s. c. 11 Cent. 787.

505. One who, in an action of ejectment, sets up a devise as a defence, is not thereby estopped from setting up an ademption of a legacy charged on the devise by the will. *Spier's Appeal*, 5 Cent. 679.

506. In an action against the plaintiff's agent for conspiracy, a former recovery by the co-defendants against the plaintiffs in assumpsit cannot be pleaded as a former recovery in bar of the action. *Rundell v. Kalbfus*, 125 P. S. 123.

507. A judgment note against the contractor of a vessel for materials does not preclude a subsequent proceeding *in rem* against the vessel under the act of 13 June 1836 (Brightly's Purdon 145). *The Odorilla v. Baizley*, 128 P. S. 283.

508. A judgment against a limited partnership (under the act of 2 June 1874, Brightly's Purdon 1086) is no bar to an action for the same debt against the members as general partners. *Sheble v. Strong*, 128 P. S. 315.

509. The discharge of a rule to open judgment is no bar to proceedings to restrain execution, unless the same issues are presented. *Nelson v. Guffy*, 37 P. L. J. 65; s. c. 131 P. S. 273.

510. A judgment for plaintiff in an action of trespass *quare clausum fregit*, where the pleas were not guilty and *liberum tenementum*, is not conclusive in a subsequent ejectment between the same parties. *McKnight v. Bell*, 135 P. S. 358; s. c. 26 W. N. C. 281.

511. In a suit by a distributee of a decedent's estate against one who has received the plaintiff's share from the executor, upon papers fraudulently obtained from the plaintiff, the orphans' court record showing the dismissal of the plaintiff's exceptions to the credit taken by the executor is inadmissible in evidence, it appearing that the money was paid in good faith and without notice of the fraud. *Brooks v. First Presbyterian Church*, 135 P. S. 137.

512. Where a plaintiff takes judgment for part of his claim for want of a sufficient affidavit of defence, and collects the same by execution, it is no bar to his proceeding to verdict and judgment for the balance. *Stedman v. Poterie*, 139 P. S. 100; s. c. 27 W. N. C. 270; 38 P. L. J. 247; reversing s. c. 37 Ibid. 322.

513. Upon the trial of a second eject-

ment between the same parties on the same title, the record of the judgment in the former ejectment is not receivable as a conclusive adjudication of the matters in dispute. *Lash v. Spayd*, 141 P. S. 360.

514. Where the plaintiff brought assumpsit and trespass and recovered a verdict in assumpsit, but before judgment was entered on that verdict the action in trespass was called for trial, it was not error to refuse to instruct the jury that the judgment recovered in assumpsit was a bar to the action in trespass. *Middletown Furniture Mfg. Co. v. Philadelphia and Reading R. Co.*, 145 P. S. 187.

515. In an action for goods sold and delivered, where the affidavit of defence averred that a prior judgment for the plaintiff before an alderman for the same cause of action was reversed on *certiorari* and a judgment for the defendant for costs therein was unsatisfied; it was *held*, that the averment as to the prior judgment raised no bar to the second action. *Jenkinson v. Hilands*, 146 P. S. 380.

516. Where the plaintiff brought suit to recover the value of certain empty beer barrels; it was *held*, that the record of a judgment for the plaintiff before an alderman for the price of the beer sold in the barrels was not conclusive against the plaintiff and was properly excluded, where it appeared that the defendant was to have a reasonable time to return the barrels after selling the beer and the judgment before the alderman was entered fifteen days after the last beer was sold. *Milligan v. Browarsky*, 147 P. S. 155.

517. Where a bill filed for specific performance of a parol partition was dismissed and the parties were relegated to their legal rights; it was *held*, that such dismissal was no bar to the setting up of the parol partition as a defence in ejectment for the same land. *Lewis v. Baker*, 151 P. S. 529.

518. A suit by a superintendent of a stone quarry under an alleged contract for expenses incurred for boarding the workmen, was *held* not to be barred by

the previous recovery of a judgment against the defendants before a justice of the peace, where the record of the justice showed that the claim in that suit was merely for salary. *Terrerri v. Jutte*, 159 P. S. 244.

519. A judgment upon an appeal taken by one of the parties is no bar to a subsequent appeal by the other party in which different errors are assigned. *Gates v. Pennsylvania R. R. Co.*, 154 P. S. 566. See s. c. 150 P. S. 50.

520. Where a widow brought an action for the death of her husband and the writ was returned *nihil habet*, and a year afterward she brought a second action in which she was non-suited, because the action was barred by the statute of limitations, and she then issued an alias in the first action to which the defendant pleaded the judgment of non-suit as a bar, and then upon the application of the plaintiff the judgment of non-suit in the second action was taken off, the costs paid and the suit discontinued and the court then overruled the plea in bar of the alias; it was *held*, that the taking off of the non-suit was within the discretion of the court, that the issuing of the second original writ was not equivalent to the discontinuance of the first suit, and that a compulsory non-suit is not a bar to another action. *Fitzpatrick v. Riley*, 163 P. S. 65.

521. Where an action for necessities was brought against husband and wife and the judgment against the wife was reversed on *certiorari* in the common pleas, but the judgment against the husband was sustained; it was *held*, that such reversal as to the wife was no bar to a subsequent action against the wife alone. *Roll v. Davison*, 165 P. S. 392.

522. A judgment upon a *scire facias* against a defendant, is no bar to a subsequent *scire facias* against the defendant and a terre tenant. *Conklin v. Cleveland*, 14 C. C. 154; s. c. 37 W. N. C. 143.

523. A judgment for costs against the plaintiff in a suit against a sheriff before a justice of the peace, where the justice had no jurisdiction, is no bar to a subsequent

suit in the common pleas against the sheriff for the same cause of action. *Enterprise v. Comrey*, 15 C. C. 627.

524. The dissolution of a preliminary injunction restraining the plaintiff railroad company from entering upon the lands of another company, is no bar to a bill to enjoin the plaintiff in the first proceeding. *Scranton & Forest City Railroad Co. v. Delaware & Hudson Canal Co.*, 1 Lack. Jur. 113.

525. A party is not concluded by a prior judgment unless the precise question which he seeks to raise was therein necessarily tried and determined; and where the record is general, it may be shown what were the matters in litigation. *Schultz v. Griffin*, 2 Lack. Jur. 251.

526. Where a creditor's bill was filed by a plaintiff on behalf of himself and all other creditors, and it was heard on bill and answer and dismissed and there was no decree for an account; it was *held*, that such dismissal was no bar to a subsequent bill by another creditor not named in the first bill brought by himself and all other creditors and similar in all respects to the first bill. *Yost v. Cowden*, 7 Montg. 73.

527. An award of arbitrators which disposes of only part of the subject-matter of the submission is void, and is no bar to a subsequent action at law. *Thomas v. Heger*, 11 Montg. 106.

528. Jurisdiction in damages for widening a street being in the quarter sessions, a decree for such damages is no bar to a subsequent proceeding in the common pleas for damages for change of grade. *Walter v. Easton*, 1 Northam. 73.

See JUDGMENT, VI.

IX. Satisfaction and payment.

529. Where the holder of a judgment against the defendant agreed to apply the same to a debt due by him to the defendant, on condition that the defendant should perform certain independent agreements which he failed to perform, the judgment will be considered as still

alive, and will have priority on distribution to a subsequent judgment against the same defendant. *McCormick's Appeal*, 14 Atlan. 257; s. c. 12 Cent. 471.

530. One who holds a judgment for the benefit of another has not the power to satisfy or release it to the prejudice of the real owner. *Geissinger's Appeal*, 3 Cent. 514.

531. The court will not strike off the satisfaction of a judgment and open the same, to permit usurious interest therein to be set up as a defence to a subsequent judgment for the same debt, where it appears that the satisfaction was entered at the defendant's instance and not fraudulently as a device to cover up usury. *Pettis's Appeal*, 126 P. S. 420.

532. A satisfaction of a judgment made of record by the plaintiff cannot be summarily set aside by the court upon the application of a third person claiming to be beneficially interested, but the court may direct an issue to determine the truth of the assertion. *Rand v. King*, 134 P. S. 641; s. c. 26 W. N. C. 81.

533. Where land is sold at sheriff's sale on a bond attached to a purchase-money mortgage and is bought in by the plaintiff for a trifle, the defendant is not relieved from the unsatisfied judgment; and this, though the land was greatly improved at the time of the sheriff's sale, *Lomison v. Faust*, 145 P. S. 8.

534. Where a judgment note was given to secure any sums previously advanced or which might be thereafter advanced, it was *held*, that checks and receipts showing payments of various sums of money both before and after the date of the judgment note, but not specifying on what account they were paid, were insufficient of themselves to establish an indebtedness, but having been admitted in evidence, the defendant might show that prior to making the said payments his decedent had deposited moneys in plaintiff's hands for investment or safe-keeping, and it was then for the jury to say whether the payments were made on account of such deposits. *McCain v. Peart*, 145 P. S. 516.

535. In a suit by an infant by her father as next friend, brought for damages for negligence, the father cannot enter satisfaction without the sanction of the court; and where such an attempt is made, pending an appeal to the supreme court, the latter court will grant damages at six per cent on the verdict and an attorney fee of twenty dollars, under the act 25 May 1874 (*Brightly's Purdon* 793). *O'Donnell v. Broad*, 149 P. S. 24; s. c. 2 Dist. Rep. 84. See s. c. 11 C. C. 622.

536. Payment by a third party of a sum of money less than the amount of a judgment, with the understanding that it should be in full satisfaction of the judgment, is a valid accord and satisfaction. *Fowler v. Smith*, 153 P. S. 639.

537. The satisfaction of a judgment will not be stricken off where it appears that it was paid to the attorney of record for the plaintiff and the money was paid by the attorney to a person who acted as plaintiff's agent in the lending of the money and collecting the interest, and the application to strike off the satisfaction on the ground that the party who received the money was not the plaintiff's agent was not made until three years after the death of the attorney. *Miller v. Preston*, 154 P. S. 68; affirming s. c. 30 W. N. C. 240.

538. Where the defendant admitted and tendered judgment for two-thirds of the plaintiff's claim and filed an affidavit of defence to the balance, and the court granted a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence and allowed judgment for the amount admitted, whereupon an execution was issued and the amount of the judgment paid; it was *held* to be error for the court to subsequently discharge the rule for judgment on the ground that the proceedings in reference to the admitted part of the claim operated as a satisfaction of the disputed part. *Taber v. Olmstead*, 158 P. S. 351.

539. Where a judgment has been paid in full, it may be agreed between the par-

ties that such judgment shall not be satisfied of record but shall remain as collateral for a new loan made or to be made; judgment creditors whose liens accrue subsequently to such an agreement cannot object to it. *Merchants' National Bank v. Mosser*, 161 P. S. 469.

540. Where a testator at the time of his death held two notes against one of his sons who was an executor, and the son becoming involved and to protect the estate, gave a judgment to secure the payment of the two notes, and having subsequently relieved himself from his financial embarrassment, the judgment was satisfied by the other executor, who retained the notes, which by the testator's directions were to be deducted as advancements; it was *held*, that the court properly refused to strike off the satisfaction of the judgment, and that legatees under the testator's will had no standing to invoke the assistance of the judgment for the purpose of protecting their shares. *Rush v. Rush*, 161 P. S. 629.

541. Where the owner of a senior judgment satisfied the judgment by mistake and the court subsequently struck off the satisfaction; it was *held*, that the judgment did not lose its priority of lien over junior judgments in existence at the time the satisfaction was entered, but as to a judgment entered pending the rule to strike off the satisfaction, where the plaintiff advanced money upon the state of the record; it was *held*, that such judgment might be asserted in priority to the satisfied one but not as against the intermediate judgments; such later judgment would only be entitled to be paid upon distribution where the fund was large enough to pay the intermediate judgments and would have gone to the junior judgment if the senior judgment had been actually paid. *McCune v. McCune*, 164 P. S. 611.

542. Where an attorney at law accepts securities instead of money in satisfaction of a judgment, his client must either ratify or repudiate, he cannot do both; if he acquiesces in the satisfaction and pro-

ceeds to enforce collection of the securities received, this is a ratification and the satisfaction will not be stricken off. *Whitesell v. Peck*, 165 P. S. 571.

543. After a judgment has been obtained, the plaintiff's attorney may accept the money for his client and give a receipt for it, but he cannot assign it to another or release lands bound by it; he cannot compromise the claim and receive less than is due, and a satisfaction entered by him without full payment or authority or ratification by his client will be stricken off. *Ely v. Lamb*, 10 C. C. 209.

544. A judgment against a treasurer of a building association was ordered to be satisfied of record where it appeared that since its entry he had paid to the association a sum exceeding in amount the judgment against him. *Norris Building Ass'n v. Altmaier*, 10 C. C. 645.

545. Where the plaintiff alleged that she was tricked into signing an order for satisfaction, while the defendant averred that the judgment was satisfied in order to aid a purpose which had failed, the court struck off the satisfaction. *Bowman v. Forney*, 15 C. C. 134.

546. Where an attorney for the plaintiff has an irrevocable power of attorney to collect for a contingent fee, and the defendant, with actual or constructive notice of such agreement, induces the plaintiff to revoke the power and to enter satisfaction, the court will strike off the satisfaction so far as it affects the interest of the attorney. *Pankake v. Ackerman*, 4 Del. 38; s. c. 6 Lanc. 225.

547. An attorney has no general authority to compromise his client's cause, and if he does so without his client's consent, his client will only be bound by his subsequent ratification or the receipt of the money; but where a claim was transmitted by New York attorneys to their correspondent in Philadelphia for collection, and the latter by the authority of the New York attorneys assigned the judgment to the defendant's attorney for a money consideration, who entered satisfac-

tion thereon and the money was transmitted to the New York attorneys; it was *held*, that the authority of the New York attorney was general, and that the compromise was valid and binding upon the plaintiffs, and the court refused to set aside the assignment and satisfaction. *Schroeder v. Gillespie*, 2 Dist. Rep. 221.

548. Upon a rule to satisfy a judgment where the plaintiff does not appear, the facts must be shown by depositions; notice to the plaintiff by registered letter was *held* to be insufficient where he lived twenty-nine miles from the court-house. *Riley v. Harris*, 2 Dist. Rep. 231.

549. The defendant in a judgment was granted, under the evidence, an issue to determine whether the judgment had not been paid; and this, although the judgment had several times been revived by amicable *scire facias*. *Hamlin v. Cobb*, 1 Lack. L. N. 245.

550. The intentional satisfaction of a judgment is *prima facie* evidence of payment or a gift; it will not be stricken off at the instance of a creditor. *Landis v. Brackbill*, 7 Lanc. 275.

551. Where the plaintiff held a judgment against the defendant for one hundred and sixty-one dollars, and the defendant sent him a check for seventy-five dollars "in full of all claims," accompanied by a letter saying "if satisfactory accept it, if not, return to me," and the plaintiff endorsed it and received the money on it; it was *held*, that this did not amount to an accord and satisfaction of the judgment. *Tucker v. Murray*, 10 Lanc. 235.

552. An attorney who acted as agent for the plaintiff in making a loan has no implied authority to collect the principal or interest of the judgment given for said loan, and where he places his name on the margin of the record as attorney for the plaintiff and enters satisfaction, such satisfaction will be stricken off in the absence of evidence of express authority; the consent of the plaintiff to the collection of interest by the attorney does not

give the latter authority to collect the principal. *Slaymaker v. Herr*, 12 Lanc. 342.

553. The court refused to strike off the satisfaction of a judgment, on the petition of the administrator of a person having the same name as that of the plaintiff, or to grant an issue as to which person was the real plaintiff. *Quigney v. Quigney*, 1 Northam. 149.

554. Where a subsequent lien creditor has paid a prior judgment under a legitimate effort to protect his interests, his right to subrogation is clear; but where the prior judgment creditor has issued execution, the court will not compel him to accept payment from a subsequent lien creditor and to assign his judgment to him. *Blick v. Weller*, 3 York 206.

555. Under the act 14 March 1876 (Brightly's Purdon 1104) the court can decree the entry of satisfaction only in cases of actual payment of the judgment in full by the defendant, or where there are such undisputed facts as produce a conclusive result of strict law, that satisfaction equivalent to actual payment has been obtained; the statute cannot apply where there is any doubt or question as to the facts or the inference to be drawn from them. *Atkinson v. Harrison*, 153 P. S. 472.

556. Upon a rule to enter satisfaction under the act of 14 March 1876 (Brightly's Purdon 1104), the proof must show actual payment in full; the court has no power to apply cross demands, or to set off judgments. *Melan v. Smith*, 134 P. S. 649; s. c. 26 W. N. C. 83.

557. If there is a substantial dispute as to the fact of the payment of a judgment, the act of 14 March 1876 (Brightly's Purdon 1104), relating to satisfaction, does not apply. *Third National Bank v. Hunsicker*, 8 C. C. 635; s. c. 6 Montg. 73.

558. Under the act 14 March 1876 (Brightly's Purdon 1104), the power of the court to direct judgments to be marked satisfied can only be exercised upon clear proof of actual payment, but the court has power to order an issue to

try whether or not the judgment has been paid or discharged, and if the jury find that it has, the court may order a perpetual stay of execution, and the defendant may compel the plaintiff to enter satisfaction under the act 13 April 1791 (Brightly's Purdon 1103). *Salsberg v. Bartikoski*, 6 Kulp 235; s. c. 4 Del. 480.

559. A creditor cannot invoke the provisions of the act of 14 March 1876 (Brightly's Purdon 1104), and require the satisfaction of a judgment. *Cowden v. McClelland*, 4 Montg. 135.

560. The court is not authorized by the act of 14 March 1876 (Brightly's Purdon 1104) to direct the entry of satisfaction, for an amount paid on account of a judgment. *Unruh v. Longstreth*, 6 Montg. 33.

561. For failure to enter satisfaction, the act of 13 April 1791 (Brightly's Purdon 1103) is an exclusive remedy; a common-law action does not lie. *Oberholzer v. Hunzberger*, 1 Mona. 543; affirming s. c. 4 Montg. 129.

562. Where the sheriff's return to a writ of *feri facias* shows that the money was made, it is the duty of the prothonotary to enter satisfaction on the judgment index, and in such case the plaintiff is not liable, under the act 13 April 1791 (Brightly's Purdon 1103), for the prothonotary's failure to enter satisfaction. *Bratton v. Leyrer*, 12 C. C. 651.

X. Rule of stare decisis.

563. A *per curiam* opinion is an opinion in which the judges are all of one mind and so clear that it is thought unnecessary to elaborate it for extended discussion; such an opinion is not entitled to less weight than any other as an authority upon the questions involved. *Clarke v. Western Assurance Co.*, 146 P. S. 561.

564. Upon the decision of a federal question, the court of common pleas is bound by the rulings of the supreme court of the United States, though in conflict with those of our own supreme court. *Nelson v. Guffy*, 37 P. L. J. 65.

565. In Philadelphia county one court will dissolve an attachment which has been issued upon the same allegations as a prior attachment dissolved by another court. *Merritt v. Quigley*, 1 Dist. Rep. 505.

JUDGMENT BY DEFAULT.

See CERTIORARI, II., (k): PRACTICE.

JUDICIAL NOTICE.

See EVIDENCE, II.

JUDICIAL SALES.

See ASSIGNMENT FOR CREDITORS: DECEDENTS' ESTATES: EQUITY, XXXVII.: EXECUTION, XI.: EXECUTORS AND ADMINISTRATORS: MORTGAGE: MUNICIPAL IMPROVEMENTS: ORPHANS' COURT SALES: PARTITION: TAX SALES.

1. A sale, in bankruptcy, of real estate in the name of the bankrupt's wife upon petition that the bankrupt's transfer to his wife was in fraud of creditors, cannot discharge the lien of a mortgage given by the bankrupt and his wife before the institution of bankruptcy proceedings. *Schwartz v. Kleber*, 7 Atlan. 209.

JURISDICTION.

See APPEAL AND ERROR: ATTACHMENT: CONFLICT OF LAWS: CONTEMPT: CORONER: COURTS: CRIMINAL LAW, XII.: ELECTION LAW: EQUITY, II.: HUSBAND AND WIFE, XI.: INSOLVENCY: JUSTICES' COURTS: LUNACY: MANDAMUS: ORPHANS' COURTS: OYER AND TERMNER: PARTITION: QUO WARRANTO: TRUSTEES.

- I. General principles.
- II. Territorial jurisdiction.
- IV. Concurrent jurisdiction.
- V. Effect of the judgment.

I. General principles.

1. The want of jurisdiction in the justice may be shown as error in the supreme court after the trial of an ap-

peal in the common pleas, where the question was not raised. *Hill v. Tionesta Township*, 129 P. S. 525.

2. Want of jurisdiction can be taken advantage of at any period of the case under the plea of "not guilty"; a special plea of want of jurisdiction will not be permitted to be filed. *Schrivver v. Nace*, 5 York 131.

3. Where a court has jurisdiction of the subject-matter, but its jurisdiction as to the particular case is restricted by circumstances peculiar to the case itself, objection to the jurisdiction may be waived, as in an action on an oil lease brought in a county other than the county in which the land is situated; in such a case, if the defendant fail to make objections before plea filed, he has waived his privilege. *Fennell v. Guffey*, 155 P. S. 38.

4. Where viewers were appointed to assess damages in taking away from the plaintiff's land stone, gravel and coal without his consent, and the plaintiff appealed from the award and filed a declaration in trespass to which the defendants entered a plea of general issue; it was *held*, that it was too late for the defendant to move to quash the proceedings for want of jurisdiction. *Morris & Essex Mutual Coal Co. v. Delaware, Lackawanna & W. R. R. Co.*, 1 Lack. L. N. 176.

5. The common pleas has jurisdiction in suits for less than one hundred dollars which are properly cognizable before a magistrate, but in such a case the plaintiff cannot recover costs. *Doherty v. Watson*, 29 W. N. C. 32

II. Territorial jurisdiction.

6. In case of a blow in one county and death following in another, the trial must be held in the county where the blow was inflicted. *Comm'th v. Cioffi*, 5 Montg. 128. But see act of 8 May 1889 (Brightly's Purdon 555).

7. Upon the division of a county after proceedings to compel a trustee to ac-

count, the court of the old county has jurisdiction to enter and enforce a decree to pay over; and this, though the parties reside in the new county. *McDonough v. McDonough*, 5 Kulp 520.

8. Upon a sale under the act of 18 April 1853 (Brightly's Purdon 1830), the court must appoint a trustee to hold the proceeds not presently distributable so as to secure the payment of legacies charged on the land. The trustee must be appointed by the court of the county wherein the land lies, and not by the court of another county where the will was probated. *Blake's Estate*, 6 Montg. 197.

9. Where a bridge spans a stream which is a boundary line between a city and a county, the city will be restrained by the court of the adjoining county from interfering with the laying of the tracks of a passenger railway company upon the portion of the bridge belonging to the adjoining county, where it appears that the consent to the laying of the railway has been given by the supervisors of the township and the commissioners of the county, and the officers of the city have been made parties defendant to the bill. *Delaware County & Philadelphia Electric Ry. Co. v. Philadelphia*, 164 P. S. 457.

10. Where the defendant on purchasing goods from an agent made false representations, upon the faith of which the principal filled the order in another county; it was *held*, that the purchaser could be indicted for false pretences in the county where the principal received the representation from his agent and where the sale was consummated. *Comm'th v. Karpowski*, 167 P. S. 225; affirming s. c. 15 C. C. 280.

11. Where an order for goods purported to have been dated in Altoona, Blair county, but the proof was that the goods were furnished upon the order in Philadelphia county, and there was no proof that the order was made and published in Blair county; it was *held*, that an indictment for a forgery of the order could not be sustained in Blair county. *Comm'th v. Fagan*, 12 C. C. 613.

12. A resident of one county is amenable to the quarter sessions of another county upon a charge of desertion. *Comm'th v. Wall*, 1 Lack. L. N. 45.

13. Upon an indictment for conspiracy the *venire* may be laid in any county in which it can be proven that an overt act was done by any of the conspirators in pursuance of their common design; and this, although they entered into the design in another county. *Comm'th v. Sterling*, 10 Lanc. 41.

IV. Concurrent jurisdiction.

14. The equity side of the common pleas has jurisdiction to enforce the payment of legacies charged on land, notwithstanding the conferring of such jurisdiction upon the orphans' court by the act of 24 February 1834 (Brightly's Purdon 620). *Brotzman v. Brotzman*, 1 Northam. 13.

15. If a charge on real estate be created by contract in the life of a decedent, and the executor be directed by his will to receive it, the common pleas has jurisdiction of a suit to compel its payment to the executor. *Capp v. Brunner*, 132 P. S. 417.

16. The orphans' court has no jurisdiction of a claim by a surviving partner of the decedent for a balance due, no account having been settled in the lifetime of the decedent. The claimant's forum is the common pleas. *Miller's Estate*, 136 P. S. 349; s. c. 27 W. N. C. 3.

17. Where the liability of the owner of land exists by virtue of covenants in the line of his title, such covenants cannot be enforced by the orphans' court. *South Mahoning Township v. Marshall*, 138 P. S. 570; s. c. 27 W. N. C. 225.

18. The orphans' court will not order the sale of real estate to pay the expenses of lunacy proceedings, allowed by the common pleas, where the personal property has been distributed and the administrator was not a party to the lunacy proceedings. The jurisdiction is in the common pleas. *Young's Estate*, 8 C. C. 4.

19. If an alleged lunatic dies pending the inquisition, the court of common pleas has no power to make an order on the executor to pay the costs of the proceeding; that is the exclusive function of the orphans' court. Otherwise, if the inquisition be found before the death. *Ebling's Estate*, 134 P. S. 227. See s. c. 47 L. I. 465.

20. Pending an issue in the common pleas as to whether certain funds are assets of a decedent's estate or belong to the executrix, the orphans' court will not interfere and order her to file her account of the same. *Keily's Estate*, 9 C. C. 175; s. c. 47 L. I. 514.

21. Equity will not interpose to set aside a sale by executors under a power, even under the allegation that it was made to deprive the legatees from getting the full value of the land sold. Application for relief should be made in the orphans' court. *Cascaden v. Cascaden*, 140 P. S. 140; s. c. 7 Montg. 10.

22. Pending an appeal in the court of common pleas, it is error for the quarter sessions to entertain and determine exceptions filed to a report of viewers awarding damages for the widening of a city street. *Chestnut Street*, 128 P. S. 214.

23. The common pleas has no jurisdiction to strike from the register names of veterinary surgeons not registered within the time prescribed by the act 11 April 1889 (Brightly's Purdon 2071). The remedy is exclusively in the quarter sessions. *Veterinary Surgeon's Case*, 8 C. C. 185.

24. Where two tribunals (as two justices) have concurrent jurisdiction over the same subject-matter, the one before whom the proceedings are first commenced has exclusive jurisdiction of the special case. *Comm'th v. Martin*, 7 C. C. 153.

25. In the county of Philadelphia, where a bill has been filed in one of the courts of common pleas to compel a trustee to account, a petition for the removal of the trustee will, on motion

of the respondent, be removed to the same court; and this, although no answer has been filed. *Daniel's Case*, 10 C. C. 190; s. c. 28 W. N. C. 198.

26. A bill by an assignee for the creditors of a corporation to enforce the individual liability of stockholders, is not a proceeding ancillary to the assignment and in Philadelphia county should be docketed and treated as an original cause. *Smith v. Dull*, 34 W. N. C. 126.

V. Effect of the judgment.

27. No court has authority to change or alter a final decree after the end of the term at which it was entered. *McCullough's Estate*, 47 L. I. 213.

28. After the lapse of the term, the court has no power to set aside a decree discharging a rule for divorce. *Glover v. Glover*, 1 Lack. Jur. 262.

29. After an order committing to an asylum a defendant acquitted on the ground of insanity, the court may at a subsequent term certify the township of the defendant's legal settlement. *Clearfield County v. Overseers of Cumeron*, 135 P. S. 86.

30. The court has no power to reinstate a case without the defendant's consent, after a voluntary nonsuit taken by the plaintiff. *Riverside Glass Works v. Kittanning Insurance Co.*, 36 P. L. J. 356.

31. Allowances in desertion cases may be increased and diminished from time to time. *Comm'th v. Johns*, 5 Kulp 238.

32. If the trust fund be not under the control of the court, and distribution has been made to the *cestui que trust* by the supreme court, the common pleas has no jurisdiction to order the money into court in order to fix the counsel fees for the attorney of the *cestui que trust*. *Gingrich's Estate*, 9 C. C. 16.

33. If money be paid by a receiver to a party litigant under an order of court obtained by mistake or fraud, a chancellor may require the money to be re-

funded. *Palmer v. Allen*, 136 P. S. 556; s. c. 26 W. N. C. 514.

34. Where a plaintiff prosecutes his claim to a judgment, in a court not having jurisdiction, he cannot maintain a second suit in a court of competent jurisdiction, the aid of the former court having been invoked by him to his own benefit. *Levey v. Norton*, 10 C. C. 278.

JURY.

See CORONER: COSTS: NEGLIGENCE: PRACTICE, XXX.

I. Selection and summoning of jurors.

III. Impanelling of juries.

V. Challenges.

(a) Challenges to the array.

(b) Standing aside jurors.

(d) Challenges for cause.

VI. Struck juries.

VII. Province of the court and jury

(a) Questions of law.

(b) Questions of fact.

(c) Mixed questions of law and fact.

VIII. Giving liquor to jurors.

IX. Separation of the jury.

I. Selection and summoning of jurors.

1. It is not the duty of the sheriff when summoning a juror in a capital case to ask him any questions in regard to his bias or prejudice for or against the prisoner, nor whether he has any conscientious scruples against capital punishment. Such conduct is irregular and not to be countenanced, but where no injury has resulted to the prisoner, the court will not reverse on that ground. *Comm'th v. Cleary*, 148 P. S. 26.

2. The jury commissioners and the judge, in alternately selecting names from the whole qualified electors of the county, may use the list made up by themselves of persons whom they deem sober, intelligent and judicious; and this, although the information on which their

judgment is based is obtained from others. *Klemmer v. Mount Penn Gravity R. R. Co.*, 163 P. S. 521.

3. A judge is not required to take an additional oath before entering upon the duty of selecting jurors. *Klemmer v. Mount Penn Gravity R. R. Co.*, 163 P. S. 521. *Comm'th v. Smith*, 12 Lanc. 337.

4. A judgment will not be reversed because the jury list, although deposited with the prothonotary, as provided by the acts 10 April 1867 (Brightly's Purdon 1107) and 18 March 1874 (Brightly's Purdon 1109), was not marked filed of record, and was withdrawn from his office and kept in the sheriff's office, where it appears that the list was not concealed or in any way tampered with. *Klemmer v. Mount Penn Gravity R. R. Co.*, 163 P. S. 521.

5. Under the act 2 April 1868 (Brightly's Purdon 898), the sheriff is not entitled to compensation from the county for attendance upon the drawing of jurors. *Totton v. Cumberland County*, 11 C. C. 316.

6. Under the act 14 April 1834, sec. 87 (Brightly's Purdon 1107, note d), before the sheriff and jury commissioners can make any selection of jurors in any year, they must take the oath prescribed by that section; an indictment will be quashed found in the year 1893, where the only oath on file was made March 17th, 1872. *Comm'th v. Rush*, 11 Lanc. 164.

III. Impanelling of juries.

7. The act of 23 June 1885 (Brightly's Purdon 1113), requiring the drawing of twenty jurors, does not apply to criminal prosecutions. *Comm'th v. Spink*, 137 P. S. 255; s. c. 27 W. N. C. 37.

8. If a juror be excused with the defendant's consent and another substituted, the defendant is estopped from claiming irregularity. *Comm'th v. Fritch*, 9 C. C. 164.

9. The manner of swearing juries is discretionary with the court; irregulari-

ties are waived by the accused going to trial. *Ibid.*

10. Where additional plaintiffs are added at the trial, the jury should be resworn, but where no such request is made, the omission to do so is not ground for a new trial. *Vann v. Downing*, 10 C. C. 59; s. c. 28 W. N. C. 259.

V. Challenges.

(a) Challenges to the array.

11. To constitute a court of oyer and terminer forty-eight jurors must be drawn and returned, but it is not a cause of challenge to the array that forty-eight were summoned, one of whom was not qualified. Such a defect is cured by the first section of the act of 21 February 1814 (Brightly's Purdon 1116). *Buchanan v. Comm'th*, 5 Cent. 733.

12. The array of jurors will not be quashed because the jury wheel, after having been properly filled, locked and sealed, was kept by one of the commissioners with the consent of the other at his home some miles from the county seat. *Klemmer v. Mount Penn Gravity R. R. Co.*, 163 P. S. 521.

13. A motion to quash the array should be made as soon as the facts which warrant it are known; where counsel for the defendant in the case knew that the jury commissioners and sheriff had failed to take the oath prescribed by the act 14 April 1834, sec. 87 (Brightly's Purdon 1107 n.), and did not move to quash the array until four months afterwards; it was held, that he had not observed due diligence and that the judgment would not be reversed. *Klemmer v. Mount Penn Gravity R. R. Co.*, 163 P. S. 521.

14. Upon a trial for murder where the prisoner has been duly arraigned and pleaded and four jurymen have been selected and sworn, a motion to quash the array because the jury wheel had not been properly sealed is too late. *Comm'th v. Freeman* 166 P. S. 332.

15. An array of the grand jury will be set aside, and an indictment quashed

where the jury wheel was not sealed by the sheriff and the jury commissioners, each with their separate seals, as required by the act 10 April 1867 (Brightly's Purdon 1107); so the array will be set aside where the wheel is sealed by the sheriff in such a way that it may be opened without breaking the seal. *Comm'th v. Delamater*, 13 C. C. 152.

(b) Standing aside jurors.

16. Upon a murder trial the commonwealth may stand aside jurors brought in on a special *venire* as well as those summoned on the regular panel. *Rudy v. Comm'th*, 128 P. S. 500.

17. The commonwealth may stand aside jurors both in felonies and misdemeanors, and even after the peremptory challenges of the defendant have been exhausted and without recalling jurors previously stood aside. *Comm'th v. O'Brien*, 140 P. S. 555.

18. Upon the trial of an indictment for murder, where all the jurors present had been called and either sworn, challenged or stood aside, and eleven had been accepted and sworn, it was not error to call the twelfth juror from those who had been stood aside where it appeared that the prisoner's peremptory challenges had not yet been exhausted; and this, without waiting for the return of jurymen who were out deliberating on a verdict in another case. *Comm'th v. Weber*, 167 P. S. 153.

(d) Challenges for cause.

19. A defendant charged with murder may waive the right to have a juror sworn on his *voir dire*, and examine him as to his qualifications without being sworn. *Comm'th v. Ware*, 137 P. S. 465; s. c. 26 W. N. C. 462.

20. That a defendant in a criminal case exchanged cigars and drinks with the juror is good ground of challenge by the commonwealth. *Comm'th v. Mosier*, 135 P. S. 221; s. c. 26 W. N. C. 182.

21. An opinion as to the guilt or innocence of a defendant charged with mur-

der, formed from reading fragmentary newspaper reports of the former trial of a co-defendant, does not disqualify the juror. *Comm'th v. Taylor*, 129 P. S. 534.

22. Whether a juror has a fixed opinion as to the prisoner's guilt must be gathered from his testimony as a whole. *Comm'th v. Moss*, 6 Kulp 31.

23. Where a juror testifies that he is on intimate terms with a defendant who is his customer and who talked with him on several occasions about the case, a challenge for cause should be sustained. *Catasauqua Mfg. Co. v. Hopkins*, 141 P. S. 30.

24. Where the court sits in the place of triers, to determine the question of the impartiality of a juror as a matter of fact, its determination is conclusive and cannot be reviewed by the supreme court; the rule is different, however, where the juror's position is such that his incompetency is a conclusion of law. *Catasauqua Mfg. Co. v. Hopkins*, 141 P. S. 30.

25. Upon a trial for murder, though jurors have formed opinions as to the guilt or innocence of the accused, which it will require the testimony of sworn witnesses to remove or change, yet if they testify that they can try the cause according to the law and the evidence, they are not disqualified. *Comm'th v. McMillan*, 144 P. S. 610; affirming s. c. 6 Kulp 281.

26. Upon an indictment for murder committed during a riot, where a juror testifies that the preceding week he served as a juror on the trial of an indictment for the riot on which the defendant and others were convicted, but had formed no opinion as to the guilt or innocence of the defendants of the murder, he is not thereby disqualified. *Comm'th v. Toth*, 145 P. S. 308.

27. A taxpayer who signs a petition to the court asking the court to accept a verdict of murder in the second degree is disqualified from serving as juror at the trial of the defendant and the court is right in dismissing him summarily; such

a petition is an improper interference with the administration of the law. *Comm'th v. Cleary*, 148 P. S. 26.

28. A jurymen may be properly challenged by the commonwealth for cause upon the trial of an indictment for murder, where he testifies that he does not think that a man who will commit such an offence was of sound mind, and that it would require evidence to change that opinion. *Comm'th v. Buccieri*, 153 P. S. 535.

29. If it appear that a juror has the ability and disposition to render a verdict on the evidence alone, he is competent; and this, though he states that it would require evidence to change the impression or opinion already formed. The supreme court will not reverse in such a case for anything short of palpable error. *Comm'th v. Crossmyer*, 156 P. S. 304.

30. An expression of opinion by a juror in a murder case as to the guilt or innocence of the prisoner is not a good cause for challenge, where the juror states that he can render a verdict on the evidence uninfluenced by such opinion. *Comm'th v. Beucher*, 10 C. C. 3.

31. Upon a trial for murder where a juror swears that he could not convict of murder in the first degree on circumstantial evidence alone, he may be challenged for cause. *Comm'th v. Heist*, 14 C. C. 239.

32. A juror is not disqualified by reason of his being a brother-in-law of one of the officers and witnesses of the defendant company; neither is a juror disqualified because he is a clerk for a firm who had an interest in the company. *Benedict v. Pennsylvania Coal Co.*, 6 Kulp 221.

33. A juror should be challenged before he is sworn; if the right to challenge is not exercised at that time, such right is waived. *Benedict v. Pennsylvania Coal Co.*, 6 Kulp 221.

34. It is no ground for a new trial that a jurymen at the time he was sworn was a non-resident of the county; his competency should have been ascertained by

challenge before the trial. *Baird v. Otte*, 12 C. C. 445.

35. Where a juror was a resident at the time his name was put in the jury wheel, but moved to Baltimore with the intention of remaining if he liked it, and if not, to return, and he did return; it was held, that he was not disqualified to act as a juror. *Comm'th v. Stokes*, 4 York 187.

36. As to the competency of a juror who has an opinion, see note to *Hall v. Comm'th*, 12 Atlan. 169.

VI. Struck juries.

37. The losing party is liable for the cost of struck juries, not ordered or allowed by the court, the case not having been continued by the winning party after the juries were struck. *Spiehlman v. Strasburg*, 8 C. C. 182.

VII. Province of the court and jury.

(a) Questions of law.

38. There being no latent ambiguity, the construction of a contract is for the court. *Duffield v. Hue*, 129 P. S. 94; *Palmer v. Farrell*, Ibid. 162; *Harris v. Kelly*, 13 Atlan. 523.

39. The construction of a contract containing no words pertaining to art or trade, written in plain and popular language, and the facts attending the execution of which are undisputed, is for the court and not for the jury. The parties are bound according to the plain terms of the contract. *Shafer v. Senseman*, 125 P. S. 310; s. c. 1 Northam. 389.

40. An issue of *nul tiel record* is triable by the court. *Dimmick v. Leath*, 5 Kulp 255.

41. The competency of a witness to testify to handwriting is a matter clearly for the court, there being no evidence raising any question as to the truth of the facts stated. *Wilson v. Van Leer*, 127 P. S. 371.

42. If there be no dispute about the facts, whether an implied contract to pay will spring thereout is a question of law for the court. *Kneedler v. Goodman*, 47 L. I. 4.

43. There being no dispute as to the facts, the question of proximate cause is for the court. *Mack v. Lombard & South Streets Railway Co.*, 8 C. C. 305; s. c. 47 L. I. 26.

44. There being no dispute as to the terms of a contract of hiring and as to the servant's conduct, his performance is a question for the court. *Elliott v. Wanamaker*, 9 C. C. 497; s. c. 155 P. S. 67.

45. A city may regulate the erection and maintenance of telegraph poles and wires, and impose a reasonable license fee for the same. The reasonableness of the fee is a matter for the court, but the burden is on the defendant to show its unreasonableness. *Lancaster v. Edison Electric Illuminating Co.*, 8 C. C. 178.

46. Upon a trial for murder, a request for instruction that the jury are judges of the law as well as the fact was properly answered as follows: "The statement of the law by the court is the best evidence within your reach; and, therefore, in view of that evidence and viewing it as evidence only, you are to be guided by what the court has said with reference to the law." *Comm'th v. McManes*, 143 P. S. 64. See *Comm'th v. Costello*, 1 Dist. Rep. 745.

47. Upon the trial of a criminal indictment, it is the duty of the jury to accept the instructions of the judge upon questions of law and to apply them to the facts which they find; it is not the province of the jury to correct what they conceive to be errors of the court by disregarding the court's instructions. *Comm'th v. Steffner*, 2 Dist. Rep. 152; s. c. 10 Lanc. 92.

48. Where a record of a former action is offered to show that the plaintiff's demand is *res adjudicata*, the question, if determinable from such record, is one of

law for the court. *Goodhart v. Bishop*, 142 P. S. 416.

49. The addition of a separate and independent agreement to a contract, which does not expressly or by fair implication alter the terms of the contract, or affect the rights and duties of the parties thereunder, will not operate to discharge the sureties; whether the additional agreement amounts to an alteration of the original contract is a question for the court. *Barclay v. Deckerhoof*, 151 P. S. 374.

50. In ejectment by a vendor against a vendee to enforce specific performance of an agreement to purchase land, where the defendant claims that a sufficient deed was not tendered to him, it is error for the court, after construing the agreement to the jury, to leave it to them to determine from inspection whether the deed was sufficient under the written agreement. *Beeson v. Porter*, 155 P. S. 579.

51. Where evidence consists entirely of writings whose authenticity is beyond question and which are not ambiguous, its construction and effect is for the court and not for the jury. *Sun Fire Office v. Ermentrout*, 11 C. C. 21.

(b) Questions of fact.

52. Where the existence of an agreement is affirmed on one side and denied on the other, it is properly submitted as a question of fact for the jury. *Robison v. Fetterman*, 14 Atlan. 245; s. c. 12 Cent. 566; *Grenninger v. Gephart*, 14 Atlan. 252; s. c. 12 Cent. 455.

53. Upon a conflict of testimony as to the truth of an allegation, the question of fact is for the jury. *O'Hara v. United Brethren Mutual Aid Society*, 134 P. S. 417.

54. When the theories of the plaintiff and defendant are diametrically opposed to each other, the question of fact should always be left to the jury. *Rafferty v. Masonic Bank*, 7 Atlan. 93.

55. Evidence tending to show fraud should always, in the event of a conflict,

be submitted to the jury. *Landis v. Neff*, 9 Atlan. 926.

56. In ejectment by a purchaser at sheriff's sale against a previous vendee of the defendant's, the question of fraud in the transfer was properly left to the jury. *Close v. Benjamin*, 9 Atlan. 51.

57. In an action against the sheriff for a wrongful levy, where the plaintiff claimed title by a bill of sale one day previous to the execution, and took possession at once, the defendant in the execution remaining as an employee, the question of intent to defraud creditors was for the jury. *Gray v. Trent*, 16 Atlan. 107.

58. If a husband be not indebted at the time, whether a conveyance to his wife was in fraud of future creditors is for the jury. *Garis v. Fish*, 7 Lanc. 5.

59. On the trial of an attachment execution where the defendant set up a transfer of his claim against the garnishee to a third person, the *bona fides* of such transfer was properly left to the jury. *King v. Beeson*, 8 Atlan. 198.

60. In replevin by a purchaser of a horse, who had permitted it to remain in the vendor's possession, against a subsequent purchaser from the same vendor, the question of the *bona fides* of both sales was properly left to the jury. *Maher v. McClellan*, 8 Atlan. 174.

61. Where the wife of the defendant claims the goods in a sheriff's interpleader and bases her right under the act of 4 May 1855 (Brightly's Purdon 1301) by reason of her husband's profligacy, the question of whether the husband had neglected or refused to provide for her is for the jury. *Bernhart v. Mitchell*, 7 Atlan. 283.

62. In a *scire facias* sur mortgage the question of payment was properly left to the jury. *German Insurance Co. v. Davenport*, 9 Atlan. 517.

63. Upon a *scire facias* to revive a judgment more than twenty years old, the question whether a payment had been made thereon within the twenty years was properly left to the jury. *Jenkins v. Anderson*, 11 Atlan. 558.

64. In a suit by a receiver of a bank, the question whether the notes sued on were paid by a check deposited by defendant was properly left to the jury as a question of fact. *Lingenfelter v. Williams*, 9 Atlan. 653.

65. In an action against a firm for money loaned, if the defence be that it was an individual loan to one partner, and the evidence is that the plaintiff's check was drawn to the order of the firm, the question should be submitted to the jury. *Dalmeyer v. Dalmeyer*, 16 Atlan. 72.

66. Where a note was found among the papers of a decedent and the defence was that it was an accommodation note, the question was properly left to the jury as a question of fact. *Potteiger v. Potteiger*, 8 Atlan. 632.

67. Upon the ownership of a note the questions of gift and undue influence in procuring the same were both properly left to the jury. *Osthaus v. McAndrew*, 8 Atlan. 436.

68. Upon a plea in trespass of *liberum tenementum*, there being a conflict of testimony as to the ownership of the freehold, it was properly left to the jury. *Grove v. McAlevy*, 8 Atlan. 210.

69. The ownership of the wires beneath the plastering used in wiring a building for electric lighting was left to the jury under all the evidence as a question of fact. *Harrisburg Electric Light Co. v. Goodman*, 129 P. S. 206.

70. Whether or not a mechanics' lien properly states the location of the building is a question of fact for the jury. *Wethered v. Garret*, 7 C. C. 535; *Brown v. West*, Ibid. 619.

71. In ejectment, the only question being one of lines, it was properly left to the jury. *Kime v. Polen*, 8 Atlan. 783.

72. In trespass *quare clausum fregit*, if there be a conflict of testimony as to boundary, the question is for the jury. *Keizer v. Beemer*, 13 Atlan. 909.

73. The application of the description in a levy and sheriff's deed to the land is a question for the jury. *Stroup v. McCloskey*, 3 Cent. 613.

74. The location of a tract of land as made upon the ground is a question of fact for the jury. *Christ v. Thompson*, 2 Cent. 523.

75. In replevin by a daughter against her mother for a piano, the question of gift by plaintiff's deceased father to the plaintiff was properly left to the jury. *Swab v. Miller*, 9 Atlan. 667.

76. Where a deed to plaintiff, duly acknowledged but not recorded, was found among the papers of the plaintiff's deceased stepfather, who was also his guardian, and there was evidence that it was executed in settlement of his guardianship, the question of delivery was properly left to the jury. *Stoney v. Winterholter*, 11 Atlan. 611.

77. If no money be paid at the execution of the deed, the question whether it was a gift or whether the consideration was to be subsequently paid is one of fact for the jury. *Horn v. Buck*, 8 Atlan. 609.

78. If the question as to the actual character of a saw-mill, whether movable or permanent, be conflicting, the question of fixture is one for the jury. *Benedict v. Marsh*, 127 P. S. 309.

79. If a fire policy provide for immediate notice of loss, but fixes no time, a reasonable time is to be allowed therefor. The act of 27 June 1883 (Brightly's Purdon 1051) does not exact the notice within ten, or proofs within twenty, days of the fire. If the facts and circumstances are not clearly established and the evidence is conflicting, the question of reasonable time is for the jury. *Springfield Fire & Marine Insurance Co. v. Brown*, 128 P. S. 392.

80. Whether the delay of ten days of a mutual aid society in refunding an assessment paid to an agent amounted to a waiver of a previous forfeiture was properly left to the jury. *United Brethren Mutual Aid Society v. Schwartz*, 13 Atlan. 769.

81. Whether a telegraph company, by dispensing with blanks containing a limitation of responsibility, and receiving and delivering oral messages, thereby

waived such limitation, was a question of fact for the jury. *Western Union Telegraph Co. v. Stevenson*, 128 P. S. 442.

82. In a suit upon the subscription to the stock of a railroad company, if there be evidence of abandonment, the question of such abandonment should be submitted to the jury. *Delaware River & Lancaster Railroad Co. v. Rowland*, 9 Atlan. 929.

83. If in malicious prosecution the evidence as to the facts showing probable cause be contradictory, the question of probable cause should, under proper instructions, be left to the jury. *Acker v. Gundy*, 12 Atlan. 595.

84. The question of the authority of the maker's business manager to sign his name to the note in suit, or whether it was subsequently ratified, was properly submitted to the jury. *Watson v. Lukens*, 126 P. S. 630.

85. Upon the trial of a *scire facias sur mortgage*, the question whether an embezzling conveyancer was acting as agent for the mortgagee or mortgagor was, under the evidence, properly submitted to the jury. *Sargeant v. Martin*, 133 P. S. 122; s. c. 25 W. N. C. 565; *Sargeant v. Aberle*, 134 P. S. 613; s. c. 26 W. N. C. 87.

86. Upon a conflict of testimony between the manager of a sewing machine company and a canvasser as to the manner in which the commissions were to be computed, it was for the jury to say what contract had been made. *American Buttonhole, Overseaming & Sewing Machine Co. v. Maurer*, 10 Atlan. 762.

87. The questions as to the nature of the plaintiff's (a real estate broker) services and the amount of compensation were properly, under the evidence, submitted to the jury. *Ringgold v. Rhodes*, 132 P. S. 189.

88. In a suit by an employee, who was injured by the falling of a bridge belonging to the employer, the question of the latter's knowledge of its unsoundness was properly left to the jury. *Everson v. Rollinson*, 8 Atlan. 194.

89. The unquestioned evidence being that the deceased, killed at a public crossing, stopped, looked and listened, whether the place where he stopped was a suitable one was properly left to the jury. *Pennsylvania & New York Canal & Railroad Co. v. Huff*, 8 Atlan. 789.

90. Where the versions of the plaintiff and defendant differ as to a parol contract, the question as to what the contract was should be left to the jury. *Muckle v. Moore*, 134 P. S. 608; s. c. 26 W. N. C. 333.

91. Though the evidence tend to establish the plaintiff's claim, it is error to give binding instructions to find for the plaintiff. It is for the jury to consider the testimony and find the facts. *Kelly v. McGehee*, 137 P. S. 443; s. c. 26 W. N. C. 493.

92. Where a note, unendorsed by the payee, was found in the papers of the plaintiff's decedent, the question whether the payee had left it with the decedent for discount only, or as collateral security for his having gone bail for stay of execution, was properly, under the evidence, left to the jury. *Holohan v. Mix*, 134 P. S. 88.

93. Where the facts and circumstances are not clearly established and the evidence is conflicting, the question of reasonable time is for the jury, under proper instructions from the court as to the law. *Springfield F. & M. Ins. Co. v. Brown*, 128 P. S. 392.

94. Where matters of fact depending on oral testimony are necessary to a proper understanding of written evidence, such admixture draws the whole question to the jury. *Home B. & L. Ass'n v. Kilpatrick*, 140 P. S. 405.

95. Where the assignment of a judgment was absolute on its face, and the evidence of the parties was conflicting as to whether the assignment was merely made for collection; it was held, that the question whether the defendant held the money in trust for the plaintiff was properly for the jury. *Schwartz v. Hersker*, 140 P. S. 550.

96. Where the defendants claimed under a deed in 1889 subject to certain leases for oil purposes, *inter alia* to "J. Beaumont 3 acres," without further description or identification, it was error to charge the jury as matter of law that the defendants took subject to a lease executed in 1882 to C. G. Beaumont and J. B. Drake under which the plaintiff claimed. Whether the lot leased and that conveyed were identical was necessarily for the jury, and could be determined only by intrinsic testimony. *Thompson v. Riddelsperger*, 144 P. S. 416.

97. Where a vendee of goods from a travelling salesman made a claim for defects, and the principal authorized his salesman to make an allowance of fifty dollars, but the salesman agreed to take back the goods on receiving another order, and this agreement was repudiated by the purchaser; it was held, that the agent's authority was a question for the jury. *Louchhiem v. Davies*, 148 P. S. 499.

98. Where the evidence as to the performance of an entire contract is conflicting, the court will leave the question to the jury. *Bachler v. Cooper*, 150 P. S. 533.

99. In an action of replevin, where the testimony was conflicting as to when title to property manufactured on order was to pass, the question was properly left to the jury. *Kent Iron & Hardware Co. v. Norbeck*, 150 P. S. 559.

100. Where a deed sixty years old calls for a corner at the end of a bridge, the exact position of which is disputed, the question of the location of the bridge should be submitted to the jury. *Krepps v. Carlisle*, 157 P. S. 358.

101. Where material facts are disputed or even in doubt or inferences of fact are to be drawn from the testimony, it is the exclusive province of the jury to determine what the facts are; where, however, the facts are admitted, or so clearly proved as to admit of no reasonable doubt, it is the duty of the court to declare the law applicable to them. *Baker*

v. *Westmoreland & Cambria Natural Gas Co.*, 157 P. S. 593.

102. The question of the location of the property conveyed or the application of the grant to its proper subject-matter is a question of fact to be determined by the jury with the aid of extrinsic evidence. *Steigleder v. Marshall*, 159 P. S. 77.

103. In an action upon a life policy, it was held, that the condition of the health of the insured when the policy was issued was a question of fact, and it would have been error to have refused to submit that question to the jury. *Dietz v. Metropolitan Life Ins. Co.*, 168 P. S. 504.

See NEGLIGENCE.

(c) **Mixed questions of law and fact.**

104. In criminal libel it is for the jury to determine whether the publication is a libel, but it is for the court to say whether the article was proper for public investigation and information. *Comm'th v. Murphy*, 8 C. C. 399.

105. In malicious prosecution the jury determines what facts are proved, but whether they amount to probable cause is for the court. *Saunders v. Landes*, 6 Montg. 77.

106. Province of the court and jury where it is alleged that a sheriff's deed is in fact but a mortgage. *Saunders v. Gould*, 134 P. S. 445; s. c. 26 W. N. C. 121.

107. As to the province of the court and jury in cases of negligence, see note to *Barnes v. Sowden*, 12 Atlan. 806.

VIII. Giving liquor to jurors.

108. There is no law which forbids the use of intoxicating liquors by jurors, even in a capital case; but the better rule is for the trial judge to forbid the use of liquor in the jury-room except by permission of the court and for cause shown. Where a juror has indulged in the use of liquor, it is the duty of the court to scrutinize his conduct, and if it appear that he has been intoxicated to any degree, a

new trial should be granted. *Comm'th v. Cleary*, 148 P. S. 26.

109. A verdict of murder in the first degree will not be set aside because the jury were furnished with liquor during the course of the trial, where it does not appear that there was a resulting misconduct or separation. *Comm'th v. Salyards*, 158 P. S. 501; affirming s. c. 13 C. C. 470.
See PRACTICE, XXX.

IX. Separation of the jury.

110. Judgment will not be arrested upon a verdict of murder in the first degree because the jury was allowed to separate during the trial, where the alleged separation consisted in the jury sleeping in two adjoining rooms in a hotel which did not communicate, six in each room, with the court officers in charge, sleeping in an adjoining room which communicated with one of the jury-rooms, and it appeared that the doors were locked by the officers and that there was no tampering or interference with the jury. *Comm'th v. Manfredi*, 162 P. S. 144.

111. Where it appeared that the jury being in a room at a hotel, one of them stepped out on a balcony; it was held to be no ground for a new trial, it being clearly shown that nothing was said to him. *Comm'th v. Painton*, 5 York 140.

JUSTICES' COURTS.

See CERTIORARI: CONSTABLES: CONTEMPT: JUDGMENT: JUSTICES OF THE PEACE: LANDLORD AND TENANT: MAGISTRATES' COURTS: PENAL STATUTES.

I. Jurisdiction.

- (a) Of the personal jurisdiction of the justice.
- (b) Of what a justice has jurisdiction.
- (c) Jurisdiction under the act of 7 July 1879.
- (d) Jurisdiction in trespass.
- (e) How jurisdiction may be ousted.
- (f) Of what a justice has no jurisdiction.

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- (a) Of the summons.
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- (d) Appearance.
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III. Parties.**IV. Of the trial.****V. Adjournment.****VI. Statement and affidavit of defence.****VII. Of the judgment.****VIII. Of the record.****X. Execution.**

- (a) General principles.
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XI. Appeals.

- (a) Right of appeal.
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- (c) Sum in controversy.
- (d) When an appeal must be perfected.
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- (g) Perfection of bail.
- (h) Of the affidavit.
- (i) Payment of costs.
- (k) Filing an appeal.
- (l) When allowed *nunc pro tunc*.
- (m) Motion to strike off.
- (n) Suits for wages of manual labor.

XII. Proceedings in the common pleas.**I. Jurisdiction.****(a) Of the personal jurisdiction of the justice.**

1. A justice cannot try a case if his nephew be one of the parties. *Grammes v. Erney*, 7 Lanc. 85.

2. A justice has jurisdiction of a suit by a guardian for a debt due his ward, though the guardian be the brother of the justice. *Moser v. Richards*, 2 Northam. 219.

3. Where summonses are issued by each party against the other, before different justices, the justice who issues the first summons has exclusive jurisdiction; and

this, though the other summons be first served. *Franklin v. Fox*, 5 Kulp 391.

4. If proceedings be begun before two magistrates for violations of the Sunday law of 22 April 1794 (*Brightly's Purdon* 1950) on the same day, the one before whom an information was first made has exclusive jurisdiction. The penalty and costs being paid in the second case, the penalty was remitted on appeal in the first case upon payment of costs. *Comm'th v. Martin*, 7 C. C. 153.

5. The successor in office of an alderman is entitled to the possession of his dockets and has exclusive jurisdiction to revive a judgment thereon. *Gill v. Collins*, 1 Lack. Jur. 224.

6. A justice who is disturbed in the performance of his official duties by loud whistling by a passer-by, may arrest the latter without a warrant for the obstruction of public justice. *Comm'th v. Zant-zinger*, Vaux's Dec. 132.

(b) Of what a justice has jurisdiction.

7. On failure to pay a hack license, under the act 22 April 1889 (*Brightly's Purdon* 242), suit may be brought for its recovery before a justice of the peace. *Washington v. McGeorge*, 146 P. S. 248.

8. A justice has jurisdiction where the claim is reduced to the statutory limit either by direct payment or by dealings amounting to and admitted as payments. *McFarland v. O'Neil*, 155 P. S. 260.

9. A justice has jurisdiction of an action on a promissory note in the hands of an endorsee although the consideration of the note was the sale of a tract of land. *Packer v. Taylor*, 12 C. C. 521.

10. In an action by an endorsee of a promissory note against the maker, where the consideration of the note was the sale of real property, a justice has jurisdiction, but he would not have jurisdiction in a suit brought by the payee. *Hunsicker v. Miller*, 14 C. C. 261.

11. A justice has jurisdiction of a claim for damages by reason of a defendant having thrown lime into a mortar box along a public street so that the plaintiff,

passing by, was splashed and had her clothing discolored. *Lehr v. Knauss*, 4 Northam. 372.

12. A justice has jurisdiction of an action upon a book account although the summons states that it is "in plea of settlement of book account"; such an action does not thereby sound in account render. *Metzgar v. Shetter*, 4 York 7.

(d) Jurisdiction under the act of 7 July 1879.

13. The jurisdiction of justices in cases of rent was enlarged to three hundred dollars by the act 7 July 1879 (Brightly's Purdon 1128). *Beatty v. Rankin*, 139 P. S. 358; s. c. 38 P. L. J. 239. *Harvey v. Gunzberg*, 148 P. S. 294; *Davis v. Rowe*, 11 Lanc. 249.

14. Under the act 7 July 1879 (Brightly's Purdon 1128) a justice has jurisdiction of the claim of a tenant to defalcate his account out of the rent, although the amount of rent claimed exceeds one hundred dollars but is less than three hundred dollars. *Lowenstein v. Helfrich*, 7 Kulp 533.

15. If the sum demanded is between one hundred and three hundred dollars the act of 7 July 1879 (Brightly's Purdon 1128) does not extend the jurisdiction of the justice to issue an attachment under the act of 8 May 1874 (Brightly's Purdon 1138) against a non-resident debtor where he is in the county when the writ is issued; but if judgment be entered on a summons issued at the same time, while the attachment will be quashed the judgment will be allowed to stand. *Fair v. Hamlin*, 2 Northam. 262.

16. In actions of contract instituted by foreign attachment, a justice of the peace, under the act 7 July 1879 (Brightly's Purdon 1128), has jurisdiction to the amount of three hundred dollars. *Bumgardner v. Morris*, 42 P. L. J. 355.

(e) Jurisdiction in trespass.

17. The act of 25 May 1887 (Brightly's Purdon 1728), abolishing the distinction

between trespass and case, did not extend the jurisdiction of justices to actions for consequential damages. *Milhauser v. Morgan*, 6 Kulp 48.

18. A justice has jurisdiction of an action of trespass for the wrongful seizure and sale of property belonging to another than the execution defendant. *Pressel v. Bice*, 142 P. S. 263.

19. A justice has no jurisdiction of an action of trespass against a trolley-car company for damages to plaintiff's wagon caused by the same being struck by the defendant's car on the public highway. *Thilow v. Philadelphia Traction Co.*, 4 Dist. Rep. 83.

20. Where the plaintiff's claim was for "three dollars for one log chain loaned to defendant and which defendant refused to return, although several demands had been made for the same"; it was held, that the record sufficiently alleged a conversion so as to give the justice jurisdiction in an action of trespass. *Cadwallader v. Wagner*, 7 Kulp 465.

21. A justice has no jurisdiction of an action of trespass for damages against a master for the negligence of his servant. The act of 25 May 1887 (Brightly's Purdon 1728), abolishing the distinction between trespass and case, does not extend the jurisdiction of justices. *Lynch v. Alderfer*, 6 Montg. 108.

22. A justice has jurisdiction of an action of trespass for damages done and committed by the defendant's employees, while in the service of the defendant, to the personal property of the plaintiff. *Carle v. White Haven Ice Co.*, 15 C. C. 546.

23. A justice has jurisdiction of an action for damages caused by the trespass of defendant's cattle. *Moore v. Gochly*, 7 Lanc. 161.

24. Where an owner of cattle is liable for a trespass committed by them, and the question of negligence in permitting them to run at large is one of fact to be decided by the evidence, a justice of the peace has jurisdiction in such a case. *Ziegler v. Hons*, 6 Kulp 374.

25. Where the defendant by the plain-

tiff's permission used the plaintiff's barn for his cow and horse, and the plaintiff nailed up some boards in the barn to hoist hay; it was *held*, that a justice had jurisdiction of an action against the defendant in trespass for removing and taking away the boards. *Hildebrand v. Smith*, 8 Lanc. 181. See *Hildebrand v. Smith*, 8 Lanc. 179.

26. A justice has jurisdiction of an action of trespass *quare clausum fregit* for damages done by cattle. *House v. Ziegler*, 11 C. C. 159.

27. Magistrates in Philadelphia have jurisdiction to the extent of one hundred dollars of actions of trespass for injuries to real or personal property. *Porter v. Butchers' Ice & Coal Co.*, 11 C. C. 256.

28. A justice has jurisdiction in an action of trespass where the matter in controversy is not title to land but merely a license to pass over and through the land. *Dobson v. Hull*, 10 Lanc. 169.

29. In an action of trespass the cause of action must be consistent with the form of action employed; in an action of trespass, it was *held* to be error to enter judgment for the price of milk sold and delivered. *Weisberger v. White*, 12 C. C. 224.

30. Upon *certiorari* to a justice's judgment in trespass, it was *held*, that the transcript was insufficient where it did not set forth the character of the alleged injury with sufficient clearness to indicate that the justice had jurisdiction. *Fitzgerald v. Campbell*, 10 C. C. 396.

31. Since, the act 25 May 1887 (Brightly's Purdon 1728) where a justice entertains jurisdiction in an action of "trespass," his record must designate the wrongful act alleged so as to show that it is within the jurisdiction of the justice conferred by the act 22 March 1814 (Brightly's Purdon 1148); otherwise the case will be reversed on *certiorari*. *Wood v. Bronson*, 12 C. C. 545.

(g) How jurisdiction may be ousted.

32. Since the passage of the act 7 July 1879 (Brightly's Purdon 1131), an affidavit that the title to real estate

"may" come in question, filed before the hearing by a defendant, is sufficient to deprive the magistrate of jurisdiction. The provision of the act 22 March 1814, sec. 2 (Brightly's Purdon 1148), is repealed by the act of 1879. *Shober v. Henry*, 6 Del. 118.

33. An affidavit that the title to land will come in question ousts the jurisdiction of a justice; and this, without tendering one-half the costs. *Williams v. Williams*, 6 Kulp 415; *Fogg v. Perry*, 6 Kulp 458.

34. An affidavit that the title to land will come in question, in order to oust the jurisdiction of the justice should be filed before the trial; query, if after filing such affidavit, the defendant proceeds and submits his defence, does such action amount to a waiver. *Raif v. Chamberlain*, 2 Lack. Jur. 381.

35. Where a defendant before a justice submits his defence and does not make oath that the title to land will come in question, he cannot afterwards on *certiorari* have the judgment set aside on the ground that evidence showed that the title to land did come into question. *Dobson v. Hull*, 10 Lanc. 169

(h) Of what a justice has no jurisdiction.

36. A justice has no jurisdiction of an action for damages for an excessive distress. *Weller v. Cramer*, 1 Northam. 344.

37. A justice of the peace has no jurisdiction in a suit for damages for maintaining a nuisance. *Heisey v. Witmer*, 6 Del. 116.

38. A justice has no jurisdiction in an action against a defendant for damage to the plaintiff's wagon by colliding with it on the public road. *Zech v. Groff*, 12 Lanc. 34.

39. A justice of the peace has no jurisdiction of an action for consequential damages arising from the negligence of a defendant as bailee. *Dougherty v. Bone*, 6 Kulp 141.

40. A justice of the peace has no jurisdiction where the cause of action is the failure of the defendants to repair a steam

boiler, which they had agreed to do within a certain time, and the total destruction of the boiler, by reason of the defendants' negligence. *Zell v. Star Steam Heating Co.*, 10 Lanc. 133; s. c. 5 Del. 234.

41. A justice of the peace has no jurisdiction of an action brought for an injury committed by an alleged malicious dog. *Henry v. Mulherrin*, 6 Kulp 462.

42. A justice has no jurisdiction of an action for damages caused by the killing of plaintiff's chickens by the defendant's dog. *Rodenbough v. Bernice*, 3 Northam. 73.

43. A justice has no jurisdiction of an action against a county to enforce the payment of costs in a criminal prosecution for which the county is claimed to be liable; the proper remedy is by mandamus. *Walton v. Lerch*, 2 Northam. 388.

44. A justice has no jurisdiction in an action against a township for the negligence of its officers in failing to keep a public highway in repair. *Hill v. Tionesta Township*, 129 P. S. 525.

45. Under the act 4 May 1889 (Brightly's Purdon 1325), a penalty for failure to secure a license by transient retail merchants must be recovered by indictment in the quarter sessions; justices of the peace have no jurisdiction. *Stroudsburg Borough v. Brown*, 11 C. C. 272.

46. If a report of referees awards money to be paid by defendant and other things to be done by plaintiff, if the court cannot enforce both they will enforce neither. A justice has no jurisdiction of a suit for the money awarded. The remedy is by bill in equity. *Yates v. Demmer*, 9 C. C. 80; s. c. 4 Del. 324.

47. Where the parties to a dispute appeared before a justice and stated that they had agreed to refer all matters at variance between them to three men whom they named for their decision, and that they had fixed upon a time and place for the hearing and that the award should be final, and the justice wrote out the agreement on the docket and the arbitrators returned the award to the justice, who thereupon wrote upon his docket

"judgment publicly according to the above award"; it was held, that the justice had no jurisdiction over the award and that the agreement contained all the elements of a common law submission, and that the award of the arbitrators was conclusive. *Climenson v. Climenson*, 163 P. S. 451.

48. A justice has no authority to enter judgment upon a claim exceeding three hundred dollars unless, in the absence of protest, the debtor voluntarily appears before him and confesses judgment. *McDonnell v. Hodgins*, 3 Lack. Jur. 285; s. c. 1 Lack. L. N. 47.

49. Under the act 20 March 1810, sec. 14 (Brightly's Purdon 1127), a justice has no jurisdiction of matters exceeding three hundred dollars unless the judgment has been voluntarily confessed or there was an acknowledged undisputed balance—a case of mutual accounts admitted to be fair and just—and the justice performed the part of an accountant merely by deducting the lesser from the greater sum. *Peter v. Gable*, 4 Northam. 87.

50. Where the transcript shows that the justice had no jurisdiction in such a matter for the reason that the injury was properly suable for in an action on the case, the judgment will be reversed on *certiorari*. *Davies v. Rosser*, 6 Kulp 268.

II. Process.

(a) Of the summons.

51. Where a summons is issued in a borough divided into wards, it must designate in which ward the justice's office is situated. *Ritchie v. Ford*, 11 C. C. 590; *Robbins v. Curley*, 15 C. C. 428.

52. A summons which does not inform the defendant where he is to appear is fatally defective. *Rea v. Titman*, 14 C. C. 651.

53. The defendant should be summoned to appear at the justice's court; if the summons fails to inform the defendant where to appear it is fatally defective. *Nutz v. Union Nat. Bank*, 4 Montg. 213.

54. A summons issued by a justice should state where his office can be found; if it fails to so state and judgment is entered for want of an appearance, it will be set aside on *certiorari*. *Mack v. Miller*, 9 Montg. 96.

55. *Dubitatur*, whether a non-resident defendant must not in all cases, under section 26 of the act of 12 July 1842 (Brightly's Purdon 1131), be proceeded against by short summons. *Link v. Repple*, 7 C. C. 138.

56. Upon *certiorari* to a justice's judgment, an exception that the defendant was a non-resident and should have been sued by a short summons cannot be sustained when the return of the constable shows that he was served by leaving a copy at his dwelling-house with an adult member of his family. *Foy v. Rice*, 3 Lack. Jur. 17.

57. Where, upon *certiorari*, the justice denied under oath that there was a material interlineation in a summons after it was served, and his testimony was corroborated by the constable; it was *held*, that the presumption in favor of the honesty of the justice and the correctness of his record would prevail over the oath of the defendant to the contrary. *Fitzgerald v. Campbell*, 10 C. C. 396.

58. Where a justice has issued a criminal warrant he cannot convert the case into an action for damages and enter judgment in favor of the plaintiff. *Clader v. Shepowich*, 13 C. C. 459.

(b) Service.

59. Under the act 20 March 1810 (Brightly's Purdon 1129) a summons may be served by leaving a copy at the defendant's house in the presence of a neighbor. *Thatcher v. Beam*, 14 C. C. 109.

60. Where personal service is had, it is not necessary that a copy of the summons be left with the defendant as in actions begun in courts of record. *Lewis Lumber & Mfg. Co. v. Ruggles*, 6 Kulp 381.

61. A return of service "by leaving a copy of the original summons on the defendant Daniel Haas, by leaving a copy

at the dwelling-house with a member of the family," was *held* to be a sufficient compliance with the substantial requirements of the law although not technically accurate. *Gillen v. Haas*, 2 York 40.

62. The original summons must be produced to the defendant and he be informed of the contents. It is not sufficient to hand him a copy. Where service is made by leaving a copy it need not be an attested copy. *Delaware, L. & W. Railroad Co. v. Plymouth*, 6 Kulp 91.

63. The service of a summons upon the assistant secretary of a corporation is not a valid service. *Wilkes-Barre German S. V. & B. Association v. Schubach*, 6 Kulp 136.

64. If a justice's record shows a service upon an insurance company by the constable of another county deputized by a constable of this county, the judgment will be reversed unless it also appear that the defendant was a *foreign* insurance company. *Berkenstock v. People's Mut. Live-Stock Co.*, 6 Lanc. 397.

65. In an action against a township, service upon one supervisor is enough; a constable's return "served this summons on within named defendant the 3d of July 1893, by leaving at the dwelling-house of P. M., the supervisor, in the presence of an adult member of his family a true copy thereof," shows a good service on the township; the return need not identify the person with whom the summons was left. *Shea v. Plains Township*, 7 Kulp 554.

66. If judgment be by default the record must clearly show a legal service of the summons or it will be reversed on *certiorari*. *Wilkes-Barre German S. V. & B. Association v. Schubach*, 6 Kulp 136.

67. A defective service of the summons is cured by the defendant's attorney joining in a written request for an adjournment. *Baltimore Mutual Aid Society v. Keely*, 6 Kulp 450.

(c) Return.

68. In estimating the five days for the return of a justice's summons, the day of

the date of the summons must be excluded. *Montgomery v. Souder*, 8 Lanc. 185; *Feris v. Zeidler*, 5 Kulp 396.

69. It is error to issue a summons returnable in more than eight or less than five days. *Ackerman v. Stoner*, 7 Lanc. 73.

70. An error of a justice in making a writ of *scire facias* to revive a judgment returnable eleven days after it is issued is an irregularity which is cured by the defendant's appeal. *Nealon v. McNeal*, 3 Lack. Jur. 117; s. c. 5 Del. 325.

71. Where the summons fixed December 5th as the return day and the copy served fixed December 7th, and the hearing occurred on December 5th, the judgment was reversed on *certiorari*. *Hoary v. McHale*, 13 C. C. 256.

72. It is not obligatory upon a justice to make his summons returnable between certain hours; a judgment will not be reversed on *certiorari* because the summons was returnable at a fixed hour. *Metzgar v. Shetter*, 4 York. 7.

73. A judgment cannot be entered by default unless the return of service be sworn to. *Hoary v. McHale*, 13 C. C. 256.

74. It is sufficient on *certiorari* that a constable's return appears to have been "on oath"; and this, though there be no statement that the constable was sworn. *Enfield v. Squires Hardware Co.*, 14 C. C. 498.

75. Where a judgment is taken before a justice by default, and the record does not show that the constable was sworn to his return, a transcript of the judgment entered in the common pleas will be stricken off. *Couch v. Heffron*, 15 C. C. 633.

76. Where a transcript of a justice's judgment shows a return by the constable and a personal service, yet fails to disclose that the return was made under oath, a judgment by default entered by the justice is void and the transcript will be stricken off. *Knoblauch v. Heffron*, 3 Dist. Rep. 765.

77. Where the defendant fails to appear, judgment cannot be entered against

him by default without due proof under oath of the service of the summons; judgment without such proof will be reversed on *certiorari*. *Neal v. Duncan*, 9 Montg. 93.

78. Upon a rule to strike off a judgment entered on a justice's transcript where the record of the justice does not show the date of the return of service, it will, in the absence of affirmative proof to the contrary, be presumed that the summons was returned before the hearing of the case. *Shea v. Plains Township*, 7 Kulp 554.

79. Where the service of a summons was upon the treasurer of a company but in the return he was described as clerk, and after the service the word "treasurer" was substituted for clerk; it was held, that such substitution was not such an irregularity as would vitiate the proceedings. *Lewis Lumber & Mfg. Co. v. Rugles*, 6 Kulp 381.

80. A constable has no right to change the return day of a summons which has been given him to serve; where he receives it too late to serve it in time he should return it "*tarde venit*" and let the justice issue a new summons. *Eaby v. Ream*, 9 Lanc. 33. See s. c. 9 Lanc. 250.

81. An action does not lie against a constable for altering the return day in a summons before serving it upon the defendant. *Comm'th v. Warfel*, 157 P. S. 444.

82. A constable's return should either set forth the name or otherwise sufficiently identify the name of the member of the family in whose presence the copy was left. *Regan v. Timony*, 7 C. C. 65.

83. Where a summons was issued against "Mr. Vasser, superintendent of the Imperial Slate Company"; it was held, that a return of service on "the defendant" was insufficient to sustain a judgment by default and such judgment was reversed on *certiorari*. *Dotendorf v. Vasser*, 3 Northam. 82.

84. Where the constable's return is defective in not showing a legal service

upon a company defendant, the judgment will be reversed on *certiorari*. *Lewis Lumber & Mfg. Co. v. Lewis*, 6 Kulp 422.

85. A constable's return of service upon the agent of a non-resident defendant cannot be contradicted on *certiorari* by proof that the party named was not defendant's agent. *Link v. Repple*, 7 C. C. 138.

86. Where a summons issued by a justice shows a return of "served by copy," the judgment entered thereon cannot be attacked in an action of replevin to recover the goods sold on execution under the judgment; and this, although the justice's docket contains the entry "served by leaving copy at place of business." *Sweeney v. Girolo*, 154 P. S. 609.

87. A judgment on an insufficient return by a constable is not void but voidable. *Smith v. Snyder*, 6 Lanc. 321.

(d) Appearance.

88. Where the plaintiff filed a probated account under the act 7 July 1879, sec. 2 (Brightly's Purdon 1131), and the defendant filed an affidavit of defence on the morning of the day of hearing, and the defendant did not appear in person or by counsel at the hearing, which was fixed at four o'clock in the afternoon; it was *held*, that there was no appearance and that judgment was properly entered by default. *Elwood Paper Co. v. Radziewicz*, 16 C. C. 81.

89. Where a defendant has been served with a long summons instead of a short summons, and he appears in response thereto and has the hearing postponed and subsequently makes defence, he will be presumed on *certiorari* to have waived the irregularity. *Temple v. Myers*, 16 C. C. 232.

90. Where a summons was to an officer of a corporation individually and the transcript showed that the suit was against the corporation against which the judgment was given; it was *held*, upon *certiorari*, that the appearance of the corporation as shown by the transcript cured

any defect in the summons. *West Myertown Creamery Co. v. Uhrich*, 1 Mag. & Con. 43.

91. An appearance before a justice by a defendant who has not been served will not toll the want of such service where it is doubtful whether he appeared as a party or as a witness, or whether as agent or in his own right. *Strauss v. Weaver*, 3 Northam. 87; s. c. 4 Del. 564.

92. The defendant's appearance before a justice is a waiver of the irregularity of making the writ returnable after too long a time. *McGinley v. McDonough*, 27 W. N. C. 340.

93. Where the defendant employed an attorney who went to the justice's office before the time fixed for the hearing and left upon ascertaining that the summons had not been served in time; it was *held*, that there was no sufficient appearance to cure the defect in the service and a judgment by default was reversed on *certiorari*. *Adams v. Anderson*, 1 York 12.

94. A defective service is cured by the defendant's appearance. *Hartman v. Kottcamp*, 2 York 215.

(e) Of the attachment.

95. Under the act 7 July 1879 (Brightly's Purdon 1128) and the act 12 July 1842 (Brightly's Purdon 1136) a justice has jurisdiction to issue attachments against non-resident debtors in claims amounting to three hundred dollars and less. *Enfield v. Squires Hardware Co.*, 14 C. C. 498.

96. If the sum demanded is between one hundred and three hundred dollars, the act of 7 July 1879 (Brightly's Purdon 1128) does not extend the jurisdiction of the justice to issue an attachment under the act of 8 May 1874 (Brightly's Purdon 1138) against a non-resident debtor, where he is in the county when the writ is issued; but if judgment be entered on a summons issued at the same time, while the attachment will be quashed, the judgment will be allowed to stand. *Fair v. Hamlin*, 2 Northam. 262.

97. A justice cannot issue an attach-

ment under the act of 8 May 1874 (Brightly's Purdon 1138) against an inhabitant of this state about removing to another. That act only applies to an actual non-resident having property here. *King v. Harmon*, 36 P. L. J. 384.

98. The act 8 May 1876 (Brightly's Purdon 2077) does not give a new process for the commencement of an action; an attachment cannot issue as an original process to collect a debt for boarding. *Carden v. Scott*, 1 Kulp 196; *McGinley v. McDonough*, 3 Lanc. 202; s. c. 27 W. N. C. 340; *Carlin v. Holland*, 11 C. C. 20; *Thatcher v. Beam*, 14 C. C. 109; *McCarty v. Dougherty*, 16 C. C. 86; *Dillon v. Treverton*, 16 C. C. 89; contra, *Smith v. Dingus*, 12 C. C. 299; *Thomas v. Glasgow*, 13 C. C. 167.

99. Where a summons in attachment is issued, the justice has no jurisdiction, under the act 12 July 1842 (Brightly's Purdon 1136), to adjudge the ownership of the property attached; that act contains no provision for summoning a garnishee or for determining the interests of third persons. *Jackson v. Bradley*, 11 C. C. 321.

100. Where the plaintiff's affidavit in an attachment fails to aver that the defendant is a non-resident of the commonwealth, the attachment will be quashed; but if the defendant appears and judgment is rendered for plaintiff on the merits, a subsequent sale will divest the defendant's title. *Bollinger v. Gallagher*, 144 P. S. 205.

101. An affidavit which charges fraud in general terms following the language of the act 12 July 1842 (Brightly's Purdon 67) is sufficient to give a justice jurisdiction to issue an attachment. *Spencer v. Bloom*, 149 P. S. 106.

102. An affidavit that deponent has good reason to believe that the defendant is about to dispose of his personal property and leave the county with the intent to defraud his creditors, is not sufficient to sustain an attachment. *Gates v. Bloom*, 149 P. S. 107.

103. In a proceeding by attachment

before a justice, where objection was made in a justice's court as to the sufficiency of the affidavit; it was *held*, that an appeal by the defendant was no waiver of the right to except to the jurisdiction. *Gates v. Bloom*, 149 P. S. 107.

104. An affidavit which avers that plaintiff has every reason to believe that the defendant is about to dispose of his personal property and leave the county with intent to defraud his creditors, is insufficient to sustain an attachment under the act 12 July 1842 sec. 27 (Brightly's Purdon 1136), and such an attachment will be quashed by the common pleas upon an appeal where such want of jurisdiction is shown at any time before the determination of the suit. *Curwensville Mfg. Co. v. Bloom*, 10 C. C. 295.

105. An affidavit which merely avers that the defendant is going out of the county with intent to defraud his creditors is insufficient. *Griffis v. Swick*, 12 C. C. 389.

106. If the bond for an attachment, under the act of 12 July 1842 (Brightly's Purdon 1136), contains but one surety, the proceeding will be quashed on *certiorari* to the common pleas. The bond cannot be amended by adding another surety. *Spettigue v. Hutton*, 9 C. C. 156.

107. Where an attachment is issued by an agent and the bond is entered in the agent's name as agent, the proceedings will be reversed on *certiorari*. *Powell v. Roderick*, 11 C. C. 191.

108. The bond must be for double the amount of the claim; where the claim was one hundred and four dollars and forty-three cents, it was *held*, that a bond for two hundred dollars was insufficient. *Griffis v. Swick*, 12 C. C. 389.

109. A foreign attachment issued under the act 8 May 1874 (Brightly's Purdon 1138) by a justice of the peace, is dissolved and the goods released by the entry of bail for payment of debt, interest and costs, and general appearance for defendant in the court of common pleas; the appeal and unconditional appearance operate as a waiver of objection to the

jurisdiction by reason of the residence of the defendant within the state. *Wright v. Millikin*, 152 P. S. 507.

110. If an attachment under the act of 12 July 1842 (Brightly's Purdon 1136) be not personally served, a summons must issue and be served on the defendant, or the proceedings will be quashed on *certiorari*. *Spettigue v. Hutton*, 9 C. C. 156.

111. A justice's attachment under the acts of 12 July 1842 and 8 May 1874 (Brightly's Purdon 1136, 1138) can be levied only on goods capable of manual seizure. *Griffith v. Hughes*, 6 C. C. 534.

112. The service of an attachment issued by a justice under the act 12 July 1842 (Brightly's Purdon 1136) was held to be void because the goods were capable of manual seizure, but the return did not show that the officer took them into his possession as required by the act 17 March 1869 (Brightly's Purdon 71). *Curwensville Mfg. Co. v. Bloom*, 10 C. C. 295.

113. Where the return of the writ does not show that a copy of the inventory was left with a person in possession of the goods, or that the defendant was a non-resident of the county and could not be found, the proceedings will be set aside. *Griffith v. Swick*, 12 C. C. 389.

114. Where an attachment is laid upon money in the hands of a garnishee, it is the duty of the constable to take the money or demand a bond conditioned for its production as required by the act 12 June 1842, sec. 29 (Brightly's Purdon 1137); where he failed to adopt either course, the proceedings were reversed on *certiorari*. *McNamara v. Roderick*, 11 C. C. 37: s. c. 6 Kulp 366.

115. Where property has been attached under the act 12 July 1842 (Brightly's Purdon 1136), and it is afterwards levied on and sold by the sheriff under an execution against the same debtor at the suit of another creditor, the effect of the sale is to transfer the lien of the attachment from the property to the fund; and if the judgment be *bona fide* and the execu-

tion creditor becomes a purchaser, he takes a title which the attaching creditors cannot impeach by levying on the same goods as the property of their debtor. *Tisch v. Utz*, 142 P. S. 186.

116. In attachment proceeding before a justice, the defendant, by appealing, waives all objections to defects in form; and this, though he had moved to quash the proceedings. *Fitzgerald v. Gardner*, 1 Northam. 352.

117. Sufficiency of a justice's record in domestic attachment under the act of 22 August 1752 (Brightly's Purdon 700). *Moore's Appeal*, 3 Cent. 586.

III. Parties.

118. A justice's judgment against a partnership will not be reversed on *certiorari*, because the record fails to give the names of the individual partners of the defendant firm. *Link v. Repple*, 7 C. C. 138.

119. A summons against J. Link & Co. will not support a judgment against J. H. Link & Co. *Link v. Repple*, 7 C. C. 138.

120. The act 23 March 1877 (Brightly's Purdon 437), permitting taxpayers to become parties to suits against school districts and other municipalities, applies only to suits pending in the common pleas; it does not apply to suits before magistrates, and an appeal by an individual taxpayer from the judgment of a magistrate against a school district will be stricken off. *Bowman v. Lebanon City School District*, 2 Dist. Rep. 321.

IV. Of the trial.

121. That the plaintiff on cross-examination before a justice refused to answer, and was sustained by the justice, saying that answering questions would not change the result in his mind, such fact may be shown by depositions on *certiorari*, and is a good ground for reversal. *Bachman v. Siglin*, 7 C. C. 112.

122. A defendant sued before a justice must set off a claim for wages for manual labor which he may have against the plaintiff, otherwise he is forever barred from recovering by any after suit. The seventh section of the act of 20 March 1810 (Brightly's Purdon 1134) applies to such a set-off. *Felpel v. Hershour*, 128 P. S. 587.

123. In an action before a justice, the neglect of a defendant to bring in his claim of set-off is a bar to any subsequent suit by the defendant against the plaintiff for the amount of such set-off. *Shetter v. Metzgar*, 4 York 8.

124. Where a defendant's demand is more than one hundred dollars, he is not bound to set it off in a suit against him before a justice, and the test is not the amount recovered but the amount of the claim in good faith. *Gillum v. Kahnweiler*, 10 Lanc. 397.

V. Adjournment.

125. A judgment of a justice will not be set aside after a delay of fifteen years, on the ground that the record shows that the justice continued the case without the appearance or consent of the defendant, and that he finally entered judgment by default without hearing any evidence. *Inquirer Printing Co. v. Wehrly*, 157 P. S. 415; affirming s. c. 9 Lanc. 209.

126. Where a justice reserves his decision and adjourns the court without day, he cannot subsequently enter judgment without notice to the parties; such a judgment will not be sustained upon *certiorari* by a memorandum on the record that a postal card was sent to the defendant. *Leslie v. Innes*, 15 C. C. 178.

127. If the record shows a continuance, without showing an appearance or consent of parties thereto, a subsequent judgment by default will be reversed on *certiorari*. *Martin v. Espenshade*, 6 Lanc. 393.

128. If a justice adjourns a case with-

out day, he cannot subsequently enter judgment without notice to the parties. *Ackerman v. Stoner*, 7 Lanc. 73.

VI. Statement and affidavit of defence.

129. Under the act 7 July 1879 (Brightly's Purdon 1131), it is not incumbent upon the plaintiff to file a statement of his claim unless he intends to require an affidavit of defence. *West Myerstown Creamery Co. v. Uhrich*, 1 Mag. & Con. 43.

130. Under the act 7 July 1879, sec. 2 (Brightly's Purdon 1131), where the plaintiff files an affidavit of his claim and it is served with the summons, the defendant is not entitled to examine witnesses at the hearing until he has filed an affidavit of defence. *Clausen v. Quigley*, 10 Montg. 92.

131. Judgment cannot be taken before a justice in default of an affidavit of defence under the act 7 July 1879, sec. 2 (Brightly's Purdon 1131), unless a certified copy of plaintiff's affidavit of claim has been served on the defendant at the time and in the manner that service is made of summons. *Abbey v. Young*, 10 C. C. 476.

VII. Of the judgment.

132. The summons being returnable between 2 and 3 p.m., judgment can be entered, after hearing the proofs, at 2.55 p.m. *Connors v. Newton*, 6 Kulp 98.

133. Where judgment is entered by default for want of an appearance, the record should state the hour of hearing and judgment and the non-appearance of the defendant at the hour fixed. *Link v. Repple*, 7 C. C. 138; *Quinn v. Mahon*, 1 Lack. Jur. 414.

134. The justice's record in a judgment by default should show that the plaintiff appeared at the hour named in the summons, and that the defendant was in default; it is not necessary, however,

to state the hour at which judgment was rendered. *Robertson v. Clark*, 9 C. C. 94; s. c. 1 Lack. Jur. 403.

135. Upon judgment by default the record must show that the plaintiff appeared at the hour, and that the justice heard evidence. *Lutz v. Derb*, 5 Kulp 500.

136. A judgment by default should show that the plaintiff appeared at the hour, as well as the day, mentioned. *Courtright v. Harringar*, 7 Lanc. 30; s. c. 5 Kulp 372.

137. A judgment entered by a justice within his jurisdiction on the confession of a defendant voluntarily appearing in person, is not void though the record recite that it is for a balance due on a note with warrant of attorney to confess judgment. *Tarr v. Eddy*, 142 P. S. 410.

138. A judgment should specify its exact amount; a judgment "for the above amount and costs" is defective. *Ackerman v. Stoner*, 7 Lanc. 73.

139. A justice is not required to enter upon his docket the hour in which he entered judgment by default. *Blessington v. Comm'th*, 14 Atlan. 416; s. c. 12 Cent. 512.

140. Upon *certiorari* to a justice's judgment, proceedings will be reversed where the judgment was by default and the record fails to show that judgment was entered at the hour fixed in the summons, or if at a later hour, and that the defendant did not appear at the proper time. *Clarke v. Lowenstein*, 7 Kulp 61.

141. That a magistrate in entering judgment for rent on a lease noted a general waiver of the exemption therein, did no injury to the defendant. *Beatty v. Rankin*, 139 P. S. 358; s. c. 38 P. L. J. 239.

142. Where a judgment is entered by default, it is necessary upon *certiorari* that the jurisdiction of the justice over the person of the defendant be made to appear by the record. *Rea v. Titman*, 14 C. C. 651.

143. A justice has no right to open a judgment without notice to the defend-

ant, and to subsequently enter another judgment for a larger sum; if he does so, the proceedings will be reversed on *certiorari*. *Carlin v. Holland*, 11 C. C. 20.

144. Under the act of 20 March 1810 (Brightly's Purdon 1134), a justice has no power to open his judgment except with the consent of both the parties. *Wise v. Hagerman*, 2 Northam. 212.

145. A magistrate's judgment of non-suit against the plaintiff is conclusive, unless appealed from. The magistrate cannot open it and grant a rehearing. *Gord v. Middleman*, 25 W. N. C. 556.

146. Where the defendant in a suit before a justice paid the costs to the justice upon his promising to enter a non-suit, and the justice subsequently entered judgment for the plaintiff; it was held, upon *certiorari*, that the payment of the costs was an end to the action and the alderman was without jurisdiction to proceed further, and such judgment being invalid, a *certiorari* could be issued within a reasonable time and the facts could be established by parol. *Reisinger v. Simpson*, 14 C. C. 526.

147. After a justice has entered judgment he cannot issue a new summons and enter an additional judgment against the defendant for the same cause of action; upon *certiorari* to the second judgment, it may be shown by depositions that the cause of action in both cases was the same. *Beynon v. Peterson*, 7 Kulp 259.

VIII. Of the record.

148. An action before a justice should be docketed as soon as the summons is issued, and every subsequent step should be docketed at once, but a judgment will not be reversed on *certiorari* for a mere failure to observe these precautions. *Schoeneman v. Glanz*, 2 Northam. 395; s. c. 4 Del. 432.

149. A justice should enter his judgment promptly on his docket; otherwise he is guilty of gross negligence. *O'Malley v. Mandeville*, 6 Kulp 44.

150. A justice may amend his record to correspond with the facts even after he has given a transcript, and upon a *certiorari*, the case will be decided upon the record as returned by the justice, although it does not correspond with the transcript previously furnished. *Moore v. Messersmith*, 12 C. C. 575.

151. A magistrate will not be ordered by mandamus to complete his record in the case of the arrest of the relator, by adding to the same the names of other persons arrested at the same time upon the same charge, and what was done in reference to such other arrests. *Comm'th v. Pole*, 11 C. C. 226; s. c. 1 Dist. Rep. 125.

152. A justice is not bound to send the defendant a transcript of his docket, in answer to a letter which does not contain the fee therefor. *Orth v. Groff*, 8 Lanc. 12.

153. The act 24 June 1885 (Brightly's Purdon 1142), authorizing justices to demand the costs before issuing a transcript of a judgment, does not apply to a case where the defendant applies for a transcript for the purpose of taking legal advice as to whether he shall appeal or take a *certiorari*. *Comm'th v. Oldfield*, 6 Kulp 272.

154. The record of a justice need not show at what hour of the day the hearing was had; it will be presumed on *certiorari* that the hearing was had and the judgment entered at the hour stated in the summons. *Fronheiser v. Werner*, 14 C. C. 522.

155. The transcript of a justice's judgment in the common pleas will be stricken off where the record fails to show that the justice heard evidence in support of the plaintiff's claim. *Barney v. Fahs*, 10 C. C. 424.

156. A judgment of a justice will be reversed on *certiorari* where the record shows that the only evidence offered for plaintiff before the justice was a sworn book account for goods sold and delivered. *Sauter v. Carroll*, 11 C. C. 192.

157. No greater particularity is re-

quired in a justice's record in stating the evidence in judgments by default than in other cases. *Baker v. Richart*, 12 C. C. 318.

158. The record must show that the judgment was sustained by evidence; a judgment "after due consideration" is not sufficient. *Gilman v. Lear*, 5 Kulp 246.

159. A judgment by default will be presumed, on *certiorari*, to be given directly upon evidence; but if the record shows that no evidence was produced, the judgment will be reversed. *McCowan v. Ward*, 5 Kulp 385.

160. Upon *certiorari* to a justice's judgment, the record should show that testimony was taken and that the case was heard, but it is not necessary for the justice to set out in full the testimony of the witnesses, or to copy at length upon his docket documentary evidence. *Hill v. Scouton*, 7 Kulp 345.

161. In a suit against a township the justice's record need not show a demand previous to suit; this is a matter for evidence; so, the record need not state the kind of evidence by which the plaintiff's claim was proven. *Shea v. Plains Township*, 7 Kulp 554.

162. Where a judgment was entered by a justice upon a promissory note purporting to be signed by the defendant, and the defendant did not appear and no testimony was taken; it was *held*, upon *certiorari*, that the judgment was void. *Montgomery v. Souder*, 8 Lanc. 185. See *Worst v. Souder*, 8 Lanc. 187.

163. A justice's record should show the kind of evidence upon which the plaintiff's demand is founded. *Andreas v. Keller*, 2 Northam. 209.

164. A justice's judgment by default will be reversed on *certiorari* where the record fails to show that the plaintiff's proofs and allegations were heard before the rendition of the judgment. *Swartsbaugh v. Lau*, 1 York 207.

165. In a suit by an assignee of a claim against a township the record need not show affirmatively that the assign-

ment was proven. *Shea v. Plains Township*, 7 Kulp 554.

166. The record of a justice on the award of referees will be reversed on *certiorari* where it fails to show that the referees were sworn or affirmed before they entered upon the performance of their duties. *Curry v. Lilley*, 9 C. C. 590.

167. The record of a justice for assessments on a live-stock insurance policy must show that the defendant was insured in the company, and state that it was for an assessment to pay losses, and for what period of time; otherwise the judgment will be reversed on *certiorari*. *Dauphin County Mut. Live-Stock Insurance Co. v. Pidgeon*, 7 C. C. 448.

168. A justice's judgment will not be reversed for the informality of calling the action trover instead of trespass. *Wilson v. Prosser*, 5 Kulp 471.

169. In trover, a justice's record, which sets forth the "withholding an order" as the cause of action, does not set forth a conversion and is defective. So the record should describe the order with some certainty. *Scureman v. Neal*, 6 Lanc. 344.

170. A justice's record in trespass for the wrongful conversion of personal property should distinctly allege the conversion or facts from which it is necessarily implied. *Connors v. Newton*, 5 Kulp 466. See *Wilson v. Prosser*, *Ibid.* 471.

171. In actions for a penalty, the record should show an information by the informer, and the evidence or its substance should be set out. *Rothermel v. Ziegler*, 7 C. C. 505.

172. If a justice's record show a judgment for defendant, and then a tender by plaintiff of a sum of money to cover any claim the defendant may have against him, such a procedure is a suit by a debtor against his creditor, and is presumptively fraudulent. *Andreas v. Keller*, 2 Northam. 209.

173. The record of a judgment before a justice against a married woman is valid, which shows that the debt had been contracted by her for necessities, to

wit, medical attendance furnished by the plaintiff to the use of her family. *Weber v. Detwiler*, 8 Atlan. 910.

174. A justice's judgment against a married woman, under the act of 11 April 1848 (Brightly's Purdon 1302), is void unless it show all requisites required by the statute. So, if it be in default of an appearance, it is void if it do not show that some testimony was heard. *McKinney v. Brown*, 130 P. S. 365.

175. All the facts necessary to confer jurisdiction in a suit against a husband and wife for necessities must appear on the justice's record. *Conlan v. Hirsch*, 5 Kulp 395.

176. A justice's record showing a judgment against a married woman for "goods sold and delivered" will be stricken off. The act of 3 June 1887 (P. L. 332) does not authorize a married woman to bind her estate generally as a *feme sole*. *Brannon v. O'Neill*, 7 Lanc. 162; s. c. 5 Kulp 458.

177. Where the transcript of a justice's judgment in the common pleas failed to show that the defendant was a married woman, depositions were heard to establish the coverture, and where they showed that the cause of action was not such as to render a married woman liable, the transcript was stricken off. *Barney v. Fahs*, 10 C. C. 424.

See CERTIORARI.

HUSBAND AND WIFE.

X. Execution.

(a) General principles.

178. It is not necessary that a return day should be mentioned in an execution issued by a justice. *Eaby v. Ream*, 9 Lanc. 33. See s. c. 9 Lanc. 250.

179. If a judgment before a magistrate be upwards of five years old, an execution cannot issue without a *scire facias* to revive has been first laid out. *Park v. Wilson*, 3 L. I. June 10, 1846.

180. The act 5 May 1854 (Brightly's Purdon 1145), which provides that no execution shall issue on a judgment of

a justice after five years unless revived by *scire facias*, is not repealed by the act 24 June 1885 (Brightly's Purdon 1143), relating to the filing of transcripts and the issue of execution in the common pleas. So the act of 9 May 1889 (Brightly's Purdon 1144) does not dispense with the *scire facias* after five years. *Smith v. Wehrly*, 157 P. S. 407; *Inquirer Printing Co. v. Wehrly*, 157 P. S. 415; affirming s. c. 9 Lanc. 209.

181. The plaintiff before a justice may issue execution forthwith upon recovering judgment, and where an appeal is subsequently taken, the costs of the execution will follow the judgment. *Sickles v. Carroll*, 10 C. C. 646.

182. An appeal taken within twenty days is a *supersedeas* of an execution from the common pleas whose levy is still pending. *Worthington v. Hobensack*, 8 C. C. 65.

183. An appeal supersedes an execution, though a levy has been made, and a sheriff, who subsequently sells under a junior execution and distributes among junior execution creditors, is not liable on his official bond for such action to the plaintiff in the execution so superseded. *Comm'th v. Smith*, 3 Cent. 252.

(b) Of the levy and sale.

184. A constable cannot levy upon goods subject to a prior levy of the sheriff; the plaintiff should file his transcript in the common pleas and issue a *feri facias* before the sheriff's sale, and he will then be in a position to order the money into court and participate in the distribution. *Croman's Case*, 11 C. C. 44; s. c. 1 Dist. Rep. 190.

185. The lien of an execution continues twenty days after the levy; and this, though the constable omit to return it and procure an alias at the expiration of thirty days from the date of the original. *Messner's Appeal*, 1 Cent. 348.

186. A constable's levy remains a lien for twenty days after the date of the levy, and during said twenty days the

constable may sell without an alias writ; and this, though the return day of his writ have passed. *Page v. Gardiner*, 11 C. C. 577.

187. A person employed and designated as a general agent, with authority to make collections both of cash and notes, has authority to direct an attorney to bring suit and to indemnify a constable by giving a bond in the name of his principal. *Swartz v. Morgan*, 163 P. S. 195.

188. An attorney at law who has been employed to bring suit has an implied authority to give a bond of indemnity to a constable in his client's name. *Swartz v. Morgan*, 163 P. S. 195.

189. If the justice had jurisdiction, a constable's sale under his execution will pass a good title, notwithstanding the existence of irregularities and errors, for which the judgment ought to have been reversed. *Kramer v. Wellendorf*, 129 P. S. 547. See s. c. 20 W. N. C. 331.

190. Where the plaintiff's affidavit in an attachment fails to aver that the defendant is a non-resident of the commonwealth, the attachment will be quashed; but if the defendant appears and judgment is rendered for plaintiff on the merits, a subsequent sale will divest the defendant's title. *Bollinger v. Gallagher*, 144 P. S. 205.

(c) Attachment execution.

191. A justice has no jurisdiction to issue an attachment execution against the executor of a decedent's estate as garnishee. *Bank v. McCall*, 5 Del. 238.

192. Under the act 8 May 1876 (Brightly's Purdon 2077), an attachment execution cannot issue against wages upon a judgment for board unless it appear that plaintiff was the keeper of a hotel, boarding-house or lodging-house. *McCourt v. Brenaman*, 11 C. C. 645.

193. Before a justice can issue an attachment execution, an execution must be issued and returned "no goods." Whether it can be issued by the justice of another county upon a transcript was

not decided. *Miller v. Snyder*, 133 P. S. 23; affirming s. c. 6 Lanc. 92.

194. The record of an attachment execution must show a judgment for plaintiff that the writ was returnable to a day certain, and service of the rule and interrogatories. *Boyd v. Smith*, 5 Kulp 380.

195. An attachment execution issued by a justice must be made returnable to some certain day and at some certain hour or between two designated hours. *O'Neill v. Roche*, 1 Lack. Jur. 326.

196. If the defendant in an attachment execution before a justice on the day of the hearing claims the exemption, it is the duty of the justice to allow it; otherwise the proceedings will be reversed. *Stern v. McHale*, 5 Kulp 387.

197. It is the duty of the garnishee to attend at the hour an attachment execution is returnable; otherwise a judgment may be entered against him by default. *O'Malley v. Mandeville*, 6 Kulp 44.

198. An answer of the garnishee denying his indebtedness to the defendant prevents the justice from giving judgment against the garnishee where the plaintiff does not demand an issue. Where the garnishees took out a *certiorari* more than twenty days after such a judgment had been entered against them, but within twenty days of the issuing of execution, the court set aside the execution with an intimation that the defendants should ask for a rule to appeal *nunc pro tunc*. *Winters v. Homsher*, 8 Lanc. 137.

199. The record of an attachment execution before a justice need not show strict accuracy in every little detail; it need not show the hour at which judgment against the garnishee was entered. *Weisman v. Weisman*, 133 P. S. 89.

200. An appeal lies from the judgment of the common pleas on *certiorari* from a justice of the peace, in a proceeding by an attachment execution under the act 15 April 1845 (Brightly's Purdon 1147); such a proceeding is not embraced within the provisions of the act 20 March 1810 (Brightly's Purdon 793). *Strouse v.*

Lawrence, 160 P. S. 421; reversing s. c. 13 C. C. 131.

201. Where an attachment execution was issued by a justice and the garnishee took an appeal; it was *held*, that the garnishee was not entitled to have a garnishee fee taxed as part of the costs under the act 29 April 1891 (Brightly's Purdon 839); such an attachment is not an attachment execution issued out of a court of record. *Deerwester v. Hook*, 9 Lanc. 247.

XI. Appeals.

(a) Right of appeal.

202. A mandamus will be granted to compel a justice to allow an appeal improperly refused. *Beach v. Evans*, 7 C. C. 241.

203. If the defendant sues out a *certiorari* and removes the justice's record, an appeal cannot be taken, neither will the court allow it. *Finley v. Smith*, 7 C. C. 661.

204. A justice's mistake in judgment cannot be corrected on *certiorari*; an appeal is the proper remedy. *Quigney v. Quigney*, 1 Northam. 20.

205. Upon a *scire facias* to revive a judgment, an appeal lies from the judgment of revival; and this, although the defendant has previously taken out a *certiorari* to the original judgment, which *certiorari* has been stricken off by the court. *Watson v. Wehrly*, 10 Lanc. 97; s. c. 5 Del. 217. See s. c. 9 Lanc. 179; 11 Lanc. 49.

(b) Waiver of the right of appeal.

206. An appeal cannot be defeated by showing by parol that the note sued on contained a waiver of the right of appeal. *Morton v. Carle*, 5 Kulp 268.

207. An appeal from the judgment of a justice will not be stricken off because of a waiver of a right to appeal, where the application is made more than one year after the appeal was taken. *Henney v. Ralph*, 11 C. C. 624.

(c) Sum in controversy.

208. If the plaintiff's claim be over \$5.33 and the judgment be for a less amount, either party may appeal. *Lake v. Pearce*, 1 Lack. Jur. 264.

209. Where the judgment is less than \$5.33 the defendant can show that the amount in controversy, by reason of a set-off, exceeded that amount. *Dobison v. Haddock*, 5 Kulp 254.

210. The right of appeal was held to be determined by the actual amount adjudicated adversely to the appellant and not by the amount for which suit was brought. *Elliott v. Palmer*, 10 C. C. 427.

211. A plaintiff is not entitled to an appeal from a judgment entered by a justice upon an award of referees unless he has lost, taking his demand as the standard of his rights, more than \$20; so, in such a case the defendant is not entitled to appeal by reason of the act 20 March 1845, sec. 3 (Brightly's Purdon 1139). *Markline v. Myers*, 2 York 52.

(d) When an appeal must be perfected.

212. In calculating the twenty days for an appeal from a justice, the day of judgment must be excluded and Monday must be added if the twentieth day come on Sunday. *John v. Hock*, 4 Del. 109; s. c. 6 Lanc. 353.

213. If a justice within the twenty days illegally open the judgment, the appeal must be taken within twenty days of the original judgment. *Wise v. Hagerman*, 2 Northam. 212.

214. If the defendant attend the hearing, but has no notice of judgment, his twenty days for an appeal does not begin to run until ten days after the hearing. *John v. Hock*, 4 Del. 109; s. c. 6 Lanc. 353; *Orth v. Groff*, 8 Ibid. 12.

215. Where a justice reserves his decision until an hour certain and fails to render judgment at the time fixed or to make a further order in the case, a party, after waiting a reasonable time, may depart; in such case the time for appeal runs from the end of ten days from that date or from the date of special notice of

the judgment, if such notice be given before the ten days expire. *Boyd v. Ward*, 10 C. C. 9.

216. Where judgment was entered by a justice on November 4, and an appeal was taken December 11, it was held, that the appeal was a nullity and would be stricken off; and this, notwithstanding an entry that the appeal was taken within twenty days after notice and oral testimony by the justice that such was the case. *Horan v. Dieter*, 7 Kulp 560.

(e) Entry and liability of bail.

217. When a defendant appeals in *forma pauperis*, he is not relieved from the necessity of giving bail by the act 24 June 1885, sec. 2 (Brightly's Purdon 1142); that section simply relieves him from the necessity of paying costs. *Davison v. Good-will Cloak & Suit Co.*, 16 C. C. 27; s. c. 1 Mag. & Con. 52.

218. One who appeals from the judgment of a justice must enter bail as required by the act 20 March 1845 (Brightly's Purdon 1139), although he has made and filed with the justice an affidavit of his inability to pay the costs. *Iams v. Hall*, 4 Dist. Rep. 259.

219. Whether a rule of court providing that no attorney at law shall be received as bail in any suit unless he be personally interested applies to the case of bail on appeal from the judgment of a justice, was not decided. *Shugar v. Mumford*, 1 Dist. Rep. 324.

220. A rule of court that no attorney shall become bail upon an appeal from a justice except by special leave of court will be enforced whenever invoked, unless there are circumstances connected with the proceedings which would have induced the court to grant leave, if its consent had been asked. *Laughlin v. Prigg*, 3 Dist. Rep. 418; s. c. 3 Lack. Jur. 280.

221. An appeal from a justice will be stricken off where the surety upon the appeal is a member of the bar and he became such without obtaining the leave of the court. *Ibid.*

222. Depositing money with the justice is not giving a recognizance, and an appeal entered on such security will be stricken off. *Steam Heat & Power Co. v. Hutchinson*, 14 C. C. 491.

223. An action on a recognizance for costs on an appeal from a justice is not barred because not brought within six years after final judgment for appellee. Such a recognizance is not a contract within the act of 27 March 1713 (Brightly's Purdon 1213). *Ehret v. Lewis*, 7 C. C. 108.

224. Bail for an appeal cannot defend upon any misunderstanding as to his liability, or any misrepresentation of the justice, not brought to the attention of the judgment creditor. *Davenport v. Searfoss*, 13 Atlan. 956.

225. Where a corporation defendant appeals from a justice and enters bail absolute under the act 15 March 1847 (Brightly's Purdon 1140), there is no condition that the appellant shall appear, and hence a failure to appear does not fix the liability of the bail in a suit upon the recognizance. *Shivery v. Grauer*, 12 C. C. 471.

226. Where a corporation, other than municipal, appeals from the judgment of a justice, it must give bail absolute for the amount of the debt, interest and costs on affirmation of the judgment. *Young v. Colvin*, 168 P. S. 449.

(g) Perfection of bail.

227. If bail for an appeal be irregular it should not be stricken off, but the court should allow it to be perfected. *Kohr v. Fake*, 7 C. C. 191.

228. If an appeal be defective the appellant should be first called on to perfect before the appeal will be stricken off. *McNeil v. Rex*, 4 Montg. 139; *Worthington v. Hobensack*, 8 C. C. 65.

229. Where an appellant has made an effort to enter a recognizance which, however, is irregular, the appeal will not be stricken off until he has been given an opportunity to perfect it. *Steam Heat & Power Co. v. Hutchinson*, 14 C. C. 491.

(h) Of the affidavit.

230. If the appellant through his own negligence fail to make the proper affidavit his appeal should be stricken off. *Cressman v. Bossing*, 9 Atlan. 191.

231. Where, upon an appeal in a suit for wages, the court permitted the defendant to perfect his appeal by giving bond, the court will not, on a subsequent application to strike off the appeal, permit the defendant to again perfect by filing an affidavit, which had also been originally omitted. *Finley v. Smith*, 7 C. C. 304.

(i) Payment of costs.

232. A municipal corporation may appeal from a justice without payment of costs. *Comm'th v. Batdorf*, 7 C. C. 242.

233. An appeal *in forma pauperis* will not be allowed without notice to the appellee. *McAndrew v. Curran*, 5 Kulp 412.

234. The transcript of an appeal should show that the costs before the justice have been paid. *Lovett v. Blackburn*, 4 Del. 162.

235. The costs on an appeal can be paid at any time before the transcript is taken. *Horton v. Douglass*, 9 C. C. 192.

236. If the appellant's attorney induces the justice to accept a less amount of costs than he is entitled to, the appeal will not be stricken off, but he will be ordered to pay the additional costs in ten days. *Wiggins v. Kelly*, 7 Lanc. 83.

237. It is only in case of judgments for want of an appearance that the defendant must pay the costs of execution to make his appeal effective as a supersedeas; where judgment is taken for want of an affidavit of defence under the act of 7 July 1879 (Brightly's Purdon 1131) the payment of the costs of execution is not necessary. *Worthington v. Hobensack*, 8 C. C. 65.

238. Where the defendant appears and takes defence, and after the costs of execution have accrued tenders payment of the costs save those of the execution and demands a transcript of appeal, he is not entitled to it; the costs which he tenders

should include the costs of execution. *Comm'th v. Snayberger*, 16 C. C. 83.

239. Upon an appeal from a justice's judgment the appellant is not obliged to pay the costs of a previous suit, the judgment in which was reversed on *certiorari* on the ground that the defendant did not have legal notice to attend the trial; and this, although the amount of the second judgment is equal to the first judgment. *Smith v. Grawlitz*, 7 Kulp 156; s. c. 5 Del. 359.

See JUSTICES' COURTS, XL, (u).

(k) Filing an appeal.

240. An appeal from a justice may be entered on a legal holiday. *Worthington v. Hobensack*, 8 C. C. 65.

241. Unless an appeal be filed in the common pleas on or before the next return day, it will be stricken off. *Seltzer v. Schoener*, 13 C. C. 288.

242. Under the act 1 May 1861 (Brightly's Purdon 1142), where an appeal is taken after the first Monday of September and before the third Monday of September in Philadelphia county, it is filed in time if filed by the first Monday of October. *Care v. Atkinson*, 10 C. C. 400.

243. Where the costs were paid and bail was entered on Saturday and the transcript delivered to the appellant on the following Monday, which was the first day of the term, but the appeal was not filed until a later day, the appeal was stricken off as not having been filed in time. *Eyerman v. Melan*, 7 Kulp 137; s. c. 5 Del. 332.

244. Where an appeal was taken on April 10, and the next term of court after the entry of bail began on April 16, but the appeal was not entered until April 27, the appeal was stricken off. *Bechtel v. Bittinger*, 8 York 137.

245. Where an appeal from a justice was filed one day too late, and the appellee filed his statement, to which the appellant filed an affidavit of defence; it was held, that all irregularity in the appeal had been waived. *Ball v. Schwenk*, 16 C. C. 222.

246. Where an appeal was not filed within the time prescribed by law and the plaintiff had done nothing to show his acquiescence; it was held, that a delay from January until May would not estop him from moving to strike off the appeal. *Long v. Daniels*, 6 Kulp 288.

247. Where an appellant after taking out his appeal asked the justice when it was necessary to file it and he was told that any time within a month would do, the court refused to strike off the appeal although it was not entered until after the first day of the next term. *Swinehart v. Montgomery*, 9 Lanc. 275; s. c. 5 Del. 111.

248. A rule of court that where an appeal was taken from a justice the appellee might file a transcript with the same effect as if filed by the appellant, was held to be a nullity. *McConochie v. Bieber*, 2 Northam. 386.

(l) When allowed *nunc pro tunc*.

249. If the magistrate demand his costs when the bail is offered on the twentieth day, and persuade the bail not to go on the recognizance, the court will allow an appeal after the twenty days have expired. *Horton v. Douglass*, 9 C. C. 192.

250. The defendant was allowed an appeal *nunc pro tunc* where the alderman violated his promise to send the transcript to him within the time for filing. *Voorhis v. O'Malley*, 9 C. C. 193; s. c. 4 Del. 392; 6 Kulp 139.

251. Where a defendant does everything required by law to perfect his appeal but fails in his purpose through a mistake of the justice, he will be allowed to enter his appeal *nunc pro tunc*; and this, whether he has any defence or not. *Shrope v. Cauley*, 12 C. C. 217.

252. The court will relieve an appellant where he fails to file his appeal by the next return day, being misled by the justice; but not where the justice is acting as his agent. *Donnelly v. Purcell*, 4 Del. 55; s. c. 5 Kulp 295; *Myers v. Keen*, 4 Del. 139.

253. Where an appellant relied on the mistaken statement of the justice that he had eleven days in which to file his appeal, when in fact he had but ten days, the court refused to permit him to file it *nunc pro tunc*. *Bellas v. Gommer*, 6 Kulp 439.

254. Where the defendant's counsel through forgetfulness fails to file an appeal in time, the court has no jurisdiction to permit the appeal to be filed *nunc pro tunc*. *Ward v. Letzkus*, 152 P. S. 318.

255. A defendant will not be permitted to file an appeal *nunc pro tunc* because he was told by the justice that he had a year in which to file his appeal, nor because the justice failed to send him the transcript according to promise. Upon such an application the court will not inquire into the merits. *Kichline v. Shimer*, 12 C. C. 279.

256. A defendant will not be allowed to file his appeal *nunc pro tunc* on the ground that his failure to file it in time was caused by reason of the absence of his counsel; and this, though the statute of limitations would have been an effectual defence before the justice. *Brendle v. Gorley*, 13 C. C. 654. See s. c. 14 C. C. 113.

257. The court will not relieve an appellant who has not perfected his appeal in twenty days; ignorance will not excuse such laches. *Donnelly v. Purcell*, 4 Del. 55; s. c. 5 Kulp 295; *John v. Hock*, 4 Del. 109. See *Myers v. Keen*, Ibid. 139.

258. After the lapse of the twenty days an appeal will not be allowed unless it be clearly shown that the appellant was prevented from taking the appeal by the fraud, negligence or mistake of the justice or opposite party. *Newton v. Hofsoner*, 5 Kulp 420. See *Frantz v. Wagoner*, Ibid. 452.

259. An appeal *nunc pro tunc* was not allowed where the plaintiff averred that she thought she had received a larger judgment. *Deery v. Tamony*, 5 Kulp 516.

260. One who did not apply for an appeal within the twenty days will not be allowed an appeal *nunc pro tunc*; and

this, though the justice failed to enter the judgment on his docket within that time. *O'Malley v. Mandeville*, 6 Kulp 44.

261. Where it appeared that an appellant took the promise of the justice to mail him the transcript of the appeal; it was held, that he took the chance of the letter miscarrying and upon his not receiving it in time for filing, the court refused an appeal *nunc pro tunc*. *Buck v. Decker*, 6 Kulp 172.

262. That an appellant, through ignorance, neglected to file his transcript in time is not sufficient ground for allowing him to file it *nunc pro tunc*. *Humphreys v. Darling*, 6 Kulp 200.

263. Leave will not be granted to file an appeal *nunc pro tunc* upon the ground that the appellant was prevented from filing it by an attack of cholera morbus, in the absence of proof that he has a defence on the merits. *Friedman v. Smith*, 7 Kulp 504.

264. The court refused to permit an appeal *nunc pro tunc* after the twenty days had elapsed, where the only ground was that the defendant had no notice of the entry of judgment against him. *Davis v. Rowe*, 11 Lanc. 249.

265. An appeal will not be allowed *nunc pro tunc* because the justice told the appellant that he had made a return to court and she had nothing more to do. *Bradley v. Ritchie*, 6 Montg. 36.

266. An appeal will not be allowed *nunc pro tunc* because of a mere expression of the justice which was not calculated to mislead. *Van Winkle v. Crumlish*, 8 Montg. 112.

267. If from negligence an appeal be not taken in time, the court will not allow an appeal *nunc pro tunc*. *Frankenfeld v. Button*, 1 Northam. 275.

268. A defendant will be permitted to file an appeal *nunc pro tunc* where it appears that the magistrate was without jurisdiction and that the defendant was misled by the magistrate's statement. *Hestonville Pass. Ry. Co. v. Boyle*, 29 W. N. C. 201.

269. An appeal does not lie to the

supreme court from an order making absolute a rule for an appeal *nunc pro tunc* from a magistrate. *Comm'th v. Reiser*, 147 P. S. 342.

270. Where a rule is made absolute reconsidering a former order striking off an appeal and reinstating the appeal, the order making such rule absolute is not a final judgment from which an appeal to the supreme court will lie. *Cupples Wood-eware Co. v. Howe*, 164 P. S. 85.

(m) Motion to strike off.

271. Where an appellant neither filed an affidavit nor entered bail his appeal was stricken off. *Hamilton v. Mulley*, 1 Lack. Jur. 156.

272. Where a suit is brought before a justice by a minor by his next friend, an appeal by the plaintiff will not be stricken off because the minor himself signed the affidavit and bond. *Campbell v. Buckius*, 8 Lanc. 115.

273. Upon a motion to strike off an appeal the court will allow the justice upon proper application to amend his docket and transcript so as to conform to the facts. *Kearney v. Pennock*, 12 C. C. 37.

(n) Suits for wages of manual labor.

274. Upon a judgment for wages and manual labor, the defendant is not entitled to an appeal without an affidavit that the appeal was not intended for the purpose of delay. *Flegel v. Dotterer*, 11 C. C. 156.

275. Where the transcript of the appeal does not show that the judgment was upon a claim for wages for manual labor, the appeal will not be stricken off because of the want of an affidavit as required by the act 20 April 1876 (Brightly's Purdon 2074). *Glahn v. Peeler*, 7 Kulp 284.

276. Under the act 28 February 1870 (P. L. 269), an appeal from a justice in an action for the wages of labor in Luzerne county must be accompanied by an affidavit

setting forth the amount, if any, admitted to be due. *Moran v. Merritt*, 6 Kulp 399.

277. The local act of 28 February 1870 (P. L. 269), requiring a special affidavit for appeal in actions for wages, is in force in Lackawanna county. *Hamilton v. Mulley*, 1 Lack. Jur. 156.

278. In an action for wages, where the appellant had done everything else that was required and asked the justice if that was all right, who replied that he "guessed it was," the court permitted him to perfect his appeal by filing the affidavit required. *McCarty v. Killian*, 6 Kulp 438.

279. Where the defendant neglected to make the affidavit prescribed by the act 28 February 1870 (P. L. 269), regulating appeals from judgments of wages for manual labor in Luzerne county, and it appeared that the defendant was misled by the justice who drew the affidavit, the court permitted the appeal to be perfected *nunc pro tunc*. *Debert v. Smith*, 7 Kulp 307.

280. In a suit for wages, the defendant was permitted to perfect his appeal by entering a new recognizance and filing an affidavit that the appeal was not for delay. *Kuebler v. Quigley*, 9 Montg. 47; s. c. 5 Del. 239.

281. In a suit for wages the defendant was allowed to perfect his appeal by filing the affidavit and recognizance required by the act 20 April 1876 (Brightly's Purdon 1142, 2074); and this, although the time for doing so had expired. *Teal v. Becker*, 5 York 118; s. c. 4 Del. 612.

282. An executor may, under the act of 2 March 1868 (Brightly's Purdon 1142), or under the act of 20 April 1876 (Brightly's Purdon 1142, 2074), in a suit for manual labor, appeal from a justice without payment of costs. *Beach v. Evans*, 7 C. C. 241.

283. In a suit for wages an administrator may appeal without paying any costs except the costs of the transcript. *Kauffman v. Newcomer*, 7 Lanc. 255.

284. If judgment be entered on a claim, part for wages and part for other matters,

bail for the whole debt must be entered on appeal. *Davenport v. Searfoss*, 13 Atlan. 956.

285. If there be a set-off of a counter claim for wages and judgment thereon, the plaintiff, on appealing, must give bail for the amount of the set-off and interest as well as for costs under the act of 20 April 1876 (Brightly's Purdon 1142, 2074). *Felpel v. Hershour*, 128 P. S. 587.

286. Though bail be not entered as required by the act of 20 April 1876 (Brightly's Purdon 1142, 2074), the appeal will not be stricken off if the depositions show that the claim was not for wages. *Blanchard v. Coxe*, 5 Kulp 451.

287. In a suit for wages an appeal is fatally defective if bond is not given for the payment of the debt and costs, and an affidavit is not attached that the appeal is not intended for the purpose of delay but because appellant believes that injustice has been done him. *Heindel v. Bruau*, 8 York 141.

288. In an action on a recognizance of bail given under the act of 20 April 1876 (Brightly's Purdon 1142, 2074), where the suit was for services in cutting wood done in part by the plaintiff and in part with the assistance of others; it was *held*, that an affidavit of defence was insufficient which set up that the claim was not within the provisions of that act. *Allesio v. Blesh*, 148 P. S. 365.

XII. Proceedings in the common pleas.

289. Assumpsit will lie in the common pleas upon the judgment of a justice of the peace in this state. *Alexander v. Arters*, 11 C. C. 211.

290. If an appeal be tried on its merits, without regard to the amount of the plaintiff's claim or the defendant's set-off, it is too late, after the testimony is all in, to have the evidence of defendant's set-off withdrawn from the jury because it exceeds the jurisdiction of the justice. *O'Ferrall v. Moore*, 127 P. S. 234.

291. After an appeal by one of two defendants, his appearance, pleading, and engaging in the trial, it is too late for him to allege a want of jurisdiction, in that he had never been served with the process. *Bowell v. Gould*, 130 P. S. 434.

292. Mere irregularities cannot be taken advantage of upon an appeal from the judgment of a justice. *Spencer v. Bloom*, 149 P. S. 106.

293. An action before a justice against a railroad company in trespass for killing a horse cannot be changed on appeal to assumpsit for breach of a contract to erect and maintain a fence. *Reitz v. Meadville & Linesville Railway Co.*, 126 P. S. 437.

294. Where a justice has original jurisdiction, the cause of action cannot be departed from in the common pleas, whatever change may be made in the pleadings or the evidence. *Knappenberger v. Roth*, 153 P. S. 614.

295. Upon an appeal from a justice, the amount demanded cannot be increased beyond the limits of the justice's jurisdiction except so far as to embrace interest which has accrued since the institution of the suit. *Shaw v. Squires*, 153 P. S. 150.

296. Upon an appeal from a justice, where the transcript showed that plaintiff claimed on an order drawn upon defendants, and the plaintiff in one clause of his statement claimed on the order, and in the second clause claimed the same amount for work done, and the plaintiff testified to having done the work and said nothing as to the order; it was *held*, that the case was properly submitted to the jury. *White v. Blanchard*, 164 P. S. 345.

297. Upon the trial of an appeal by a married woman (sued before the justice as a single woman), the plaintiff was permitted to file a statement that the debt was contracted by her for necessities. *Degnan v. Hutchison*, 2 Northam. 322.

298. Where a married woman is sued before a justice as a single woman, an amendment will be allowed on appeal by adding the name of her husband as

co-defendant. *Degnan v. Hutchison*, 2 Northam. 322.

299. Where a rule of court provides that upon appeals from justices, the issue shall be raised by a declaration for money had and received and a plea of assumpsit, and the cause be tried upon the merits without regard to form, the transcript is substituted for the statement of fact, and where such transcript shows affirmatively the liability, it will sustain a verdict against a married woman for necessities. *Kooker v. Williams*, 3 Dist. Rep. 446.

300. A judgment of *non pros.* for failure to file a declaration within a proper time after appeal filed, where the failure was from neglect of counsel caused by sickness, will be stricken off. *Sander v. Beilstone*, 6 C. C. 579.

301. Where a rule of court provided that on appeals from justices a *non pros.* might be taken for want of a declaration in three months, it was *held* that the filing of a paper not containing the requisites of a declaration would not prevent judgment. *Griffith v. Warnock*, 8 C. C. 357.

302. After an appeal has been duly filed, it is irregular to enter a judgment of *non pros.* for want of an appearance and affidavit of claim without notice to the plaintiff; such a judgment will be stricken off. *Hubert v. Weger*, 14 C. C. 128.

303. In Greene county, if an appeal be placed on the issue docket without a plea, the appellant may strike it off on the first call of the list, but not thereafter. *Goodwin v. Slusher*, 5 Cent. 263.

304. In Greene county, under the rules of court, if the appellant does not appear when the case is called for trial, the court may enter judgment for the same amount as that given before the justice. *Goodwin v. Slusher*, 5 Cent. 263.

305. A rule of court that in appeals from justices, if no appearance be entered for the appellee within a specified time, the prothonotary on *præcipe* filed shall enter judgment for the appellant, is void as in conflict with the act 20 March 1810, sec. 4 (Brightly's Purdon 1140), which

provides that from the entry of an appeal, the suit shall take grade with and be subject to the same rules as other actions, where the parties are considered to be in court. *Jones v. Brown*, 1 Dist. Rep. 675.

306. If the plaintiff appeals from a justice he is entitled to judgment for want of an affidavit of defence, notwithstanding the defendant filed an affidavit before the justice. *Belfield v. Mandeville*, 6 Kulp 23.

307. On an appeal from a justice, judgment may be taken for want of a sufficient affidavit of defence. *Smith v. Mishler*, 7 Lanc. 169.

308. The procedure act of 25 May 1887 (Brightly's Purdon 1728), as regards the plaintiff's statement and judgment by default, does not apply to appeals from justices of the peace. *Lentz v. Sylvester*, 6 C. C. 580. See *Moore v. Washington Hose & Steam Fire Engine Co.*, 5 Montg. 190; *Craig v. Tamaqua Knitting Co.*, 13 C. C. 444.

309. The act 23 May 1887 (Brightly's Purdon 1728) does not apply to appeals from justices; upon an appeal from a justice, judgment cannot be taken for want of an affidavit of defence. *Marshall v. Neiman*, 7 York 95.

310. The act 9 April 1833 (Brightly's Purdon 1140), that the costs on an appeal from a justice shall abide the result and that the plaintiff shall pay the costs unless he recover a more favorable judgment, applies in torts as well as in contracts. *Knappenberger v. Roth*, 153 P. S. 614.

311. Where the plaintiff brought suit before the justice to recover damages for injuries to crops caused by defendant's cow breaking down a division fence and recovered a verdict of twenty dollars and costs, and the defendant appealed and on the trial the jury rendered a verdict for plaintiff for one dollar and seventy-five cents; it was *held*, that under the act 9 April 1833 (Brightly's Purdon 1140) the plaintiff was entitled to full costs. *Knappenberger v. Roth*, 153 P. S. 614.

312. If in trover, on appeal from a justice, the judgment be less than that before the justice, judgment will be entered for plaintiff without costs, and for defendant for the costs accrued on the appeal. *Brinzer v. Shartzter*, 6 C. C. 590.

313. An appellant plaintiff, who recovers in the common pleas less than before the justice, while he is, under the act of 9 April 1833 (Brightly's Purdon 1140), liable for the costs in the common pleas, is nevertheless entitled, under the act of 24 June 1885 (Brightly's Purdon 1142), to the repayment of his costs paid by him to the justice to secure his appeal. *Brinzer v. Shartzter*, 7 C. C. 528.

314. In a suit before a justice where the defendant tendered a judgment for fifty dollars and interest, which the plaintiff refused to accept, and the plaintiff subsequently obtained a verdict for sixty-three dollars, which was a larger sum than the amount of the judgment tendered with interest, the court refused a motion to enter judgment for the plaintiffs without costs. *McGuire v. Morris*, 6 Kulp 485.

315. No appeal lies to the supreme court to a judgment of the common pleas reversing the proceedings of a justice of the peace, in an action to recover the penalty provided by an ordinance prohibiting an act not an indictable or public offence. Such a proceeding is a civil action within sec. 22 of the act 20 March 1810 (Brightly's Purdon 794). *Mahanoy v. Wadlinger*, 142 P. S. 308.

316. The judgment of the court of common pleas on *certiorari* to a city recorder in a civil action was held to be final. *Foster v. Erie*, 142 P. S. 407.

JUSTICES OF THE PEACE.

See JUSTICES' COURTS; MAGISTRATES' COURTS.

- I. Election and appointment
- II. Of his official certificate.
- III. Criminal jurisdiction.
- IV. Docket.
- V. Fees.
- VI. Actions against justices.

I. Election and appointment.

1. In cities of the third class incorporated under the act 23 May 1889 (Brightly's Purdon 1541), each ward is entitled to but one alderman. *Harris's Application*, 4 Dist. Rep. 320.

2. In third class cities each ward is entitled to elect one alderman; and this, whether the city be incorporated under the act 23 May 1874 (P. L. 230), or under the act 23 May 1889 (Brightly's Purdon 1541). *Comm'th v. Hastings*, 16 C. C. 425.

3. Where a borough was divided by an act of assembly into two wards with a proviso that each ward should elect two justices; it was held, that such act was repealed by implication where the borough was subsequently divided into four wards by proceedings under the acts 14 May 1874 and 10 May 1878 (Brightly's Purdon 237, 238), and that under the latter act only two justices could be elected in such borough by the concurrent votes of each ward. *Fox's Case*, 1 Dist. Rep. 513; s. c. 12 C. C. 65; *Comm'th v. Pattison*, 12 C. C. 202.

4. The act 10 May 1878 (Brightly's Purdon 238), which provides that every borough which may be divided into wards shall elect two justices by the concurrent votes of each ward, applies to boroughs divided before the passage of that act. *Comm'th v. Pattison*, 15 C. C. 238.

5. Under the act 22 March 1877 (Brightly's Purdon 1122), where a vacancy occurs in the office of a justice of the peace less than twenty days before the February election, the term of the ap-

pointee extends to the first Monday of May of the following year. *In re Justices of the Peace*, 4 Dist. Rep. 142.

6. The physical or mental disability of a justice of the peace or other elective officer does not create a vacancy which the governor is entitled to fill under art. VI., sec. 4. of the constitution. *Huth's Case*, 4 Dist. Rep. 233.

7. The governor has power to fill a vacancy in the office of alderman, but the physical or mental disability of an incumbent of such an office does not create a vacancy. *Swanck's Case*, 16 C. C. 318.

II. Of his official certificate.

8. The certificate of a justice that an oath was duly administered, though not conclusive, is not to be overturned except upon clear proof to the contrary. *O'Day's Contest*, 5 Kulp 491.

III. Criminal jurisdiction.

9. Where a person was arrested on a charge of aggravated assault and battery, which is not triable by a justice under the act 1 May 1861 (Brightly's Purdon 1154); it was held, that by discharging him from the charge of aggravated assault and battery and holding him for assault and battery, the justice did not acquire jurisdiction to try the defendant of the latter charge before a jury of six; the jurisdiction of justices under that act depends upon the character of the offence charged in the information. *Comm'th v. Catterson*, 3 Lack. Jur. 1.

IV. Docket.

10. An alderman who retains possession of the docket and papers of his office after the expiration of his term will be compelled by mandamus to deliver them to his successor; in such case, under the act 8 June 1893, sec. 4 (Brightly's Purdon 1288), the petition for the mandamus should be filed in the name of the successor. *Wadsworth v. Reel*, 15 C. C. 440.

11. When the term of a justice of the peace expires he will be compelled by mandamus to deliver to his successor his docket and papers and the pamphlet laws received from the prothonotary during his term of office. *Comm'th v. Brackenridge*, 16 C. C. 400.

V. Fees.

12. The act 23 May 1893 (Brightly's Purdon 886, 890), establishing fees for constables and justices, does not apply to constables and justices who were in office at the time of its passage and approval. *Rupert v. Chester County*, 13 C. C. 342.

13. The act 23 May 1893 (Brightly's Purdon 886, 890), fixing uniform fees for justices and constables, is applicable to all constables elected after its passage; so far as it relates to officers elected before its passage it is unconstitutional. *Cornell v. Beaver County*, 42 P. L. J. 262.

14. The act 2 April 1868 (P. L. 3), so far as it relates to the fees of aldermen, justices and constables elected or appointed in Luzerne county, subsequent to the passage of the act 23 May 1893 (Brightly's Purdon 886, 890), is repealed by the latter act. *Fenner v. Luzerne County*, 167 P. S. 632.

VI. Actions against justices.

15. A justice is not liable to an action for damages for wrongfully refusing the plaintiff an appeal. *Bogart v. Ink*, 5 Kulp 309.

16. A justice of the peace who illegally orders or causes a person to be arrested or refuses to accept bail where the offence is bailable, is liable in damages for false imprisonment. *Grohmann v. Kirschman*, 168 P. S. 189.

17. Upon the payment of a judgment by the defendant to a justice, the justice and his sureties are liable on their bond for his failure to pay over the money to the plaintiff. *Walter v. Ziegler*, 8 Kulp 25.

18. Upon a proceeding, under the act of 28 March 1820 (Brightly's Purdon 1153), to compel a justice to pay over money, the petition must state that the money was received on a judgment rendered by him; he is not entitled to thirty days' notice. *Coyne v. Donohue*, 5 Kulp 508.

19. If a justice receives money in his official capacity, he is entitled to notice, under the act of 21 March 1772 (Brightly's Purdon 1150), previously to the commencement of a suit against him to recover it back. *DeLucca v. Derr*, 5 Montg. 73.

20. Where a judgment is paid to the authorized clerk of an alderman, it is a payment to the alderman, and he and his sureties are liable on their bond for a failure to pay over the money to the plaintiff. *Comm'th v. Ziegler*, 4 Dist. Rep. 552.

21. Where money is paid to a justice in his official capacity and on demand he refuses or neglects to pay it over, the proper remedy is upon his official bond; a justice of the peace has no jurisdiction

of such an action. *Ferry v. Schutter*, 8 Kulp 64.

22. In an action against a justice for taking illegal fees, a notice, which does not set forth that the claim is for the penalty imposed by a statute for taking illegal fees but uses other language indicating that the proposed action would be for the malicious, illegal and oppressive conduct of the justice, for which an action would lie other than the penalty of the statute, is insufficient, under the act 21 March 1772 (Brightly's Purdon 1150), to sustain the action. *McClelland v. Semmens*, 1 Dist. Rep. 356.

23. Where a justice of the peace receives illegal fees under the act 2 April 1868 (P. L. 3), he is not subject to the penalties inflicted by the previous act 28 March 1814 (Brightly's Purdon 879). *Irons v. Allen*, 169 P. S. 633; s. c. 36 W. N. C. 507; affirming s. c. 14 C. C. 319.

KIDNAPPING.

See CRIMINAL LAW, XXXVII.

C. L. 3.



